The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association
Editor-in-Chief, Larry Foyle, Esq.

Fall 2006

PRESIDENT'S MESSAGE

by David J. Tong, Esq.
Saxon, Gilmore, Carraway, Gibbons, Lash & Wilcox, P.A.

Thanks for your hard work this year

As my term as President draws to a close, I want to thank everyone who contributed to our success this past year. We accomplished a lot during this past bar year --

• We put on 1 full day and 2 half day seminars on the new Bankruptcy Act, at deeply discounted prices, featuring our local Bankruptcy Judges (and a visiting Bankruptcy Judge), the US Trustee's office and our Ch. 13 trustees, in addition to a full complement of our monthly luncheons.

• We started hosting free informal consumer bankruptcy-themed pizza lunches each month at the courthouse, featuring several of our Bankruptcy Judges, panel trustees and local attorneys.

• We started meetings between our Judicial Liaison Committee and the Judges on a bi-monthly basis, to facilitate communication between our members and the Court.

• We formalized our arrangements with Stetson University College of Law so that the Alexander L. Paskay Scholarship will be awarded every year, based on a recommendation from a committee we appoint.

• We increased our membership from under 300 attorneys to 340 attorneys.

• We sponsored a cocktail reception for the Executive Committee of the NCBJ and our Bankruptcy Judges.

• We put on a golf tournament, a tennis tournament, a holiday party and our annual dinner, each meeting the high standards we have come to expect from these events.

All of this was possible only because of the hard work of our dedicated members. Ed Rice, our Chair, was instrumental in providing expert guidance and leadership to our board, and was always quick to share his expertise. Our Vice President, Herb Donica, was involved in every significant project of the Association. He was an invaluable assistant and is well positioned to take over the reins of the Association. Shirley Arcuri, our Secretary, has done a tremendous job maintaining our records and she organized the unveiling reception for the Douglas P. McClurg Professionalism Award. Caryl Delano, our Treasurer, kept our

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2008-2009
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You Can Havoco Your Cake But You Can't Eat It Too

by Larry Foyle, Esq.
Kass, Shuler, Soloman, Spector, Foyle & Singer, P.A.

ELEVENTH CIRCUIT ISSUES DECISION IN IN RE CHAUNCEY

On July 7, the 11th Circuit Court of Appeals entered its decision in **Chauncey** 2006 U.S. App. LEXIS 16972; 19 Fla. L. Weekly Fed. C 745 (11th Cir. 2006). In the case, the court was asked to decide an issue which it had confronted, in part, when it certified a question to the Florida Supreme Court in **Havoco of Am., Ltd. v. Hill**, 790 So. 2d 1018 (Fla. 2001) concerning whether homesteads in Florida could be subject to equitable liens. In addition, the 11th Circuit was asked to decide whether a deliberate transfer or transformation of non exempt property into a Florida homestead could cause a Debtor to forfeit the right to a discharge in chapter 7.

In **Havoco**, The Florida Supreme Court had decided that under Florida's Constitution, the exceptions to an otherwise qualified homestead were extremely narrow and as a result, the ability to trace funds into a homestead and impose and equitable lien on the homestead would be limited to those instances in which the proceeds were tainted. The taint could not be constructively imposed because of a suspicious transfer or a transfer used to defeat creditors' claims, but had to be proceeds that were the result of ill gotten gain. As a result, absent ill gotten gain, otherwise legitimately obtained proceeds could be transferred at any time from non exempt to exempt status without repercussion and be shielded using the Florida exemption.

In **Chauncey**, the 11th Circuit determined since the Debtor had a legitimate right to the proceeds received from a personal injury settlement, the fact that she then took the proceeds and paid down her homestead did not affect her rights in the homestead exemption and the Trustee's objection was overruled. The 11th Circuit went on to determine, however, that the Debtor's deliberate delay in the timing of filing the bankruptcy so as to first obtain the proceeds and then using those proceeds to maximize her exemption was in fraud of her creditors and she lost her right to a discharge. The lingering question is now whether this decision will have efficacy as a result of BAPCPA 2005. Under section 522(o) of the bankruptcy code we now have a look back or "claw back" provision. The section provides:

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in--(1) real or personal property that the debtor or a dependent of the debtor uses as a residence; . . . **shall be reduced** to the extent that such value is **attributable to any portion** of any property that the **debtor disposed of in the 10-year period** ending on the date of the filing of the petition **with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.**

It would appear that section 522(o) was enacted to deal with the kinds of issues that the court faced in **Chauncey**, in its Pre BAPCPA decision. If creditors under certain circumstances can seek to reduce the Debtor's exemptions claimed by the amount of any transfers of property made with the intent to hinder, delay or defraud a creditor, then one may ponder whether creditors in a **Chauncey** like case will determine whether they could file an involuntary case against the Debtor (since the Debtor was not discharged) and then in the new post BAPCPA case attack the debtor's homestead exemption using 522(o). Such litigation, if commenced would likely need to be based upon fact-driven issues concerning the homestead's property value, how long has Debtor lived in the property, how much did the property value exceed $125,000 etc. Moreover there are those commentators and judges who have indicated that personal involuntary cases may be a hurdle because of the requirement of Debtor education as a condition precedent to eligibility under section 109(g). Well, that is something to ponder for a different day.

People On The Go

by Andrew T. Jenkins, Esq.
Bush Ross, P.A.

Michael P. Brundage has joined the law firm of Jennis & Bowen as a partner, and the firm will now be known as **Jennis Bowen & Brundage, P.L.** Mr. Brundage will continue to focus his practice in the areas of business reorganizations, bankruptcy, commercial litigation, state law insolvency proceedings, creditors' rights, asset acquisitions and dispositions, and general corporate transactions.

Michael P. Horan has joined the law firm of **Trenam Kemker** as a shareholder in the firm's Business Reorganization and Bankruptcy Practice Group.

Robert A. Soriano has joined the law firm of **Shutts & Bowen, LLP** as a partner in the Tampa office where he continues to concentrate his practice in the areas of bankruptcy and creditors' rights.

Alison Walters has joined Dennis LeVine & Associates as an associate. Alison is a native of New Orleans and a graduate of Loyola University School of Law. She has practiced in Tampa for the last 3 years in the creditors' rights area.

