The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Jake Blanchard, Fowler White Boggs P.A. **Fall 2011**

PRESIDENT'S MESSAGE

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

Arrrr Maties -- Tampa Bay Bankruptcy Bar Off to a Great Year!

After several years of Ray's fundraisers to reach our goal of a $15,000 sponsorship for the NCBJ, our efforts were truly rewarded with an exceptional night. Our Association decided several years ago that we would raise a minimum of $15,000 to highlight our Bar to all of the Judges and bankruptcy attorneys around the nation when the NCBJ was held in Tampa. This endeavor paid off handsomely on the festive night of October 13, 2011. Both our outgoing Chief Judge, Judge Glenn and our incoming Chief Judge, Judge Jennemann, had nothing but praises about our Association and the NCBJ party. Judge Jennemann, "The party at the Aquarium was so unique and fun. **The Bar went above and beyond for the NCBJ, and it really showed.**" Kudos to all of our members who made this event a splashing success.

I am happy to report that we have started off our year with momentum and enthusiasm. We have officially launched our new website, www.tbbba.com. We are growing into the 21st century. Our members are now available on our website, as well as upcoming events and other useful information and links. Please join me as I make it my mission to have a more interactive website for our members, those interested in our Bar, and out of town attorneys who seek counsel in our area. Make sure you are an active member and that your contact information is accurate on our website.

As the consumer bar grows and foreclosure mediations soar, our Bar is right there to explore this ever changing economic atmosphere. We have already had several lunches to educate our members about this new arena. Our Second Tuesday of the month CLE meetings are also off to a terrific start. We had our second annual half day seminar with the HCBA in September. This was a nice mix of attorneys. The topics were a cross of bankruptcy and real estate, areas of law that continue to be at the forefront.

We now come into this Fall/Winter season with View From the Bench and the retirement announcement of Judge Killian, our Tuesday CLE luncheons, and our upcoming holiday party. Judge Jennemann will be present at our November CLE luncheon, as a guest, and will give us a state of the union speech at our January CLE luncheon. We are delighted that she is willing to come to Tampa so often!

Our committees continue to be active in the community: C.A.R.E., pro bono, and law school day at the court are our pride and joy. I encourage you to be an active member with the Association. Any contribution is welcome!

Inside This Issue

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

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2011-2012
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Business as Usual; *Stern v. Marshall* Did Not Change That Much

by Keith W. Meehan, Gardner Brewer Martinez-Monfort, P.A.

The Bankruptcy Court for the Middle District of Florida (hereinafter "the Bankruptcy Court") recently delivered an opinion in a case where the Debtor proposed a plan calling for the contribution of a large amount in assets from the Principals of the Debtor's parent company. *In re Safety Harbor Resort & Spa*, 2011 LEXIS 3238 (Bankr. M.D. Fla. Aug. 20, 2011), (hereinafter "*Safety Harbor*"). These Principals were also the non-debtor guarantors on a large debt owed to a creditor. In exchange for that contribution, the Bankruptcy Court imposed a four-year stay on any actions by the Creditor against the non-debtor guarantors. In view of the Bankruptcy Court's action, the Creditor requested for the Bankruptcy Court to impose "lock up" restrictions on the non-debtor guarantors and the Debtor's business to ensure that no assets were disposed of in an effort to impede the Creditor's collection efforts after the end of the four-year period.

With the belief that the "lock up" provisions exceeded the Bankruptcy Court's constitutional authority as interpreted in the recent Supreme Court ruling of *Stern v. Marshall*, 131 S.Ct. 2594 (2011), the Debtor objected. The Debtor further contended that, in fact, the Bankruptcy Court had no constitutional authority to impose *any* "lock up" restrictions due to *Stern*'s new limitations on a bankruptcy court's jurisdiction. In order to effectively review the issue of whether it had the authority to impose any "lock up" restrictions, the Bankruptcy Court conducted a careful analysis of the *Stern* decision.

