The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Robert J. Wahl, Forizs & Dogali, P.A.

Fall 2010

PRESIDENT'S MESSAGE

by Elena Paras Ketchum
Stichter Riedel Blain
& Prosser, P.A.

The Tampa Bay Bankruptcy Bar Association is off to the races!

Our Association continues its march of progress, by continuing to provide a variety of services to its members and to improve or bring new services to the membership. **In looking at the TBBBA as a whole, it is, quite simply, an awesome organization** - our Association organizes volunteer events, organizes monthly consumer and CLE luncheons, prints a membership directory, prints this publication, organizes social functions, maintains the Attorney Resource Room at the courthouse and I could keep going on and on. The TBBBA varies from other bar associations of comparable size throughout Florida in that it is run entirely by volunteers. **Put simply, it is you who keeps the Association running strong!**

I am happy to report that we have started the year with great momentum and enthusiasm which will carry us for the remainder of the year. The following are a few items on which the Association is working:

Volunteer Events: a call to volunteerism has been sounded by inviting our members to participate in "The Act" - A single act of volunteerism. There are a number of programs which are either currently available or are in the process of being formulated for which volunteers are needed. Members can immediately become active by volunteering for: (i) the Credit Abuse Resistance Education Program (or C.A.R.E.) which presents a 1 hour program and powerpoint presentation to local high school and college students regarding the pitfalls of credit cards or (ii) Case Intake at Bay Area Legal Services. Three programs currently in the works and for which volunteers are needed are: (i) Stetson Bankruptcy Law Clinic – assist with establishing, in conjunction with Stetson College of Law, a bankruptcy clinic for Stetson's third year law students., (ii) TBBBA Bankruptcy Forms Clinic – a clinic to be held at the courthouse to assist pro se filers with bankruptcy forms, and (iii) Bay Area Legal Services Training Clinic – establish a bankruptcy training clinic for Bay Area Legal Services' volunteer attorneys. If all of our members volunteer for one event, we can make a tremendous impact in our community. It takes only a single act to make a difference!

continued on p. 5

Inside This Issue

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

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Court Prevents Chapter 7 Debtors from Avoiding Junior Liens

by Teresa M. Hair and Rubina K. Shaldjian

Recently, the Middle District of Florida, Orlando Division, consolidated nine Chapter 7 cases in which the Debtors argued that they were entitled to strip and avoid the junior liens on their respective homesteads under 11 U.S.C. § 506(a) and § 506(d) because the value of the liens exceeded the value of the property. The Debtors argue that these two provisions operate together as a two-step process whereby § 506(a) strips the lien and § 506(d) avoids it.

One of the junior lien-holders, Suntrust, filed a Memorandum in Opposition. The Creditor primarily based its argument on the United States Supreme Court case of *Dewsnup v. Timm* and stressed that § 506(a) cannot function independently. There are a number of Chapter 13 provisions, as well as Chapter 7 provisions relating specifically to personal property, that help give § 506(a) any practical meaning. However, there is no similar Chapter 7 section relating to real property that gives § 506(a) a context in which to operate. Additionally, since *Dewsnup* was decided prior to BAPCPA, Congress could have added a "helper" provision during reformation of the Code if it so intended.

In a ruling issued July 28, 2010, Judge Jennemann held that Chapter 7 debtors cannot "strip off" their wholly-unsecured junior liens under section §506(d) of the Bankruptcy Code. In forming its opinion, the court followed the Creditor's lead and relied heavily on *Dewsnup*.

The debtors in *Dewsnup* had argued that § 506(a) and § 506(d) of the Bankruptcy Code must be read together. By applying section 506(a) to section 506(d), the debtors reasoned that when the value of the lien exceeds the value of the property, the debtor can strip off the unsecured portion under § 506(a) and void it under § 506(d). The creditors in *Dewsnup* countered that §506(a) is not a definitional provision and therefore should not define the "allowable secured claim" language of §506(d).

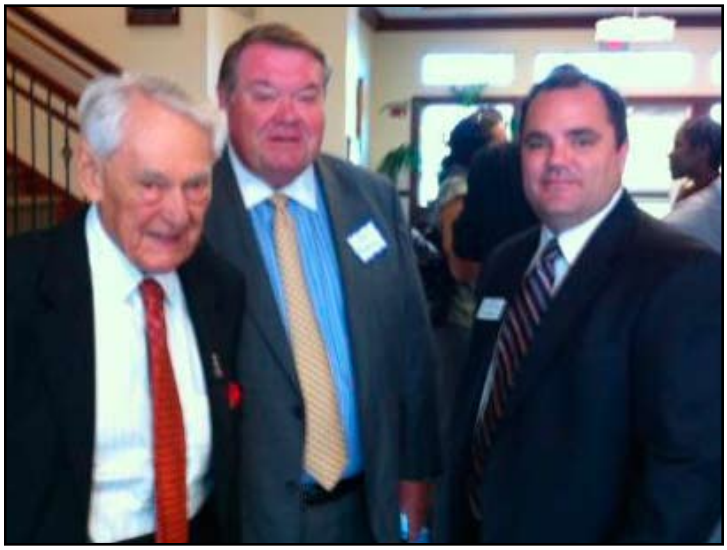
The *Dewsnup* majority ultimately agreed with the creditors, finding that courts must interpret the key phrase of § 506(d) – "allowed secured claim" – by defining each word independently of the other, with no reference to § 506(a). Based on this reasoning, a lien is "allowed" if it's allowed under § 502. A lien is a "secured claim" if it is secured by collateral, without any reference as to the value of the collateral. Furthermore, under the terms of the mortgage, the creditor's lien remains attached until the foreclosure is complete. The "voidness" language of § 506(d) relates only to any real deficiency created by the liquidation of the property. If the value of the property increases before the foreclosure sale, the secured creditor is entitled to that value to prevent the Debtor from receiving a windfall.