Camille J. Iurillo, of **Iurillo and Associates, P.A.**, was recently named President-Elect of the St. Petersburg Bar Association for the bar year 2006-2007.

Please congratulate **Luis Martinez-Monfort** with **Mills Paskert Divers, P.A**. and wife Amy who are the proud parents of their newborn daughter Alexandra Jane Martinez-Monfort!

Florida Bar President, Henry Coxe, has appointed the **Honorable Catherine Peek McEwen** to chair the bar's Federal Court Practice Committee for 2006-2007. In addition, she has been named to a two-year term as Judicial Chair of the Florida Bar's Business Law Section Bankruptcy/UCC Committee.

Submissions to **People on the Go** may be emailed to ajenkins@bushross.com

BCPCPA Section 526(a)(4) is a facially unconstitutional restriction on free speech. The District Court for the Northern District of Texas has held that Section 526(a)(4), which Section 526(a)(4) prohibits a "debt relief agency" from advising clients to incur debt in contemplation filing bankruptcy petition or to pay the debt relief agency's fees, violates debtors' First Amendment rights. The court began its analysis by holding that a consumer bankruptcy attorney is a "debt relief agency." The court went on to note that Section 526(a)(4) is a content based restriction on speech that, in some instances, prevents an attorney from giving advice to take actions that are lawful and financially prudent. The court rejected the argument that Section 527's disclosure requirement unconstitutionally compels speech. Hersch v. United States, Case No. 05-2330 (N.D. Tex. July 26, 2006) (Judge Godbey). The opinion is available online at:
bankruptcy.cooley.com/Hersh%20Order.pdf

Judge Alexander L. Paskay Scholarship Awarded

At the Tampa Bay Bankruptcy Bar Association's annual dinner held on June 6, 2006, a special presentation was made. Esther McKean, a recent graduate from Stetson University College of Law is the first recipient of the Judge Alexander L. Paskay Scholarship Award. Ms. McKean received her undergraduate degree from the University of Central Florida, magna cum laude. After College, but prior to attending law school, Esther worked as a paralegal in the bankruptcy group of a private law firm. That experience sparked her interest in bankruptcy law. During law school, Ms. McKean completed an internship with Judge Michael G. Williamson. She will be working for Akerman, Senterfitt et al in the firm's Orlando office.

Case Law Update

by Andrew T. Jenkins, Esq.
Bush Ross, P.A.

SUPREME COURT RULES ON SOVEREIGN IMMUNITY IN PREFERENCE ACTIONS

Early this year, in Central Virginia Community College v. Katz, 126 S.Ct. 990 (2006), the United States Supreme Court again weighed in on the interaction between the Eleventh Amendment of the United States Constitution and the Bankruptcy Clause of Article I, section 8. In this case, the Supreme Court addressed the assertion of certain Virginia universities that sovereign immunity barred the commencement of proceedings under sections 547(b) and 550(a) of the Bankruptcy Code by a Chapter 11 trustee to recover alleged preferential transfers made to the universities. The Court declined to answer the constitutional issue left open by Hood v. Tennessee Student Assistance Corp. (In re Hood), 541 U.S. 440 (2004), of whether Congress' attempt to abrogate the States' sovereign immunity through section 106 of the Bankruptcy Code is constitutional. Rather, in a five-to-four decision, the Court, avoiding the section 106 issue altogether, ruled that the recovery of alleged preferential transfers was not barred by the States' sovereign immunity as the States had agreed, through ratification of the Bankruptcy Clause, to subordinate their sovereign immunity to effectuate the in rem jurisdiction of the bankruptcy courts.

The plaintiff in the adversary proceeding was Bernard Katz, the court-appointed Chapter 11 liquidating trustee of Wallace's Bookstores, Inc., which had done business with certain Virginia universities prior to filing bankruptcy. Katz filed suit in bankruptcy court to avoid and recover alleged preferential transfers made to each of the universities by Wallace's. The universities filed motions to dismiss those proceedings on the basis that the universities were entitled to sovereign immunity. The bankruptcy court denied the motions to dismiss. Both the district court and the United States Court of Appeals for the Sixth Circuit affirmed the bankruptcy court's denial based on the Sixth Circuit's prior determination that Congress abrogated the States' sovereign immunity in bankruptcy proceedings. The Supreme Court granted certiorari.

Before engaging in a substantive discussion of the legal questions at issue, the majority in Katz first acknowledged that statements in Seminole Tribe v. Florida, 517 U.S. 44 (1996), reflect an assumption that Seminole Tribe would apply to the Bankruptcy Clause and, therefore, the Eleventh Amendment would bar any avoidance action against a State. The majority concluded, however, that "[c]areful study and reflection" convinced them of the error in that assumption and that the Court was not bound by its own dicta from Seminole Tribe in which the point now at issue in this case was not fully debated. The Court began its analysis of the legal issues by noting, as it had previously in Hood, that bankruptcy jurisdiction is principally in rem jurisdiction as a bankruptcy court's jurisdiction comes from the debtor and its estate, not from the creditors involved in the case. Thus, a bankruptcy court's jurisdiction

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Bankruptcy Seminar with Judge Paskay and Stetson University College of Law

The Office of Conferences & Events at Stetson University College of Law

is proud to present

The 31st Annual
Alexander L. Paskay Seminar
BANKRUPTCY LAW and PRACTICE
December 8-9, 2006

Judge Paskay has assembled an incredible national faculty to address important Bankruptcy Issues, including the repurcussions of the Bankruptcy Abuse Prevention and Consumer Protection Act, following its first year. The speakers include the Hon. Bruce Markell, the Hon. Cecelia Morris, Susan Freeman, Richard Lieb, Lou Phillips, John Rao, and Mark Redmiles. The 31st Annual Seminar will be held at the Sheraton Sand Key Resort in Clearwater Beach, Florida on December 8-9th. The annual Primer on Bankruptcy: "How Not to Get Lost in a Bankruptcy Court," will be held Friday afternoon at the Tampa Law Center on November 17th, 2006 – and will focus on information for paralegals, legal assistants, finance professionals, and new Bankruptcy attorneys. Friday evening will feature Judge Paskay's annual reception, which allows for networking time with the speakers, judges, and fellow attendees. Plans are also in motion for hosting the 6th International Bankruptcy Symposium, please check our web site or call our office for more details. If you are interested in more information on any of the Bankruptcy seminars or sponsorships, please call Stetson's Office of Conferences & Events at 813-228-0226. www.law.stetson.edu/cle, e-mail cle@law.stetson.edu

What the TBBBA Does For You

by David J. Tong, Esq.
Saxon, Gilmore, Carraway, Gibbons,
Lash & Wilcox, P.A.