The Bankruptcy Court's Analysis of *Stern v. Marshall*

In *Stern*, the debtor-in-possession asserted a counterclaim for tortious interference in response to to a proof of claim based on state-law defamation. Since the debtor-in-possession brought the counterclaim in response to a proof of claim, the *Stern* Court treated the counterclaim as a core proceeding under 28 U.S.C. § 157(b)(2)(C); however, before the bankruptcy case was filed, a claim for fraudulent inducement to sign a living trust was filed in the Texas probate court by the individual who was acting on behalf of the debtor-in-possession. The California bankruptcy court ruled in favor of the debtor-in-possession, but the creditor appealed its decision. While this appeal was proceeding but before any final decision was entered by the district court, the Texas probate court ruled against the individual acting on behalf of the debtor-in-possession. Thus, there were two inconsistent rulings that needed to be reconciled. Under applicable law, the ruling entered first is given preclusive effect. The review then turns to whether the California bankruptcy court had the power to enter a final judgment on what was essentially a state-law tort claim; if it did not have this power, then the Texas probate court's ruling would stand as being the ruling effectively entered first.

The *Stern* Court concluded that filing a proof of claim is insufficient to give a bankruptcy court authority to enter a final judgment on a state-law counterclaim. The *Stern* Court then explained that there is a difference between proceedings that may have *some* bearing on the case, such as the state-law counterclaim in *Stern* where the only effect is that it augments the bankruptcy estate, and claims that either (1) come from the bankruptcy itself or (2) must be resolved in the claims allowance process. Thus, the *Stern* Court struck down as unconstitutional 28 U.S.C. § 157(b)(2)(C) because it gave bankruptcy judges the power to render final judgments on common law compulsory counterclaims that were not resolved in the proof of claims process.

continued on p. 4

Business as Usual

continued from p. 3

The Bankruptcy Court's Application of *Stern v. Marshall*

After performing a careful analysis of *Stern*, the Bankruptcy Court turned to the central issue of whether the *Stern* holding limits its power to impose "lock up" provisions in the confirmation order to the non-debtor guarantors. In doing so, the Bankruptcy Court emphasized *Stern*'s use of the language "Congress exceeded Article III's constitutional limitations in 'one isolated respect,'" and pointed to *Stern*'s assertion that "the question before it was a 'narrow one.'" The *Stern* Court even contended that whether a bankruptcy court can enter a final judgment on a state-law counterclaim is to be decided on a case-by-case basis. The Bankruptcy Court found that nothing in the *Stern* opinion limits a bankruptcy court's authority to rule on the other core proceedings under 28 U.S.C. § 157(b)(2), and it is universally agreed upon that confirmation is a core proceeding. Additionally, the Bankruptcy Court construed the *Stern* Court's use of the word "reaffirm" as indicative that nothing has changed, except for the "one isolated respect" that was litigated in *Stern*.

Safety Harbor then expanded on *Stern* by stating that, since 28 U.S.C. § 157(c)(2) expressly authorizes it, parties may still consent to a bankruptcy court entering a final judgment on a proceeding that is not defined as a core proceeding. The Supreme Court recognizes "the value of waiver and forfeiture rules [in] complex cases," and that "[n]o procedural principle is more familiar to this Court than that a constitutional right, or a right of any sort, may be forfeited." *Safety Harbor* at 12.

Conclusion

Pursuant to the Bankruptcy Court in *Safety Harbor*, the *Stern* decision does not change all that much. The *Stern* Court merely changed "one isolated respect" and made a very "narrow" ruling. Therefore, the Bankruptcy Court reasoned in *Safety Harbor* that the "lock up" provisions proved to be integral to the confirmation of the plan and thus, as it was a core proceeding, fell within the Bankruptcy Court's jurisdiction under 28 U.S.C. § 157(b)(2)(L). Moreover, the parties expressly and impliedly consented to the Bankruptcy Court's jurisdiction through the actions in the case.

It is clear that when the *Stern* opinion was published, many bankruptcy attorneys were concerned about how the decision would affect their practice; however, after reading *Safety Harbor*, it is safe to say everyone can rest assured that, in most cases, it is back to business as usual for the bankruptcy courts.