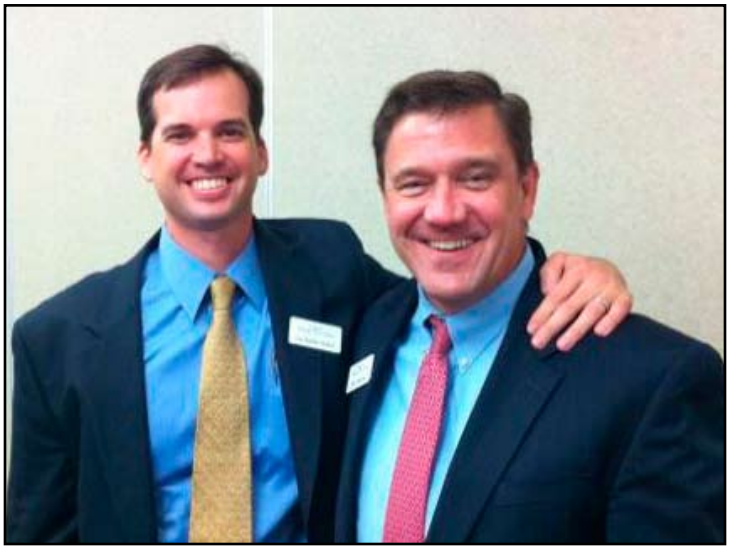
Though the Middle District identified the public policy concerns regarding the vast foreclosure market and the number of debtors who lack equity in even their senior mortgages, it followed the precedent set in *Dewsnup*. The court also recognized that the Fourth and Sixth Circuits and the Bankruptcy Appellate Panel for the Ninth Circuit have all applied *Dewsnup* to deny Chapter 7 debtor motions to avoid wholly-unsecured junior liens. Finally, the opinion discounts the minority of courts that have allowed Chapter 7 debtors to avoid a wholly-unsecured lien under §506(d) and concludes that these courts misinterpreted the ruling in *Dewsnup*.

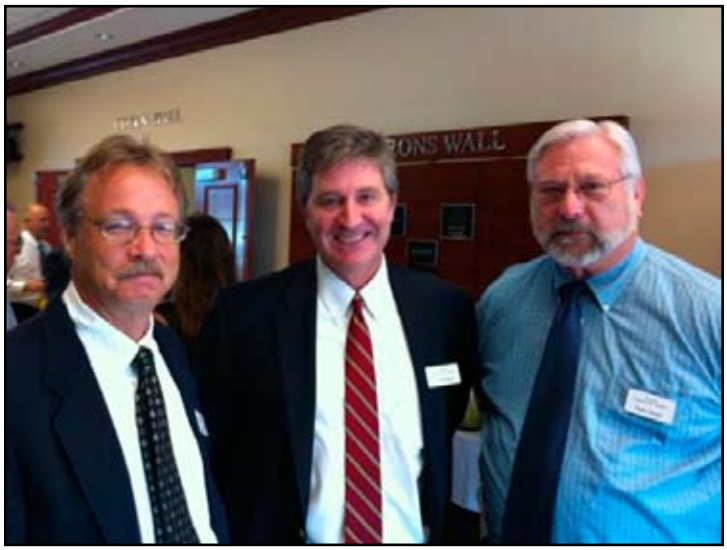
With this opinion, the Middle District has joined the majority of Circuits and held in accordance with the United States Supreme Court precedent set in *Dewsnup*. Specifically, Chapter 7 Debtors may not strip and avoid wholly-unsecured liens under § 506(a) and § 506(d). As such, it appears the reasoning in *Dewsnup* will likely remain applicable in a large part of the country until Congress takes action to amend the Bankruptcy Code or the Supreme Court has the opportunity to revisit the matter.

First Annual Joint HCBA/TBBBA Bankruptcy Seminar

This was a half-day seminar focusing on current real estate issues. Judge Williamson gave us a discussion on the state of the bankruptcy court and Hillsborough Circuit Court Judge James Barton, discussed the new mandate from the Florida Spring Court concerning mediations for residential foreclosures. The seminar also had consumer and commercial breakout sessions. Mark Rodriguez and Rose Bobier from Senior Lending, discussed uses of reverse mortgages. Shawn Yesner discussed mortgage modifications and Chapter 13 issues. Jim Williams provided insight of the mediation process. Keith Fendrick lead a talk on the use of bankruptcy code section 1111(b). Turnaround specialist, Bill Maloney, gave a detailed analysis of the turnaround business. The luncheon featured a keynote presentation by Raymond Sandelli, Senior Managing Director of CB Richard Ellis, focused on regional trends in the real estate market.