Soon you will receive in the mail a membership renewal statement for the 2006-2007 bar year. For the sixth consecutive year, our annual dues remain $60. What do you get for your membership? Former President John Lamoureux wrote about this topic in the Spring 2004 issue, and I have liberally borrowed from his excellent article (with his permission).

As you know, the Association puts on a CLE luncheon program each month during the bar year, from September through May (and in some years, even more frequently). Two of those programs are usually held in connection with bankruptcy seminars sponsored by the Association. The monthly luncheons feature Bankruptcy Judges and experienced attorneys as speakers, and are designed to cover a wide range of timely topics in a practical fashion. Even though the Association's costs for these luncheons have increased over the past several years, we have held the line on our pricing. Members obtain CLE credit (including ethics credit for some programs) by attending the lunches.

Every year, the Association publishes a handy Membership Directory with complete information on our membership and information regarding the Judges, the Trustees and the Clerk's office. Our recent membership survey found that 7 out of 8 members considered the Directory to be an important or very important benefit. The 2006 Directory was mailed to our members this Spring.

Each June, the Association puts on a year-end dinner. The dinner provides an excellent opportunity to meet and mingle, and we always have a special program planned. The Association subsidizes the cost of the annual dinner to keep it affordable for all our members to attend. At this year's dinner, at the Palma Ceia Golf and Country Club, we presented the Douglas P. McClurg Professionalism Award for the second time ever, to Leonard H. Gilbert, our founding Chair. We also presented the Judge Alexander L. Paskay Scholarship Award to Esther A. McKean, a student at Stetson University College of Law.

Every April, the Association holds a golf tournament. For the last several years, we have held it at the Bay Palms Golf Course at MacDill Air force Base. The course is always in excellent condition, and we try to keep the price affordable. Lunch and dinner are included. Many contests and prizes are available, and the event sells out year after year. It is one of our most popular events and is open to all our members.

Each December, we have a holiday party with a charity as beneficiary. We ask all members to bring either a cash donation or a new, unwrapped toy, or a book or some other item used by a local charity. This past December, Metropolitan Ministries was the charity we chose and we were pleased to provide them with many toys and other items to brighten up the life of a child in need.

The Association recently put on its annual tennis tournament. The Association subsidizes the tournament to keep it affordable. This year's tournament was held at the Harbour Island Athletic Club in early March.

The Cramdown you are reading is published quarterly, and is sent out by mail to all of our members. In addition, copies are distributed to the Judges and the Clerk's office. Each issue contains a great deal of information regarding our Association and the local Bankruptcy Court, and has informative articles on new decisions and Bankruptcy topics. This issue contains the results from our recent membership survey.

Our community service committee is working with the local Judges, who are considering implementing a rule which would parallel the rule in the United States District Court, allowing law students to practice under the guidance of a lawyer. These law students could be appointed by the Judges to represent pro se debtors in connection with adversary proceedings and other Bankruptcy matters. The community service committee also handles matters relating to the award of the Alexander L. Paskay

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IRS OUTLINES STEPS FOR PROMPT DETERMINATION OF BANKRUPTCY ESTATE'S UNPAID TAX LIABILITY

Prepared by David Goch
Washington Legislative Counsel
Commercial Law League of America

On May 30, 2006 the IRS published in Internal Revenue Bulletin No. 2006-22, Revenue Procedure 2006-24 which provides steps a bankruptcy trustee or a debtor in possession must follow to obtain a prompt determination of any unpaid tax liability of the estate.

A prompt determination of any unpaid liability of the estate is requested by filing a signed written request, in duplicate, with the Centralized Insolvency Operation, P.O. Box 21126, Philadelphia, Pa. 19114; the request must be marked "Request for Prompt Determination," and must be accompanied by an exact copy of the return (or returns) for a completed taxable period filed by the trustee with the service.

The request must also contain the following information:
• the name of the debtor;
• the name and location of the office where the return was filed;
• the debtor's Social Security number, taxpayer identification number and/or entity identification number;
• the type of bankruptcy estate;
• the tax years/periods sought;
• the bankruptcy case number; and
• the court where the bankruptcy is pending.

Within 60 days of receipt of the request, IRS will notify the trustee whether the return filed by the trustee is being selected for examination or is being accepted as filed.

Sanctions imposed against law firm and secured creditor for appending pre-signed signature page to certification in support of motion for relief from stay. A national foreclosure mill was sanctioned by the New Jersey Bankruptcy Court for its long-standing practice of appending pre-signed signature pages to certifications filed in support of stay relief motions. New Jersey local rules require that motions for relief from stay be supported by an affidavit or certification. In the interests of efficiency, the law firm kept pre-signed signature pages in its files, and would append these to the completed certification that contained default and accounting information for a particular loan. The individual employee of the mortgagee who signed the certification did not actually review the completed certification. The Bankruptcy Court found that this practice violated Bankruptcy Rule 9011, and imposed sanctions against both the client-mortgagee and the law firm. The law firm was sanctioned $125,000.00 for the estimated 250 prior violations, and was referred for disciplinary action. The case presents an extremely egregious set of factual circumstances, but is a good reminder to all attorneys that having clients sign a blank form or a stand alone signature page is not a good practice, and that the client should review and sign the final version of all discovery and affidavits. In re Rivera, Case No. 01-42625 (Bankr. N. J. May 25, 2006) (Judge Stern). Available online at http://www.njb.uscourts.gov/chambers2/stern/06ms002p_01-42625_Jenny_Rivera.pdf

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does not usually invade a State's sovereignty "even when States' interests are affected."

Continuing its analysis, the Supreme Court found that the history of and reasoning behind the Bankruptcy Clause and the legislation that was enacted under the Bankruptcy Clause following the States' ratification of the Constitution demonstrated that the Bankruptcy Clause "was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena." The Supreme Court noted that a critical feature of every bankruptcy case was the exercise of exclusive jurisdiction over the debtor's property, the distribution of such property to the debtor's creditors, and the discharge that relieves the debtor from further liability for pre-petition debts. The majority further noted that the universities had conceded that "'whether or not [States] choose to participate in the proceeding, [they] are bound by a bankruptcy court's discharge order no less than other creditors.'"