Upcoming Events

Tuesday, November 22nd • 05:30 - 05:00pm • Judicial Liaison Committee Meeting

Friday, December 2nd • TBBBA Tennis Tournament

Thursday, December 8th • Holiday Party

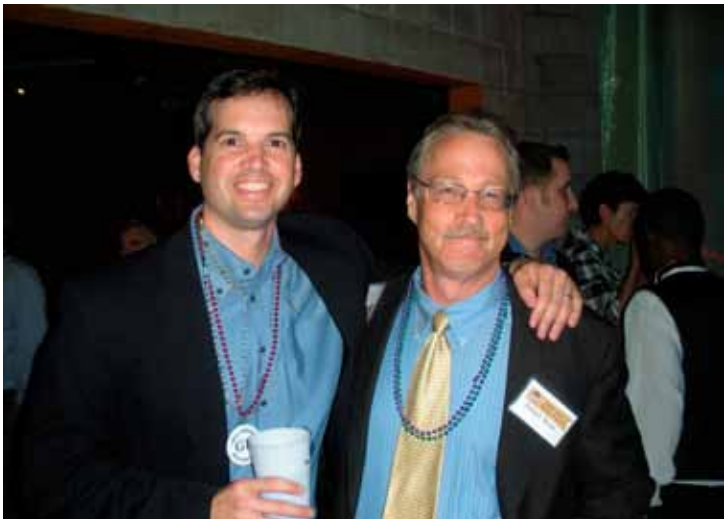
Tuesday, January 3rd • Board Meeting

Tuesday, January 3rd • Consumer Brown Bag Lunch

Tuesday, January 17th • TBBBA Luncheon

Tuesday, January 24th • Judicial Liaison Committee Meeting

The National Conference of Bankruptcy Judges
held its 85th Annual Conference on October 12-15, 2011 in Tampa at the Tampa Marriott Waterside.
Most of the fun was at the Florida Aquarium during the after party.



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People on the Move

Past TBBBA President **Edward Waller**, Fowler White Boggs PA. has been Selected as 11th Circuit Trustee of American Inns of Court: Mr. Waller practices in the areas of business litigation, class actions, health care litigation, lender liability, bankruptcy and creditors' rights generally.

Kara Hardin was recently awarded an Hon. Cornelius Blackshear Fellowship by the National Conference of Bankruptcy Judges. The fellowship is named in honor of Judge Blackshear, a retired bankruptcy judge from the Southern District of New York Bankruptcy Court, who has an extensive public service record and enduring contribution to bankruptcy jurisprudence. The fellowship is awarded to a minority lawyer to attend the annual conference of the NCBJ.

Jake C. Blanchard has joined Fowler White Boggs PA. as an associate in the Tampa office. Mr. Blanchard practices in the Firm's Bankruptcy and Financial Restructuring Practice Group and will concentrate his practice in all types of bankruptcy, from both the debtor and creditor side; business and commercial litigation; foreclosure; wrongful repossession and contract disputes.

No, **Robbie Colton** did not get a part-time job. Robbie represented a Waffle House franchisee with numerous stores.

Bankruptcy Can Cost Job Opportunities in a Bad Economy

by Robert Gidel, Jr.
Summer 2011 Intern for U.S. Bankruptcy Court for the Middle District of Florida and J.D. Candidate 2013, University of Florida Levin College of Law

Score another one for private business.

In following the lead of a recent Fifth Circuit ruling,[1] the United States Court of Appeals for the Eleventh Circuit held that the Bankruptcy Code's antidiscrimination provision of 11 U.S.C. § 525 did not prohibit a private employer from denying employment to an individual on the grounds that he or she is or has been a debtor in a bankruptcy case.[2]

In *Myers v. TooJay's Management Corp.*,[3] the court wrestled with the statutory language of subsections (a) and (b) in § 525,[4] after a purported employee, who had previously filed a Chapter 7 petition, brought an action against a purported private employer for discrimination in their hiring practices.[5]