President's Message

continued from p. 1

Member Functions: the Association has already organized two Happy Hours to encourage our members to socialize and get to know one another. In addition, we are working on planning a Saturday family outing to take place in the park located in front of the Tampa Museum of Art and the Glazer Children's Museum. Be on the lookout for this "Art in the Park" event, which will be scheduled for early next year.

Website: this year, the Association is working on bringing an upgraded website to its members. In addition, the Association has recently acquired the domain names of www.tbbba.com and www.tbbba.net. Our upgraded website will utilize these domain addresses.

Luncheons and Consumer Meetings: our monthly CLE luncheons and monthly consumer meetings are off to a great start! Our first CLE luncheon was a joint event with Hillsborough County Bar Association and featured a half-day seminar addressing both consumer and commercial issues. As a reminder, the CLE Luncheons are held on the second Tuesday of the month. This is a great way to earn CLE credit and visit with fellow bankruptcy practitioners. In addition, the consumer meetings, held at the courthouse, are held the first Tuesday of the month. Reminders of these events are sent in the weekly email blasts.

We have a great year ahead of us. I look forward to seeing everyone at our luncheons, happy hours, volunteer events and other Association functions!!!

Lessons from Scrutiny of CCT Fee Applications

by Suzy Tate, Jennis & Bowen, P.L.

In a recent opinion from the Southern District of New York, the bankruptcy court disallowed $78,910.50 in fees for a debtor's bankruptcy counsel and $46,136.00 in fees for the debtor's special counsel. *In re CCT Communications, Inc.*, 2010 WL 3386947 (Bankr. S.D.N.Y.). Chapter 11 debtors' counsel could avoid having their fees disallowed by reviewing the CCT decision and the bases for the bankruptcy court's disallowance of such fees.

In the CCT case, after the debtor's bankruptcy case was dismissed, the debtor's sole shareholder objected to the fee applications of the debtor's counsel and special counsel. The shareholder objected to fees for services that appeared to be provided prior to the approval of the retention, improperly lumped, vaguely described, related to the preparation or defense of the fee applications, or duplicated by multiple attorneys, among other objections. The court granted in part and denied in part the shareholder's objections, focusing on the following issues in the counsel's fee applications:

Pre-Retention Services

The shareholder objected to services provided by the debtor's counsel prior to the date of entry of the order approving the retention, which turned out to be six months after the commencement of the case. The court did not disallow such fees because the delay was not caused by the debtor's counsel, but rather was due to "extraordinary circumstances" in that the proposed order languished in the UST office waiting for a "sign off."

The court came to a different conclusion with regard to pre-retention fees of special counsel. The court had entered an order approving the retention of debtor's special counsel for a specific purpose. Thereafter, the debtor filed an application to expand the retention and submitted an order providing for approval *nunc pro tunc* to the date of the original order approving the retention of special counsel. Apparently, the application failed to request *nunc pro tunc* approval because this provision was struck from the proposed order without prejudice for the debtor to seek retention *nunc pro tunc* to an earlier date. Later when special counsel sought fees for services provided prior to the entry of the order, the court disallowed them because the debtor's failure to file another application seeking *nunc pro tunc* approval did not qualify as extraordinary circumstances.

Improperly Lumped Time Entries and Vaguely Described Services

The court noted that multiple project services rendered on the same day may be lumped if the aggregate daily time does not exceed thirty minutes. Alternatively, multiple projects that exceed thirty minutes may be lumped, but the time entry had to indicate in parentheses the amount of time spent on each project. Of the $115,007.51 in lumped time entries included in debtor's counsel's fee application, the court disallowed $78,610.50 and of the $16,681.00 in lumped time entries included in debtor's special counsel's fee application, the court disallowed $14,131.00 for failure to comply with this rule.

The court also disallowed fees for time entries related to phone calls and email, that failed to indicate the subject matter or other party involved. Further, the court held that "attention to" or "work on" was vague and cut such fees by fifty percent. Alternatively, the court sustained the objections with regard to time entries indicating the "review" of items finding such services not vague as it means "to read."

Fee Applications

The court held that while the preparation of fee applications was compensable, the review and edit of time records was not compensable and disallowed any time entries for same. With regard to the defense of fee applications, the court noted conflicting opinions regarding fees for such services. However,

continued on p. 11

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Court to Use Special Notice for Summary Judgment Motions

by Honorable Catherine Peek McEwen

Pursuant to Eleventh Circuit case law, when a *pro se* litigant is served with a motion for summary judgment, the litigant must receive express notice of (1) the summary judgment rules, (2) the right to respond by submitting documents, and (3) the consequences of failing to respond to a motion for summary judgment. *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); *see also Farred v. Hicks*, 915 F.2d 1530, 1534 (11th Cir. 1990) (11th Circuit extended to non-criminal matters the special protection afforded to *pro se* litigants defending motions for summary judgment). *If this procedure is not followed, then a trial court commits reversible error if judgment is granted to the movant.*

The above judicial gloss on summary judgment procedure is not surprising given the Eleventh Circuit's deferential policy toward *pro se* parties generally. The Eleventh Circuit instructs that courts should treat pro se litigants with "special care" because they "'occupy a position significantly different from that occupied by litigants represented by counsel.'" *Johnson v. Pullman*, 845 F.2d 911, 914 (11th Cir. 1988) (quoting *Moore v. Florida*, 703 F.2d 516, 520 (11th Cir. 1983)). "Given the unique status of pro se litigants in our court system" it would be inappropriate in *pro se* cases to automatically apply the rules the same way as "in cases where parties are represented by attorneys presumably schooled in established court procedures." *Id*.