Therefore, the majority concluded that by ratifying the Bankruptcy Clause, the States acquiesced to the subordination of their sovereign immunity to effect the in rem jurisdiction of the bankruptcy courts. Thus the Supreme Court held that because a bankruptcy court order directing the turnover of preferential transfers is ancillary to a bankruptcy court's in rem jurisdiction, the States cannot assert their sovereign immunity as a defense in such an action. The majority cautioned, however, that it was not ruling "that every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity." The majority also noted that its ruling does not address the question of whether Congress properly abrogated States' sovereign immunity under section 106 of the Bankruptcy Code. Rather, the majority's decision addresses "whether Congress' determination that States be should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'"

The dissent in Katz noted that States are not subject to suit by private parties for monetary relief absent either (1) the States' consent or (2) valid congressional abrogation. Citing Alden v. Maine, 527 U.S. 706 (1999), the dissent argued that it was settled law that Article I, which includes the Bankruptcy Clause, does not establish these prerequisites. The dissent further argued that nothing in the text, structure, or history of the Constitution or ratification thereof justifies discarding States' sovereign immunity in favor of individuals seeking recovery of preferential transfers in bankruptcy proceedings. The dissent also concluded that not only was the majority's decision impossible to reconcile with settled state sovereign immunity jurisprudence, such as Seminole Tribe, it was impossible to reach without overruling the Supreme Court's decision in Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989).

Although Katz is certainly determinative in actions for preferential transfers, its application to other types of adversary proceedings or contested matters in bankruptcy court is subject to question as to whether the disputed matter involves the in rem jurisdiction of the bankruptcy court. Unfortunately, there is no clear delineation of when a bankruptcy court's in rem jurisdiction is invoked, which may result in inconsistent court decisions. In at least one recent case, Florida Dept. of Revenue v. Omine (In re Omine), 2006 WL 319162 (M.D. Fla. Feb. 10, 2006) (slip opinion), Katz was applied to eliminate the sovereign immunity defense as to an action against a state for its violation of the automatic stay in a Chapter 13 case.

Tampa Bay Bankruptcy Bar Association
Annual Golf Tournament
April 7th, 2006
MacDill Air Force Base

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Country Club

Bankruptcy Courts Reject Chapter 13 Plans Which Do Not Comply with the Bankruptcy Code

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

We sometimes see cases where a debtor puts a provision into a Chapter 13 Plan that is contrary to the Bankruptcy Code, and the Plan is confirmed without objection. It has been a long-held belief that a creditor's failure to object to confirmation of a Chapter 13 Plan waived any objection to the Plan once the Court confirmed the Plan. This position is supported by the legal concept of res judicata (i.e. the binding effect of a Court order), which is incorporated into Section 1327:

"(a) The provision of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan".

In order to obtain confirmation, however, the Bankruptcy Code states that a Chapter 13 Plan must comply with the provision of Chapter 13 and with the other applicable provisions of Title 11 [§1325(a)(1)] and (2) be proposed in good faith and not by any means forbidden by law. [§1325(a)(3)]. Thus, there is a clear that provisions placed in plans that are contrary to law **should** doom confirmation of a Chapter 13 Plan.

With the number of changes recently made by Congress to Chapter 13 in BAPCPA, courts are now dealing with the issue of whether the absence of an objection by a creditor can be deemed "implied acceptance" of a Plan containing a provision which appears to be contrary to provisions of BAPCPA. This issue recently came to light in two recent cases where a debtor's Chapter 13 Plan provided to bifurcate a secured claim under §506 for a vehicle financed within 910 days of filing.

The so-called "hanging paragraph" found after §1325(a)(9) added by BAPCPA limits the ability of an individual debtor to cramdown a 910-day vehicle loan. In In re Montoya, 341 B.R. 41 (Bankr. D. Utah 2006), the Plan proposed to cramdown a 910-day vehicle loan, and the secured creditor did not file an objection. The Chapter 13 Trustee and the debtor contended that the secured creditor's failure to object to confirmation of a Chapter 13 Plan containing a cramdown of a 910-day claim constituted acceptance of the Plan. The Court in Montoya rejected this argument, and stated that "a plan should not be used as a sword to change the explicit provisions of the Code to what the parties wish Congress had drafted." The Court noted the case law which considers the absence of a creditor's objection to a Chapter 13 Plan to be implied consent, but found these cases missed the point:

"The concept of implied acceptance of an otherwise compliant plan, or even voting on similar provisions in Chapter 11, however, is quite different from proposing a plan intentionally inconsistent with the Code and then waiting for the trap to spring on a somnolent creditor. Creditors are entitled to rely on the few unambiguous provisions of the BAPCPA for their treatment. They should not be required to scour every Chapter 13 Plan to insure that provisions of the BAPCPA specifically inapplicable to them will not be inserted in a proposed Plan in the debtor's hope that the improper secured creditor treatment will become *res judicata*."

The Court supported its denial of confirmation by pointing to Section 1325(a)(1) of the Bankruptcy Code, which provides that, "The Court shall confirm

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a plan if (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title." The Judge in Montoya found that a Bankruptcy Judge "has an affirmative duty to review and ensure that the Plan complies with the Code even if creditors fail to object to confirmation. This offending provision presents no less a bar to confirmation than failing to pay priority claims in full, proposing a Plan in bad faith, or proposing a Plan that is not feasible." The Court concluded that trying to insert an impermissible provision into a Chapter 13 Plan (such as the proposed cramdown of a 910-day vehicle claim) "is not an option." The Court noted that its opinion did not preclude a debtor and secured creditor from agreeing to a cramdown for a 910-day vehicle claim. The Court also stated in a footnote that it was not addressing the issue of whether a secured creditor's filing of a bifurcated Proof of Claim constituted "expressed acceptance or some sort of waiver of the provisions of the hanging paragraph."

The analysis in the Montoya case was followed by a bankruptcy court in Kentucky. In In re Montgomery, 341 B.R. 843 (Bankr. E.D. Kentucky 2006) the secured creditor actually filed an objection to a debtor's Chapter 13 Plan proposing a cramdown of a 910-day vehicle loan, but the objection was not timely filed. The Court nevertheless denied confirmation of the Plan, and adopted the holding in Montoya.