The case turned on whether or not Eric Myers, a prospective employee, was ever *actually* an employee of TooJay's Gourmet Deli.[6] As part of the defendant's hiring protocol, the plaintiff worked at the delicatessen for a brief two-day "on the job evaluation" period.[7] If Myers was considered an employee, the court reasoned that § 525(b) would effectively protect the individual from discriminatory practices concerning the termination of his employment.[8] If Myers was not considered an employee, however, then only in the public employment sector was Myers protected under § 525(a).[9]

Myers had filed for Chapter 7 and had received a discharge before moving to another state and obtaining a job as a supervisor in a coffee house.[10] Myers sought employment at TooJay's and was given an interview and an on-the-job evaluation where the plaintiff was paid $100 per day.[11] During the training, Myers performed managerial job functions and was asked to fill out numerous employment and background forms.[12] At the conclusion of the training, the plaintiff believed he was given a start date, and thus was an employee of the Deli.[13] TooJay's argued successfully that it had conditioned the alleged start date on the passing of a background check.[14]

In stating that TooJay's was not liable for having discriminated against Myers because of his previous bankruptcy filing, the court reasoned that the difference in language concerning the public hiring practices in § 525(a) and the absence of such language in the private context discussed in § 525(b) demonstrated congressional intent to differentiate the two.[15]

The court detailed that because TooJay's was not a public employer, it was not governed by subsection (a). Had TooJay's been a "government unit, Myers would have [had] a refusal to hire claim," but because it was not, Myers' claim was governed by subsection (b) pertaining to private employers. Subsection (b)'s language does

continued on p. 11

1 *Burnett v. Stewart Title, Inc.*, 2011 WL 754152 (5th Cir. March 4, 2011).
2 *Myers v. TooJay's Management Corp.*, 640 F.3d 1278, 1285 (11th Cir. 2011).
3 *Id.*
4 See *id.* at 1283:
"11 U.S.C. § 525(a) provides in relevant part that: [A] governmental unit may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated . . . . Section 525(b), by contrast, provides in relevant part: "No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt . . . ." See *id.*
5 *Id.* at 1278.
6 *Myers*, 640 F.3d at 1284 (providing, in pertinent part, that "[i]f TooJay's were a governmental unit, Myers would have a refusal to hire claim; because it is not, he does not.").
7 *Id.* at 1281.
8 *Id.* at 1283-84.
9 *Id.* at 1283 (providing, in pertinent part, that "the private sector is prohibited only from discriminating against those persons who are already employees.").
10 *Id.* at 1280.
11 *Id.*
12 *Myers*, 640 F.3d at 1281.
13 *Id.* at 1282.
14 *Id.*
15 *Id.* at 1284 (*quoting Dean v. United States*, 129 S. Ct. 1849, 1854: "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

continued from p. 10

not differ materially from (a), with the exception of the clause "deny employment to."[16]

The court did agree, however, that if TooJay's had hired Myers, § 525(b) did not protect the private employer from "terminating an employee because he has filed for bankruptcy."[17] Thus, the fate of the claim rested on whether Myers was reasonable in believing he was an employee.

In the instant case, the court agreed with the jury's finding that Myers was never considered an employee of TooJay's, despite oral representations to the contrary.[18] On the witness stand, however, Myers had differing time frames as to when he believed he had been hired.[19] Myers had quit his previous employment at the coffee house on the understanding that he was, in fact, offered the managerial position at TooJay's.[20] The jury needed only 40 minutes to deliberate before concluding that the plaintiff had never been an employee of TooJay's.[21]

Myers also argued that the court should interpret the language more broadly because, by doing so, the Bankruptcy Code's remedial "fresh start" purpose would be better served.[22] The court reasoned that, by changing the language of § 525(b) to include discriminatory hiring practices by private businesses, the court was integrating a congressional purpose and not interpreting and applying the statutory language.[23]

The court also added that "it would be illogical to read the identical language in two successive subsections to have different meanings."[24] The case law seems in agreement with the Eleventh Circuit Court of Appeals rationale in regards to the protections afforded to private businesses in their hiring practices.[25]

On a petition for a writ of certiorari from an unreported 2010 decision of the Third Circuit,[26] the United States Supreme Court had the opportunity to visit the precise issue decided in Myers, but it recently denied the petition.[27] Therefore, only congressional intervention can now save individuals from discriminatory hiring practices by private businesses. While that might be unforeseen with the current makeup of Congress, it does not mean that the issue could not rise to the surface again in the near future.