Perhaps due to the obscurity of the special rule requiring special care when dealing with summary judgment motions against *pro se* parties, movants do not generally provide the required notice – unless during a pretrial conference the trial court remembers to prompt the movant to do so. As a consequence, reliance on counsel to provide the notice is an iffy proposition.

Rather than adopt a local rule imposing the duty on counsel to give the special notice required by the Eleventh Circuit – and document the record with proof of same, the Bankruptcy Court for the United States Bankruptcy Court for the Middle District of Florida has undertaken to create and provide such a notice to individual litigants. That notice will be put into use immediately. Therefore, you should become accustomed to seeing the notice in every case or adversary proceeding in which a motion for summary judgment is filed against an individual. (In order keep the process simple, the Court is not requiring its case managers to make a determination whether a given individual is *pro se*.)

The new notice tells the recipient what a summary judgment is and how to combat one. The notice is accompanied by an excerpt from Rule 56, Federal Rules of Civil Procedure (adopted by reference in Rule 7056, Federal Rules of Bankruptcy Procedure). It is also accompanied by a shell form of declaration in opposition to the motion.

For counsel with cases pending in district court, the new notice can be adapted if the district court does not provide the required notice on its own. After all, who wants to risk a reversal on the omission of such a simple act?

Personal Property Lease Assumptions and the Discharge: When is it a Reaffirmation?

by Brook Baker
Summer 2010 Intern for U.S. Bankruptcy Court for the Middle District of Florida; J.D. Candidate 2011, University of Florida Levin College of Law

Personal property lease assumption language sometimes includes a statement waiving the § 524(a)[1] discharge. The question has arisen whether this type of waiver is effective absent the express disclosures and approval mandated by § 524(c)[2].

In re Eader[3] dealt with a lease assumption for a 2008 Mazda.[4] The assumption was in consideration for waiver of the § 524(a) discharge.[5] The court determined that although an assumption under § 365(p)(2) does not require approval by the court, the assumed lease remains subject to discharge under § 524(a) unless the debtor reaffirms in compliance with the requirements of § 524(c).[6]

The court reasoned that although Congress did not expressly include new language addressing the effect of waiver of discharge in an assumption agreement, BAPCPA increased protections to the debtor by implementing additional requirements to obtain a reaffirmation.[7] The court reasoned that this signaled Congress did not intend a debtor to waive the effect of the discharge without the explicit disclosures mandated in § 524(c), and that the required disclosures of § 524(c) would be "rendered meaningless if, by the simple signing of a [*sic*] 'assumption agreement,' debtor is re-obligated for the pre-petition lease obligations without the protections mandated by Section 524."[8]

Several other cases are in agreement with the *Eader* holding. In *In re Finch*[9] the court dealt with a stipulation for assumption that included waiver of the discharge under § 524(a). Though the stipulation was not properly before the court, the court stated that the effect of the agreement was a reaffirmation and denied approval of the assumption as an undue hardship.[10]

In *In re Creighton*[11], the court dealt with an assumption agreement that stated that the debtor would "waive the effect, if any, the discharge under 11 U.S.C. § 524(a) has as to the assumed Lease Agreement[s]."[12] After a lengthy discussion, the court stated that

> An agreement to assume a lease of personal property is an 'agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title,' within the meaning of § 524(c).[13]

The court stated there was no reason that such an agreement was not subject to § 524(c).[14] Case law seems in agreement that although a lease assumption does not require court approval, an assumed lease is still subject to the discharge absent explicit reaffirmation in compliance with the Code.

1 11 U.S.C. § 524(a) (2005)
2 11 U.S.C. § 524(c) (2005)
3 *In re Eader*, 426 B.R. 164 (Bankr.D.Md. 2010)
4 *Id.* at 164.
5 *Id.*
6 *Id.* at 166.
7 *Id.* at 167.
8 *Id.*
9 *In re Finch*, 2006 WL 3900111 (Bankr.D.Colo.)
10 *Id.* at 1.
11 *In re Creighton*, 427 B.R. 24 (Bankr.D.Mass. 2007)
12 *Id.* at 25.
13 *Id.* at 30.
14 *Id.*

Lesson from Scrutiny

continued from p. 7

the court allowed such fees in this case because the attorneys substantially prevailed with regard to their fee applications.