There is no doubt that some debtors and their counsel will try to place provisions into a Chapter 13 Plan which (either implicitly or explicitly) do not comply with the requirements of the Bankruptcy Code (e.g. a provision ignoring In re Till, and providing for an interest rate of 2% on a secured claim paid over time through a Plan). Notwithstanding these two cases, secured creditors must be vigilant. A thorough review of all Chapter 13 Plans by secured creditors is imperative.

What TBBBA Does For You continued from p. 7

Our Community Service Committee is working with the local Judges, who are considering implementing a rule which would parallel the rule in the United States District Court, allowing law students to practice under the guidance of a lawyer. These law students could be appointed by the Judges to represent pro se debtors in connection with adversary proceedings and other Bankruptcy matters. The Community Service Committee also handles matters relating to the award of the Alexander L. Paskay Scholarship at Stetson University College of Law.

Our Consumer Committee sponsors a monthly pizza luncheon at the Courthouse, featuring Judges and attorneys speaking on various consumer oriented topics. These seminars are free, and open to all. It is a great way for us to publicize the Association, and provide a service to all lawyers who practice consumer bankruptcy.

Our members receive e-mail notices of the events of the Association. We have found that there is no better way to keep abreast of the goings on of the Association than to occasionally e-mail our members with the information. Over the past several years, we have saved thousands of dollars in postage this way.

The Association works hard at creating positive relationships between Bankruptcy attorneys and the Judges and Court personnel. Each year, the Association has had a “Clerk’s luncheon” at the Courthouse where we have provided lunch (this year catered by Spain Restaurant) for the members of the Clerk’s office staff, and the Judges and their respective staffs. It is a way for the Association to say thank you to these people who work tirelessly behind the scenes and keep the Bankruptcy Court functioning.

When you get your dues statement in the mail, think about the return on your $60 investment. The many benefits of membership are yours for a bargain price. We also invite you to participate in the work of our committees, which produce these many events. If you are interested, just check the box for that committee on your membership renewal and the committee chair will get in touch with you!

United States Bankruptcy Court
Middle District Of Florida
Sam M. Gibbons United States Courthouse
801 North Florida Avenue Tampa, Florida 33602

Press Release June 29, 2006

LEE ANN BENNETT
APPOINTED CLERK OF BANKRUPTCY COURT TAMPA, FL

Chief Bankruptcy Judge Paul M. Glenn announced that the United States Bankruptcy Court for the Middle District of Florida has appointed Lee Ann Bennett as Clerk of the Court.

Prior to her appointment as Clerk, Ms. Bennett, 45, was the Chief Deputy Clerk for almost three years and also served as Acting Clerk for the past seven months pending the Court's appointment of a permanent Clerk to the vacant position. "Hers is an American success story," said Glenn, "she has literally come up through the ranks," having held almost every job within the Clerk's office during her 18 years of service to the federal court system. "Her performance has been exceptional at every level and in every Division of this Court, she has proven her abilities, and she is highly regarded by all in the Court," he said.

Following Glenn's announcement to all Court employees, made via a live simulcast to the three courthouses housing the Clerk's staff, Bennett said, "This truly is a dream come true. The last seven months have re-emphasized something that I have always known, that we have a great bench and a great court family -- one that I am very proud to be a part of. I so look forward to working with each of you [staff] in the years to come, and I look forward to serving the judges of the district and the people who come to this Court."

United States Bankruptcy Court
Middle District of Florida – Tampa Division
Sam M Gibbons U S Courthouse
801 North Florida Avenue, Suite 727
Tampa, Florida 33602-3899

Memorandum from
Chas G Kilcoyne

Telephone
(813) 301-5037

Date August 2, 2006
To All Interested Parties
Subject Year to Date Statistics for 2006

Tampa/Ft. Myers Divisions Combined Case Totals:

Month	Chap 7	Chap 9	Chap 11	Chap 12	Chap 13	Total	Adv.
January	149	0	3	0	182	334	62
February	203	0	1	0	203	407	59
March	369	0	4	0	287	660	53
April	386	0	9	0	260	655	36
May	334	0	5	0	244	583	36
June	372	0	8	0	281	661	30
July	346	0	10	0	244	600	36
August							
September							
October							
November							
December							
Total	**2,159**	**0**	**40**	**0**	**1,701**	**3,900**	**312**
2006 Case Average	*308*	*0*	*6*	*0*	*243*	*557*	*45*
2005 YTD Totals	10,999	0	70	0	4,038	15,107	552

Increase/Decrease to Date Compared to Calendar Year 2005 of -74 18%

Ft. Myers:

Month	Chap 7	Chap 9	Chap 11	Chap 12	Chap 13	Total	Adv
January	10	0	1	0	13	24	20
February	19	0	0	0	29	48	15
March	26	0	1	0	34	61	22
April	25	0	5	0	37	67	11
May	33	0	0	0	30	63	25
June	27	0	3	0	37	67	17
July	32	0	1	0	36	69	9
August							
September							
October							
November							
December							
Total	**172**	**0**	**11**	**0**	**216**	**399**	**119**
2006 Case Average	*25*	*0*	*2*	*0*	*31*	*57*	*17*
2005 YTD Totals	**1,391**	**0**	**7**	**0**	**666**	**2,064**	**81**

Increase/Decrease to Date Compared to Calendar Year 2005 of -80 67%

The Tampa Bay Bankruptcy Bar Association Cocktail Reception in honor of

The Officers and Board of Governors of the National Conference of Bankruptcy Judges

Friday, February 24, 2006

Presentation of the Douglas P. McGlurg Award to Leonard H. Gilbert

President's Message continued from p. 1

financial affairs running smoothly. I want to personally thank all of our officers for their help this year.

Our board members put in a lot of effort to make things run smoothly. Carrie Beth Baris did an excellent job editing the Cramdown this year, putting out our largest issue ever. Al Gomez kept the tenth floor resource room running, and has spearheaded our efforts to develop a website. We are now finalizing our website plans, and hope to be online soon.

Donald Kirk and Cheryl Thompson co-chaired our CLE Committee. They did a fabulous job putting on our seminars and our monthly luncheon meetings. These are the most visible aspects of the Association, and they are to be commended for their excellent work.