With bankruptcy filings becoming more prevalent and the economy making it harder for job seekers, political pressure could conceivably steer Congress towards re-evaluating § 525 during these hard times. For those that wish to see the "fresh start" ideology become a reality in all circumstances with regard to bankruptcy, it continues to be a cause worth fighting for.

16 *Id.* "As we have already noted, § 525(a) expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, while § 525(b) does not."
17 *Id.* at 1287.
18 *Myers*, 640 F.3d at 1287.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* at 1284.
23 *Myers*, 640 F.3d at 1284-85.
24 *Id.* at 1285.
25 *Id.*
26 *Rea v. Federated Investors*, Case No. 10-1440 (3d Cir. Dec. 15, 2010).
27 *Rea v. Federated Investors*, 2011 WL 4530417 (mem.) (U.S. October 3, 2011).

Judge Lewis M. Killian was presented with a plaque in recognition of his 25 years of service as a Bankruptcy Judge.

Judge Paskay received the Distinguished Lifetime Services Award from the Business Law Section of the Florida Bar in connection with the View from the Bench Seminar in Tampa on November 2, 2011.

Bankruptcy Law & Practice:
View from the Bench Seminar-November 3rd in Tampa

The Golden Rule, Courtroom Edition: Be Nice!

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

In September 2011, an *en banc* panel of the United States Bankruptcy Court for the Southern District of Florida sanctioned an attorney for misconduct. Regardless of whether one views the court's order as overly harsh or undeservingly generous, one cannot help but agree with its noble characterization of what the legal profession should look like. As the Preamble to Chapter 4 of the Florida Bar Rules explains, a lawyer is a "public citizen having special responsibility for the quality of justice."

Attorneys, as officers of the court, should further the public's confidence in the rule of law and the integrity of the judicial system. Our communications with judges ought to be respectful. One should not, as this particular attorney did, question a judge's qualifications by insisting that the court's findings are not supported by the record. Just because you think the judge is unfairly prejudiced against you does not mean you should callously disparage or humiliate him. Doing so, as the order states, violates Florida Bar Rule 4-8.4(d).

It also violates Florida Bar Rule 4-8.2(a), which requires that a lawyer "not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." In disciplining attorneys under this rule, the Florida Supreme Court asks "whether the attorney had an objectively reasonable factual basis for making the statements."[1]

Being human, attorneys often make mistakes. In attempting to remedy a blunder, however, one should not, as this particular attorney did, send a bottle of wine to the judge as a truce offering. Such a request for an *ex parte* communication violates Florida Bar Rule 4-3.5(a), which forbids lawyers from seeking to "influence a judge, juror . . . or other decision maker except as permitted by law or the rules of court."

As one who was recently sworn in as a member of the Florida Bar, I cannot help but notice how similar these rules are to the declarations in the Oath of Attorney. At some point, we all promised to act with truth and honor. We swore to "abstain from all offensive personality." As demanding and competitive as the legal profession can be, we should try to remember that we pledged "fairness, integrity, and civility."

The court's order boils down to a single point: Be nice! Chivalry is not dead, especially not in the courtroom. This maxim holds true not just for bankruptcy attorneys, but all attorneys. Not just in Florida, but all across the country. No matter how offended or frustrated you feel by the tone or content of a judge's orders, you should remain professional.

Ultimately, the court suspended the attorney from practice before the U.S. Bankruptcy Court for the Southern District of Florida for a period of sixty days and referred the attorney to the Florida Bar for the imposition of any additional sanctions that it may find appropriate. In doing so, the court reminds us that successful lawyering requires knowledge of not only the specific rules of substance and procedure, but also the rules of courtesy and common sense.