Duplication of Effort

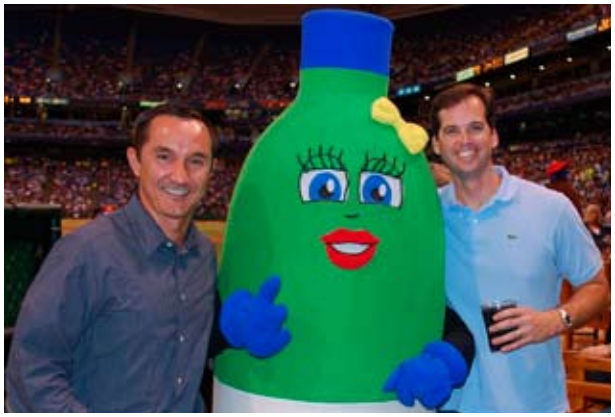
The shareholder objected to time entries for conferences between attorneys or where more than one attorney attended a hearing. The court held that billing for conferences between two or more attorneys is not *per se* unreasonable and noted that such conferences are necessitated early in a chapter 11 case because of the chaotic nature and compressed time frames during that time. With regard to fees for the attendance of more than one attorney at a hearing, the court held that when such time entries are entered, the applicant should indicate the reason for the appearance of both attorneys. Because of the absence of such explanation in the fee applications at issue, the court cut such time entries in half.

Debtor's counsel should consider these issues when preparing their fee application. Even if no one objects to a fee application, the CCT court noted the court's independent duty to scrutinize these.

Ray's Night at the Corona Beach Bar

by Editorial Board

On Friday, August 13, 2010, the Tampa Bay Bankruptcy Bar Association held its second annual Tampa Bay Ray's Fund Raiser to raise funds for the upcoming 2011 National Conference of Bankruptcy Judges. Instead of last year's pre-game tailgate, the Association moved the whole event inside Tropicana Field to the Corona Beach Bar. The Corona Beach Bar is a 100 person plus seating section along the third base line, adjacent to left field, that includes tabletop seating, game side seating, full food, beer and wine service, and an unprecedented ground level view of the action.



The event was a huge success with over 100 attendees who enjoyed fun, food and friendship (along with ice cold beers), all while watching the Rays continue their quest to be the ultimate 2010 American League East Division Champions.

Adding to the fun of the evening was an action-packed raffle and silent auction featuring an Evan Longoria jersey, Rays' baseball caps, t-shirts and other prized Rays memorabilia including a signed Carl Crawford baseball. In addition, each attendee received a gift bag filled with useful office items courtesy of our event sponsors.

Except for the Rays suffering a rare loss at the hands of the Baltimore Orioles, it was a great night. Once again, thanks to event coordinators Robert Wahl, Keith Appleby and Luis Martinez-Monfort for their hard work and a special thanks to our event sponsors:

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Start marking your calendars now as, building on the success of this year's event, the Association is already in negotiations with the Rays to secure the Corona Beach Bar for either a New York Yankees or Boston Red Sox game during the summer of 2011.

One Is the Loneliest Number: *Olmstead* Diminishes Refuge in the Single Member - LLC

by Kelly Robinson, Esq.
Thomas Seider, Esq.

The Florida Supreme Court recently ruled that under Florida law, a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment.[1] With this decision, the Court upends the role of the single-member LLC as a safe haven for debtors and creates significant implications for the use of all limited liability companies ("LLCs") as debtor-protection vehicles in the state of Florida.

Shawn and Julie Olmstead were found guilty of certain unfair or deceptive trade practices in connection with an "advance-fee credit card scam."[2] Their assets, including their interests in multiple single-member Florida LLCs, were frozen and, in partial satisfaction of the judgment, were surrendered to the receiver.[3]

On appeal, the Olmsteads contended that, pursuant to Fla. Stat. § 608.433(4), the Court could not compel the turnover of their interests in the single-member LLCs. Rather, the only remedy available to the FTC was a charging order. A charging order assigns a member's economic right of payment to its creditor while, in an effort to protect the governance of a corporate entity, it prevents the creditor from taking an active management role in the LLC. As a result, the LLC has been a popular instrument for debtor protection, among other attributes.

Under the Court's analysis, the birth of single-member LLCs created novel issues for judgment creditors. First, without any non-debtor members to protect, it would seem the traditional rationale behind a charging order is moot. Further, a creditor's interest under a charging order is typically economic, i.e., a right to distribution.[4] However, in a single member LLC, distribution pursuant to a charging order is unlikely, as such distribution would necessarily be motivated only by the debtor's (and sole member's) charitable spirit.

The Supreme Court of Florida held that judgment creditors have the right to cause the surrender of all right, title, and interest of a debtor in its single-member LLC. Section 56.061 provides that "stock in corporations," "shall be subject to levy and sale under execution."[5] The Court reasoned that because an LLC is a type of corporate entity, the ownership interest in an LLC is a type of corporate stock and thus, pursuant to Florida Statute Section 56.061, is subject to levy and sale.

Pursuant to sections 608.433(4) and 608.402(23), a judgment creditor has only assignment rights to a debtor's economic interest. Despite this statutory language and its apparent conflict with the Court's interpretation of Section 56.061[6], the *Olmstead* court refused to view the charging order as a creditor's *exclusive* remedy against the owner of a single-member LLC. Specifically, the Court stated that, "[t]here is no express provision in the statutory text providing that the charging order remedy is the only remedy that can be utilized with respect to a judgment debtor's interest in an LLC."[7] Thus, like corporate stock, a debtor's ownership interest in an LLC is subject to levy and sale under § 56.061.