Randy Hiepe and Larry Foyle co-chaired the Consumer Bankruptcy Committee. They started the monthly pizza lunches at the Courthouse, using the Clerk's training room. The lunches focus on consumer-oriented topics and are free to all. Most of the time, one or more Judges have announcements to make, and the Clerk's office has practice pointers or announcements.

Ed Whitson handled our community outreach efforts. He took the lead, along with former chair, Harley Riedel, in working on the Alexander L. Paskay Scholarship Fund, and has been working with the Judges to develop a law student participation program in the Bankruptcy Court, similar to the one in place in the U.S. District Court.

Louis Martinez-Monfort was our Membership Committee Chair this year. He kept our records organized and published the directory. It is a difficult job to keep everything straight, especially with so many new members, but he handled it well. Patrick Tinker lead the Judicial Liaison Committee, heading up our special luncheon for the Clerk's Office, and working with our Judges to improve communication with our members.

Harley Riedel, a former chair, provided invaluable assistance in helping us finalize the arrangements with Stetson University College of Law for the Judge Alexander L. Paskay Scholarship Fund. We donated $3,000.00 in honor of Judge Paskay's thirty years as an adjunct professor at Stetson, and thanks to Harley Riedel's efforts, the scholarship will now be awarded annually, chosen by a committee appointed by the President.

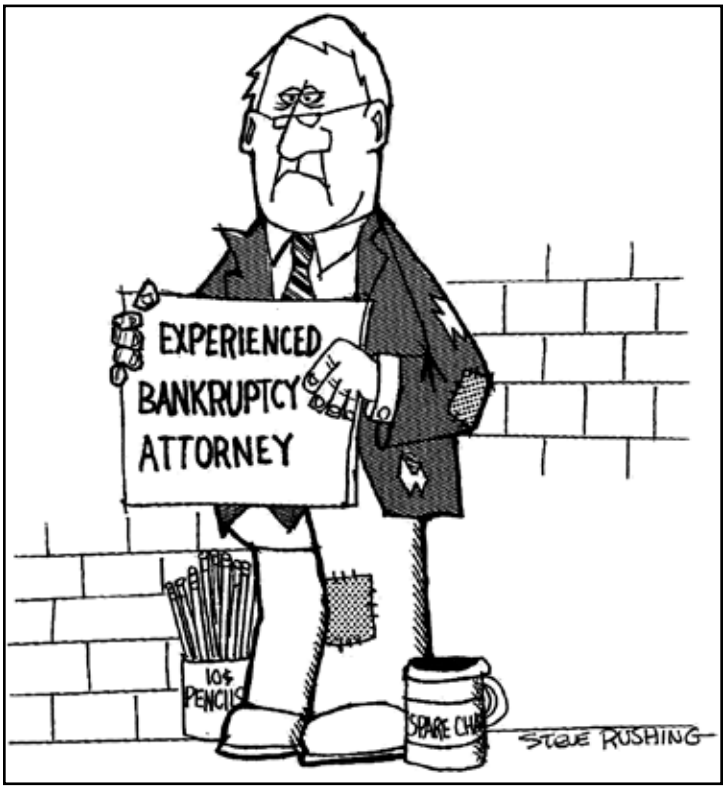
Many people helped us throughout the year, chairing monthly lunches or large events. Mike Markham did his usual excellent job on the golf tournament, Lynn Sherman and Susan Sharpe put on a great tennis tournament, Carrie Beth Baris handled our holiday party and our annual dinner, with Stephanie Biernacki and Cheryl Thompson assisting on the annual dinner. Special thanks go out to Keith Appleby, Greg McCoskey, Don Golden, Edward Peterson, Bob Wahl, John Anthony, John Emmanuel, David Hicks, Kelley Petry, Adam Alpert, Elena Ketchum, Lori Vaughn, Drew Jenkins, Pat Smith, Jan Donica, Dennis LeVine, Larry Hyman, Jay Passer, Charles Moore and Brad Hissing for their fine efforts.

Our Chapter 13 trustees, Terry Smith and Jon Waage, provided the speakers and materials for our first seminar on the new Act, and generously donated their time and efforts to help us throughout the year. We thank them for everything they did for us.

Lee Ann Bennett, our acting Clerk of Court and Chuck Kilcoyne, the Deputy Clerk in charge of the Tampa division, provided invaluable assistance to us throughout the year. Their contributions are greatly appreciated. They helped make this Association even better.

We cannot say enough about our local Bankruptcy Judges. Chief Judge Glenn, Chief Judge Emeritus Paskay and Judges Williamson, May and McEwen are among the finest in the country. We are very fortunate to have them here in Tampa. They willingly donate their time and effort to help our Association achieve our goals. They speak at our seminars and luncheon programs, provide materials and assistance for those programs, and are a great resource for us here in Tampa.

To everyone who helped make this year a great one for us, I thank you. Your efforts have made the Association an integral part of the Tampa Bay area legal community. It has been an honor to work with all of you this year.



Leonard H. Gilbert Receives the Douglas P. McClurg Award

by Harley Riedel, Esq.
Stichter Riedel Blain & Prosser, P.A.

At the annual dinner held on June 6, 2006, Leonard H. Gilbert was honored as the second recipient of the highest award of the Tampa Bay Bankruptcy Bar Association, the Douglas P. McClurg Award. Members who attended the dinner saw a video of Leonard, Judge Paskay, and Don Stichter (the first recipient of the McClurg Award) recounting their experiences in the early years of the bankruptcy bar practice. Judge Michael G. Williamson presented the award.

Leonard grew up in Lakeland, Florida. He graduated from Emory University and Harvard Law School, clerking for the Mabry Reeves law firm in Tampa during one summer for the magnificent sum of $25 per week. He was admitted to The Florida Bar in 1961 and accepted an associate attorney position with Mabry Reeves, which later became the current Carlton Fields firm (a firm of which Leonard served as President for a number of years). For the past 7 years, he has headed up the national bankruptcy practice of Holland & Knight.