As attorneys, it is easy to put our game faces on and assume an aggressive persona in support of our clients. It is more difficult to do this while simultaneously extending grace and courtesy to our adversaries and arbitrators. Such a feat is challenging, but not impossible, and definitely one worthy of inspiration.

There is a fine line between ardent advocacy and judicial denigration, but not so fine that one would cross it inadvertently. The Florida Rules of Professional Conduct and the Florida Bar Rules exist for both our own good and the good of the profession as a whole. Perhaps we should flip through them every once in a while. As the Southern District of Florida clearly demonstrated, you do not want to get "bench-slapped" by a judge.

1 *The Florida Bar v. Ray*, 797 So. 2d 556, 559 (Fla. 2001).

Notable Bankruptcy Court Decisions:
In re Agriprocessors, Inc.

Bankr. ND IA Under Iqbal and Twombly, a claim for constructively fraudulent transfers must allege sufficient facts that plausibly show: (i) a transfer within the applicable time period, (ii) a lack of reasonably equivalent value (or fair consideration), and (iii) debtor's insolvency during the relevant time period. A mere recitation of the three legal elements is inadequate to establish a plausible factual basis. To properly plead a "transfer," the plaintiff must allege sufficient factual information, including the date of the transfer, the amount of the transfer, the name of the transferor, and the name of the transferee. To properly plead "less than reasonably equivalent value," the plaintiff must describe the consideration and why the value of such consideration was less than the amount transferred. To properly plead the debtor's insolvency, the plaintiff must must allege facts that plausibly show that at the time of the transfers, debtor was insolvent. The complaint cannot merely make a conclusory statement that a debtor was insolvent. It must must contain enough factual information to plausibly show the debtor's liabilities exceeded assets at the time of the transfers.

In re. Weinshank: A Twist on Fla. Stat. § 222.11

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

Fla. Stat. § 222.11 is entitled "Exemption of wages from garnishment." In a bankruptcy context, it is the statute consumer debtors use to exempt "earnings" from administration in a bankruptcy estate particularly when those "earnings" are in the form of cash holdings in a financial institution.

Fla. Stat. § 222.11(2)(a-c) states that "disposable earnings" for a "head of family" are exempt from garnishment up to $750/week, that earnings above $750/week may only be garnished if specific permission is given by the head of family, and "disposable earnings" from persons other than "head of family" may not be garnished in excess of the amount allowed under the Consumer Credit Protection Act.[1]

Fla. Stat. § 222.11(3) states that earnings that are exempt under § 2 and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings.[2]

The majority of the published bankruptcy opinions regarding Fla. Stat. § 222.11 deal with the question of what is "disposable earnings" especially with regard to the "head of family" for exemption purposes.[3] However, the Court in *In re. Weinshank*, 406 B.R. 413 (S.D. Fla. 2009) addresses a new issue: how Fla. Stat. § 222.11(3) exemption can apply to non-head of family disposable earnings on deposit in a bank account for less than six months.

The debtor in *Weinshank* was a single man with no dependents. Mr. Weinshank had approximately $4,800.00 in a two bank accounts on the date he filed a Chapter 7 Bankruptcy. The debtor did not qualify as a "head of family" under § 222.11(1)(c) and §§ 222.11(2)(a-b) would not apply to him. The debtor argued that § 222.11(2)(c) should apply to him and, therefore, the exemption found in § 222.11(3) should as well.

In his opinion, Judge Hyman reasoned that the "language of Fla. Stat. § 222.11(2) and (3) is unambiguous" and that Fla. Stat. § 222.11(2)(c) "specifically addresses persons other than a head of family and exempts…earnings of a person other than a head of family…" (at 417).

Judge Hyman further states in his opinion that:

> "subsection (3) provides that earnings that are exempt under subsection (2), that have been…deposited into a financial institution, and which can be traced and identified as earnings, are exempt for six months after receipt by the financial institution" (Weinshank at 417).