In a lengthy dissent, Justice Lewis criticized the majority for disregarding "the clearly recognized legal separation between the specific assets of an LLC and a member's interest in profits or distributions from those assets."[8] Justice Lewis accused the majority of judicially legislating "through a speculative inference not reflected in the legislation," and attacked the majority's statutory interpretation of § 608.433(4), specifically the notion that the remedies provided are non-exclusive unless specifically stated as such. The dissent cited multiple academic and judicial sources supporting the argument that where a statute provides only one remedy, it should be read as an exclusive one.[9]

Further, Justice Lewis stated the plain language of the statute restraining the transferability of ownership rights does not change in the context of a single-member LLC. In fact, if it is truly the lack of exclusivity language that allows the majority to apply remedies beyond a charging order, the dissent sees no reason why all multimember LLCs aren't then vulnerable to attack under this same argument.[10]

Looking forward, *Olmstead* has diminished the role of a single-member LLC as a tool for debtor protection and threatens to significantly weaken the protection afforded by the multiple-member LLC. These issues would certainly benefit from definitive legislation. However, in the meantime, *Olmstead* is a clear victory for creditors who previously understood their ability to collect on a debtor's interest in an LLC to be limited to the charging order.

1 Olmstead v. FTC, 2010 WL 2518106.
2 F.T.C. v. Olmstead, 528 F.3d 1310 at 1312 (11th Cir., 2008).
3 Id.
4 Fla. Stat. § 608.402(23).
5 Olmstead v. FTC, 2010 WL 2518106 at 3.
6 Id.
7 Id at 5.
8 Id at 10.
9 Id at 7.
10 Id.

Default Judgments Checklist & Tips

by Lisa Pease, Law Clerk to U.S. Bankruptcy Judge Catherine Peek McEwen

Local Rule 7055-2* explains that a party seeking a default judgment as a result of a defendant's failure to respond to a properly served complaint must provide:

- ❑ Motion for entry of default.
- ❑ Proposed entry of default.
- ❑ Motion for judgment by default.
- ❑ Attached to the motion shall be an affidavit in support of the allegations set forth in the complaint.
- ❑ Affidavit, or Department of Defense Certification, of non-military service, where applicable.
- ❑ Proposed order granting motion for judgment by default.
- ❑ Proposed judgment.

Paragraph (c) of Local Rule 7055-2 requires motions for entry of default to state that:

- ❑ Service was duly effectuated in compliance with the Federal Rules of Bankruptcy Procedure;
- ❑ No extension of time was sought or obtained by the defendant;
- ❑ The defendant failed to file a responsive pleading or motion within the time specified; and
- ❑ The movant seeks an entry of default.

**See also, Rule 7055, Fed. R. Bankr. P., and Rule 55, Fed. R. Civ. P.*

Affidavits

As noted above, Local Rule 7055-2 requires that a motion for judgment by default be accompanied by an affidavit in support of the allegations in the complaint. This affidavit provides the Court with the factual basis for granting the requested relief. When preparing the affidavit, attorneys must keep in mind that the same basic requirements for use of affidavits to establish evidentiary facts in court are needed to support a default judgment. Consequently, the affidavit must show on its face that the affiant is competent to testify and has *personal knowledge* of the matters stated or, if the affiant relies on hearsay, the affidavit must set forth an applicable exception to the evidentiary rule against admission of hearsay testimony. For example, in an adversary proceeding where a trustee/plaintiff seeks recovery of money allegedly owed by the defendant, an affidavit by the trustee's attorney, or even by the trustee himself or herself, asserting facts in support of the debt will not support a default judgment if the attorney or trustee has no *personal knowledge* of those facts. An affidavit by the attorney or trustee may provide an adequate basis for relief if the existence of the debt can be established under Rule 803(6), Fed. R. Evid., through records that qualify as records of a regularly conducted business activity, and the attorney or trustee has *personal knowledge* of those records. Conclusory allegations by an attorney about a client's financial affairs, however, are insufficient, *see, e.g., Kamen v. American Telephone and Telegraph Co.,* 791 F.2d 1006, 1011 (2nd Cir. 1986) (attorney's statement that client receives no financial assistance was not based on personal knowledge and thus did not satisfy Rule 56(e)), and it is generally difficult for an attorney or trustee to satisfy the business records exception. The affiant must also, of course, make an oath or affirmation as to the veracity of the statements made.

In addition, Local Rule 7055-2 requires an affidavit, of Department of Defense Certification, of non-military service for individual defendants. Practitioners can obtain this certification though the Defense Manpower Data Center's website, found at www.dmdc.osd.mil/appj/scra/scraHome.do, using the defendant's: (i) last name; and (ii) social security number or date of birth.

Costs

If the moving party is legally entitled to costs and the complaint seeks an award of costs, the motion for default may request, and the judgment may include, a provision that the prevailing party shall recover its costs of action. The judgment will not, however, include the amount of costs. A separate bill of costs must be filed with the clerk of court within 14 days of entry of the judgment. See, Local Rule 7054-1, *citing*, Rule 7054(b), Fed. R. Bankr. P.