Leonard specializes in the practice of bankruptcy law, while also handling commercial litigation and commercial transactions and occasionally serving as an arbitrator. He progressed from filing motions seeking stay relief in the early 1960's to permit his clients to repossess vending machines to representing debtors, major secured creditors, and committees in many of the largest cases filed in Florida, including Hillsborough Holdings, Lykes Bros. Steamship Co, General Development Corp., Gardinier, and Provincetown-Boston Airlines. He is recognized in numerous peer-rated surveys as one of the premier bankruptcy lawyers in the State of Florida, including publications such as World's Leading Insolvency and Restructuring Lawyers, Best Lawyers in America, Chambers & Partners' America's Leading Lawyers for Business, Who's Who Legal, Florida Trend Magazine's Florida Legal Elite, and Florida Superlawyers.

Notwithstanding his busy practice, Leonard has generously given of his time in the service to the bar. He was a founder, and served as the first Chair, of the Tampa Bay Bankruptcy Bar Association. He has also served as the President of The Florida Bar and the American College of Commercial Finance Lawyers, as a Fellow, Director and Regent of the American College of Bankruptcy, as the Chair of the 13th Judicial Circuit Judicial Nominating Committee, as a Director of the American Bankruptcy Institute, and in many similar capacities with the American Bar Foundation, the American Bar Association, the International Insolvency Institute, and too many other organizations to list. He has frequently spoken and written on bankruptcy-related topics for the American Bar Association, The American Bankruptcy Institute, The Florida Bar, and numerous other legal and business groups. He is currently a member of the ABA Committee on the Federal Judiciary.

Leonard is married to Jean Gilbert, and they celebrated their 43rd wedding anniversary this year. They have two children, Jonathan and Suzanne – both of whom are practicing lawyers. Through Carrie Baris' skillful "manipulation," Jonathan and Suzanne were both able to attend the June 6 ceremony without giving away the fact that (known to them and only a handful of other people) their father was to receive the award. Earlier in the program, Leonard had presented the Alexander L. Paskay Scholarship Award to Esther McKean – an example of Leonard's continuing willingness to actively participate in the programs of the Tampa Bay Bankruptcy Bar Association. When you are next in the Federal Courthouse, stop for a moment on the ground floor and look at the plaque for the McClurg Award that now bears Leonard's name.

Annual Bar Dinner
June 6, 2006
Palma Ceia Country Club

Credit Counseling Requirement Not Met: A Case for Selective Enforcement?

*by Catherine Peek McEwen**
Bankrupcty Judge, Middle District of Florida

** This is a re-titled and revised version of an article that first appeared in the newsletter of the Association of Bankruptcy Judicial Assistants.*

Overheard by a JA, listening to her bankruptcy judge: "Congress meant for debtors to obtain credit counseling before filing or else get it immediately afterward if they can fit within a temporary exemption. We have no choice but to follow Congress's intent and *sua sponte* dismiss cases where the debtor is noncompliant."

Overheard by another JA, many states away, listening to her judge: "The credit counseling requirement is an eligibility requirement under section 109. We don't automatically dismiss Chapter 13 cases when the debtor is ineligible to be in a 13 under section 109, so why should we do so respecting a debtor who is ineligible for a different reason? Let a creditor be the one to seek dismissal if it wishes, and we'll follow the law."

Thus you have the two basic approaches to what to do with individual debtors who fail to comply with the new requirement of pre-petition budget and credit counseling under the Bankruptcy Abuse Prevention and Consumer Protection Act (the "Act") which became effective, for the most part, on October 17, 2005. The Act added a new subsection (h) to section 109, which deals with eligibility. Section 109(h) provides that "an individual may not be a debtor" unless the individual received, within 180 days preceding the filing, from an "approved nonprofit budget and credit counseling agency…an individual or group briefing (including a briefing conducted by telephone or on the internet)…." A short exemption period is available to permit qualifying debtors to obtain counseling post-petition if they could not obtain it beforehand but tried prior to filing.

Given that one theme of the Act is to discourage bankruptcy filings, the purpose of the counseling requirement is to let debtors know whether an informal payment plan outside of bankruptcy might be a better alternative. Media reports, however, suggest that counselors are finding very few individuals who are not too far into financial disaster for an alternative to bankruptcy to be helpful.

Some bankruptcy judges around the country could have uttered the first overheard snippet above, while others could have urged the second. An example of a judge who felt constrained by the Act to follow the first approach, though obviously unwillingly, is found in *In re Sosa*, 2005 WL 3627817 (Bankr. W.D. Texas Dec. 22, 2005). This opinion, by Judge Frank Monroe, is a fun read, if only for the judge's use of sarcasm to convey to Congress his disagreement with the requirement and the consequences of noncompliance.

At least for the time being and until the case law further develops on this issue, the judges in the Tampa Division of the Middle District of Florida now uniformly follow the second approach, for several reasons. First, the Code mandates no specific consequence for an ineligible debtor. Congress could have made the filing of proof of pre-petition counseling one of the items in section 521(a)(1) that must be filed within 45 days to avoid automatic dismissal – but Congress did not do that. "The Court does not have to be antagonistic to debtors where there is no mandatory requirement of dismissal," said Chief Bankruptcy Judge Emeritus Alexander L. Paskay, the longest-sitting full-time bankruptcy judge in the land. Second, the Act places the oversight responsibility for consumer debtor education on the Office of the United States Trustee, not the bankruptcy courts.

Finally, and perhaps most persuasive, is that a debtor's eligibility is not jurisdictional in the eyes of the bankruptcy judges in the Tampa Division of the Middle District of Florida, meaning it is a waivable noncompliance. According to Collier's

> If a debtor ineligible for relief under a particular chapter files a case and no party raises the issue of ineligibility, the relief that the debtor may receive under that chapter may not subsequently be successfully challenged for lack of jurisdiction.

Collier on Bankruptcy ¶109.01[2]. This is frequently the situation in many Chapter 13 cases where the debtor exceeds the debt limits that define eligibility. Unless a party of interest seeks a dismissal and raises the issue of eligibility, the debtor-ineligible Chapter 13 case progresses the same as any other Chapter 13.

continued on p. 22

Credit Counseling continued from p. 21

This is not to suggest that cases in this district will not be dismissed if there is a noncompliance with section 109(h). They probably will be dismissed -- just not until or unless someone asks. The "probably" appears in the preceding sentence because recent case law suggests that dismissal may not be mandated in every case. See *In re Hess*, 2006 WL 2338040 (Bankr. D. Vt. Aug. 14, 2006) (judicial discretion exercised to grant an exemption based on totality of circumstances); *In re Bass*, 2006 WL 1593978 (Bankr. W.D. Tenn. June 9, 2006) section 105 based on totality of circumstances and that a primary purpose of bankruptcy is to provide "relief of the honest but unfortunate debtor from the weight of oppressive indebtedness") (citation omitted).

One problem we have encountered with applying our position of waiting until someone asks for dismissal is what to do with a debtor who waves the red flag of ineligibility by asking for a determination of whether he has complied with the credit counseling requirement. We wish debtors would take the position used by the military concerning one of its policies: "Don't ask; don't tell."

Why would anyone care whether the bankruptcy court *sua sponte* dismisses a case for the debtor's failure to obtain pre-petition credit counseling if the debtor can cure the omission and re-file? Aside from the debtor's obvious need for relief in the case at hand, there can be negative consequences under the Act if a debtor has been a debtor in one or more prior cases within a certain period of time. Our court does not want to be the cause of a debtor's coming back to bankruptcy with "one strike" or more against her -- not to mention causing her to pay a second filing fee if she is ineligible for a filing fee waiver.

Moreover, as noted above, media reports of credit counseling agencies' activity support the proposition that the purpose of credit counseling is not being fulfilled by the requirement. The apparent purpose, of course, is to deter from bankruptcy debtors who can qualify for a non-bankruptcy payment plan. As Congress stated, the Act "requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences." House Report 109-031 Part I, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Purpose and Summary. However, one study reported by *The St. Petersburg Times* found that almost 97 percent of those who have gone to credit counseling were unable to repay any of their debts, meaning only a miniscule 3+ percent of those counseled had an alternative to bankruptcy. The cliché about punishing the many for the sins of the few comes to mind when assessing that data.

If the purpose of credit counseling requirement is so overwhelmingly unmet, why should parties in interest seek its enforcement so as to result in a blanket denial of access to bankruptcy relief for the overwhelming number who absolutely need it and have no alternative? Given that the eligibility requirements of section 109 are waivable, would not a more fair implementation of the credit counseling requirement be to seek enforcement on a case-by-case basis, i.e., only when the debtor *cannot* demonstrate that bankruptcy was her *only* alternative? After all, if bankruptcy is the only alternative, then why dismiss the case only to have the debtor go through what amounts to a "fire drill" and pay a second filing fee?

This writer hopes that, over time, enforcement of section 109(h) will be sought selectively -- in cases where the requirement would serve Congressional intent and not amount to a meaningless exercise given the debtor's particular situation and taking into account technical noncompliances such as tardy counseling. Such an approach would not be without precedent: There exist numerous examples of legislative mandates that are generally ignored by those charged with enforcing them as not worth the cost of enforcement or as being outdated, such as criminal prosecution for uttering bad checks of a relatively nominal amount or for certain sexual conduct between consenting adults. Also, selective enforcement could work for the benefit of creditors in some cases, such as when slavish advocacy of the credit counseling requirement would result in a lost liquidation opportunity for a Chapter 7 trustee following discovery of undisclosed assets of an ineligible debtor.

So long as the right to seek dismissal for lack of credit counseling is used prudently, the purpose of credit counseling can be achieved for those few who have an alternative to bankruptcy, while at the same time allowing the most vulnerable debtors access to bankruptcy without unnecessary cost and stressful hurdles.

This article should not be construed to mean that this writer will enforce section 109(h) only selectively. What the law requires in a particular case must be followed. Rather, the focus of this article is: Must *every* noncompliance be raised?

Chapter 15: A Source of New Business for Commercial Practitioners and Bankrupcty Courts (Or, A New Thing I Learned in Judge School)

by Catherine Peek McEwen
Bankrupcty Judge, Middle District of Florida

New Chapter 15 of the Bankruptcy Code has been met with a shrug by most bankruptcy practitioners. Aside from the interesting piece of trivia that Chapter 15 is the first new chapter in years -- since the addition of Chapter 12, a chapter on foreign proceedings seems rather meaningless to most of us. Or so I thought until attending the Federal Judicial Center's recent workshop for bankruptcy judges.

Chapter 15, Ancillary and Other Cross-Border Cases, was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Chapter 15 replaces the Code's old section 304 on cases ancillary to foreign proceedings. Chapter 15 is based on the Model Law on Cross-Border Insolvency promulgated by a United Nations commission.

The purpose of Chapter 15 is to "incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency…." 11 U.S.C. section 1501(a). In implementing that purpose, Chapter 15 aims to engender cooperation between countries and provide a fair framework for protecting the rights of all parties affected by foreign insolvency proceedings.

One facet of Chapter 15 that has garnered little publicity is section 1509, which conditions a foreign representative's access to American courts. That section requires the bankruptcy court to take action on a "petition for recognition" of a foreign insolvency proceeding before a foreign representative involved in the foreign proceeding may sue or be sued in courts in America. Coupled with the exclusive jurisdiction of the bankruptcy courts (via the district court orders of general reference) under 28 U.S.C. section 1334 to address matters raised under Chapter 15, section 1509 means that the bankruptcy courts control the access by foreign representatives to the state and federal court systems in the United States.

These provisions put the bankruptcy court in a "gatekeeper" role. The gatekeeper function is to ensure that the foreign representative's request for assistance of courts in this country is appropriate under the guidelines of Chapter 15. Think of the childhood game "Mother, may I?" And, with one exception, the gatekeeper's approval must be obtained for every instance of a foreign representative's desire to seek from American courts relief ancillary to a foreign insolvency proceeding. The lone exception is the foreign debtor's collection of its accounts receivable.

What Chapter 15 may mean to practitioners and the bankruptcy court is an opportunity for a new type of business and customer. Nearly no litigation ancillary to a foreign insolvency proceeding may take place unless the proponents first drop into bankruptcy court for an "entry visa," a phrase used informally by drafters of Chapter 15. Without that visa, results of the American-based litigation are arguably void based on lack of jurisdiction of the forum court to entertain the action. Consequently, the predicate act of obtaining approval of the bankruptcy court is paramount.

So, prior to the commencement of litigation ancillary to a foreign insolvency proceeding how will our non-bankruptcy commercial litigator counterparts know about the bankruptcy court's gatekeeper role and the importance of first obtaining bankruptcy court approval (and the need to associate bankruptcy counsel therefor)? Spread the word.

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