Chambers of
Circuit Judge
Thirteenth Judicial Circuit

Manuel Menendez, Jr.
Chief Judge

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September 7, 2010

Dear Attorneys Practicing in the 13th Judicial Circuit,

As you are all aware, the current economic climate has created an increased need for legal services among the neediest in our community. Pro bono organizations have experienced a dramatic increase in the number of clients who need assistance.

On behalf of the judges sitting in the 13th Judicial Circuit, I would like to urge each of you to help manage this crisis by taking on a pro bono case. We thank the members of the legal community who have already volunteered to manage this overflow by taking on pro bono clients. The One Campaign (one attorney, one client, one promise) has been launched to recruit additional lawyers to represent indigent clients.

The Florida Bar's Rules of Professional conduct emphasize a lawyer's professional responsibility to provide pro bono legal services. Rule 4-6.1 of the Florida Rules of Professional Conduct provides that:

> Each member of the Florida Bar in good standing, as part of the member's professional responsibility should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to legal needs of the poor.

Rule 4-6.1 states that members of the Florida Bar should volunteer at least 20 hours of pro bono legal assistance to the poor or, alternatively, make an annual contribution of at least $350 to a legal aid organization. Unfortunately, the need for pro bono lawyers cannot be fixed by donations only. Indigent, unrepresented litigants need your help, and you are qualified to assist.

The Florida bar Standing Committee on Pro Bono and our local pro bono committee are in the process of exploring ways to handle the increase in pro bono clients, including pro bono clients at the courthouse, seminars, and special recognition of volunteers. As always, the pro bono committee welcome new ideas and involvement.

Yours in Public Service,

Manuel Menendez, Jr.,
Chief Judge

Orlando's Chapter 13 Mortgage Modification Mediation Program

by Stefan Beuge, Esq.

With much of Florida real estate undisputedly under water (figuratively, mostly), relief for drowning homeowners attempting to save their homestead may loom on the horizon. The Orlando Division of the U.S. Bankruptcy Court recently implemented a new program allowing homeowners to discuss mortgage modifications on primary residences with lenders on an accelerated track.

The program is still in its early stages and is only available to qualifying Chapter 13 Debtors. As pending loan modifications clog the system and delay plan confirmation, the Orlando Bankruptcy Court's program is streamlined and aims to reduce cost and time. At the same time, it seeks to improve the success of a Chapter 13 plan by making it easy for parties to facilitate a loan modification.

A Debtor interested in participating in the program must file a Motion requesting a mortgage modification mediation. The court does not set the matter for hearing. Rather, it enters an Order modifying the automatic stay, to the extent necessary, to allow the parties to begin immediate negotiations.

The court's Order is quite detailed. For example, the parties must schedule the mediation within 14 days of the entry of the Order, and the mediation must take place within 60 days. The Order also requires that the Mediator be qualified to mediate mortgage foreclosure issues. Within seven days of the conclusion of the mediation, the mediator must file a report indicating whether or not the parties agreed to a modification. The Debtor is responsible for a small fee to the Trustee, who pays the mediator upon completion of the mediation.

Despite its level of detail, the Order does not sufficiently address deadlines for the mutual exchange of information that is necessary for the parties. Specifically, it requires that creditors make all document requests no later than 14 days before the Mediation. However, it does not place a similar deadline on Debtors to remit such documentation. The potential problem is that Creditors may not receive the documents needed with enough time to complete the review prior to the scheduled mediation. Nevertheless, one must assume that all parties are acting in good faith, and that Debtors sincerely wanting a modification would not willfully hinder their chances.

Unlike the loss mitigation conference program implemented in New York, which does not involve a mediator but requires a face-to-face meeting with a lender representative who has authority to settle the loan modification, the Orlando program allows the Creditor and its counsel to appear telephonically. While New York's model does not involve the expense of a mediator, Creditors are heavily burdened by travel expenses to attend these face-to-face meetings. Some in the Middle District bankruptcy community prefer a face-to-face loss mitigation process like the one in New York. However, the cost, efficiency, and advantages of modern technology should be balanced against the likelihood of success.

Though many believe mortgage modification mediations in bankruptcy are a good idea, there are some who see it as a risky venture. One concern is the risk that the bankruptcy mediation would arguably leave a Debtor out of the state court mediation program if the bankruptcy mediation fails. This is because lenders may be excused from mediating if mediation has already occurred. For instance, if the bankruptcy mortgage modification mediation is unsuccessful, and a foreclosure action proceeds, the Debtor may be unable to mediate legal issues such as standing since he has exhausted his one shot at mediation. Furthermore, there is some concern over using state court-trained mediators who are not necessarily familiar with bankruptcy law.

With mediation in bankruptcy increasing in importance, and other Divisions considering similar programs, it may be necessary for bankruptcy and foreclosure attorneys, as well as county and bankruptcy judges, to work together in the near future to differentiate between the kinds of mediations (mediation of all legal issues versus modification mediation) available at different stages. This would help ensure that borrowers unable to modify their loans in bankruptcy are not left without any recourse in the foreclosure case.

Likewise, as with any new program, finding qualified mediators with experience may prove to be a challenge at first. But there is no doubt that time will change that. In the meantime, creditors, and often Debtors, are represented by counsel who are familiar with bankruptcy and can help direct modification mediations when necessary.

In the end, mortgage modifications are the probably the best alternative for all involved. The Debtors keep their homes, the creditors continue receiving a steady stream of payments, and with less foreclosure properties on the market, property values can perhaps begin to finally stabilize.

Lost & Found

The law clerk's table in Courtroom 8B houses Judge McEwen's chamber's lost and found department. If you are missing glasses, Bankruptcy Codes, or umbrellas, please stop by the table to see whether what you lost has been found.

People on the Move

Effective September 27, 2010, Jo Shumard begins her new position with the United States Bankruptcy Court for the Middle District of Florida as Legal Advisor to the Clerk of the Court. Over the course of her career, Jo spent many years in private practice and has served as a law clerk in both the United States Bankruptcy Court and the United States District Court.

Jo's first projects will be to convert Administrative Orders into Local Rules as they pertain to courtroom and filing procedures, working towards uniformity of procedures across the District. As such, it is anticipated that she will be very involved with the local bar communities.

Proposed Rule Amendments and Public Comment

The Advisory Committee on Bankruptcy Rules has recommended amendments to Rules 3001 on proofs of claim, 7054 on costs, 7056 on timing of summary judgment motions, Official Forms 10 and 25A, and Official Form 10 attachments and supplements: The proposed amendments may be reviewed at:
http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed%200810/Reports%20of%20the%20Advisory%20Committee%20on%20Bankruptcy%20Rules.pdf

The deadline for public comment on these proposed amendments is February 16, 2011. More information on the comment process may be viewed at:
http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/proposed%200810/Memo%20of%20BK%20and%20CR%20Procedure%20August%202010.pdf

An Open Letter from Judge McEwen

Tradition has it that a gift for couples celebrating a five-year anniversary should be something made of wood. My five-year anniversary with the bankruptcy court here in the Middle District of Florida is not a marriage celebration but is like one in some respects. So, like another tradition, I'll simply "knock on wood" that my next nine years as a bankruptcy judge are as rewarding as the first five.

My enjoyment on this job since August 22, 2005, is, largely, a direct consequence of the people with whom I cross paths every day. Yes, the legal problems are stimulating and the opportunities sometimes to play law professor, financial advisor, workout officer, or social worker make the job even more engaging.

But the value-added feature of this job really is the people. They include the many caring, spirited, and professional lawyers who come before the bankruptcy court for hundreds of hearings each week. So, first, I thank you, the lawyers who are reading this letter, and your paralegals and assistants. You are in great measure responsible for how well the cases flow, both in the courtroom and behind the scenes. That makes my coming to work each day something to look forward to. And you do this good work while maintaining a pleasant attitude despite your being overwhelmingly busy and having to cover too much within a short period of time.

I must also thank the litigants who come to court, whether with or without a lawyer. They are the real people behind the paper issues. They suffer from financial distress and uncertainty, and this group includes creditors who have been impacted by the financial distress of someone else. They come into the courtroom somewhat apprehensive or downright fearful – sometimes even angry, yet they are respectful of the system and the judge.

Another group of people that I must thank are those who, while being paid to be here, are nonetheless a reason why working in this Court is a joy: The Court's staff. The staff is hard working and always looking for ways to improve their performance for the good of the system and service to the public.

Of course, my list of what I love about the past five years would not be complete without a special acknowledgment of the enormously talented men and women who are my colleagues and mentors on the Middle District bankruptcy bench. This bench, I think, is the most collegial bench in the nation.

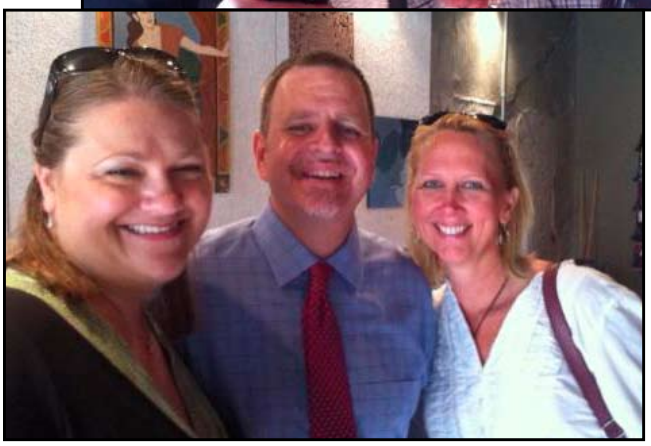
As with any relationship worthy of celebration on an anniversary, I understand that an anniversary is just a date on the calendar and that it takes continuous work to maintain and improve on the relationship. Knock on wood, and God willing, that is my commitment for the remainder of my 14-year term as a judicial officer of the United States Bankruptcy Court for the Middle District of Florida.

Thank you all, again.

Cathy Peek McEwen

TBBBA Happy Hour

The TBBBA held its first ever Happy Hour on August 19, 2010, at the Bunker located in historic Ybor City. Members enjoyed camaraderie and refreshments. We look forward to seeing you at the next Happy Hour!



The Cramdown
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