Based on a plain language reading of the 222.11, Judge Hyman concluded that there is "nothing in the statute that would limit application of [its] exemption provisions to situations involving only a head of family" (at 417-18). The Judge agreed with the debtor that his earnings qualify under § 222.11(2)(c) as "earnings as a person other than a head of household." That being the case, the money the debtor had on deposit with a bank for less than six months that was traceable to earnings should be exempt from the reach of creditors and exempt from administration in his Chapter 7 case.

Judge Hyman concluded his opinion by addressing several issues raised by the Trustee in the case. The Judge determined the following: (1) a plain reading and application of the statutory text leads to a logical result; (2) there is not sufficient ambiguity within the statute to discount a plain reading; and (3) a plain reading presents no conflict with either the intent of the drafters or with federal statutes (at 418-20).

Based on Judge Hyman's plain reading of the statute, he entered an order allowing the debtor to exempt all of the money in his bank account that had been on deposit six months or less and directly traceable to earnings. In this case, that amount was $4,631.95.

There are no other published opinions in the 11th Circuit discussing the possibility of this type of application of Fla. Stat. 222.11. If this interpretation becomes the predominant one throughout the jurisdiction, it would affect numerous cases and could represent a great benefit to debtors who do not qualify as heads of family under Florida Statutes.

1 (2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to $750 a week are exempt from attachment or garnishment.
(b) Disposable earnings of a head of a family, which are greater than $750 a week, may not be attached or garnished unless such person has agreed otherwise in writing. (form of writing included in statute omitted here)
(c) Disposable earnings of a person other than a head of family may not be attached or garnished in excess of the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

2 222.11(3) Earnings that are exempt under subsection (2) and are credited or deposited in any financial institution are exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings. Commingling of earnings with other funds does not by itself defeat the ability of a head of family to trace earnings.

3See e.g. In re. McDormett, 425 B.R. 848 (M.D. Fla. 2010); In re. Stoup, 221 B.R. 537 (M.D. Fla. 1997); In re. Braddy, 226 B.R. 479 (N.D. Fla. 1998); In re. Harrison, 216 B.R. 451 (S.D. Fla. 1997).

Discovery Timing: How Rule 26 Works (Don't Jump the Gun)

by Jamil Gittens
Temporary Law Clerk to Hon. Catherine Peek McEwen

Rule 26 of the Federal Rules of Civil Procedure governs the general provisions for administration of discovery in bankruptcy adversary proceedings.[1] It is common for discovery to take place shortly after the pleadings have been filed and may continue shortly before trial. The parties are required to meet "as soon as practicable" to discuss the claims and defenses that have been filed and whether there is any possible settlement.[2] In any event, parties must confer at least 21 days before a scheduling conference is to be held.[3] A party may not engage in formal discovery until after the discovery conference.[4] If a party jumps the gun and serves discovery before the conference, a motion to compel responses should be denied.[5] If no settlement is reached during the conference, parties are required to prepare a "discovery plan."[6] The discovery plan covers the nature and subject on which discovery is to be had, as well as the timing and form of disclosures and discovery.[7] The attorneys of record must attempt to agree on the proposed plan and submit it to the court in written form within 14 days after the conference.[8]

After the discovery conference, the parties will then make initial mandatory disclosures.[9] Once initial disclosures are finalized, the parties may serve discovery requests on one another and on third party witness. Methods of discovery may be used in any sequence that the parties see fit.[10] Once a case proceeds closer to trial the parties will once again make certain mandatory disclosures of expert witness information and any other evidence that is necessary.[11]

1 Fed. R. *Bankr.* P. 7026.

2 Fed. R. Civ. P. 26(f).

3 *Id.*

4 Fed. R. Civ. P. 26(d).

5 *MCI Construction, LLC v. Hazen and Sawyer, P.C.*, 211 F.R.D. 290, 291 (M.D. N.C. 2002).

6 *Id.*

7 Fed. R. Civ. P. 26(f)(2).

8 *Id.*

9 Fed. R. Civ. P. 26(a)(1)(A).

11 Fed. R. Civ. P. 26(d).

10 Fed. R. Civ. P. 26(a)(2)(A).

Chapter 7 Filers Benefit from Tampa Division's Competitive Market?

by Luke Mellish
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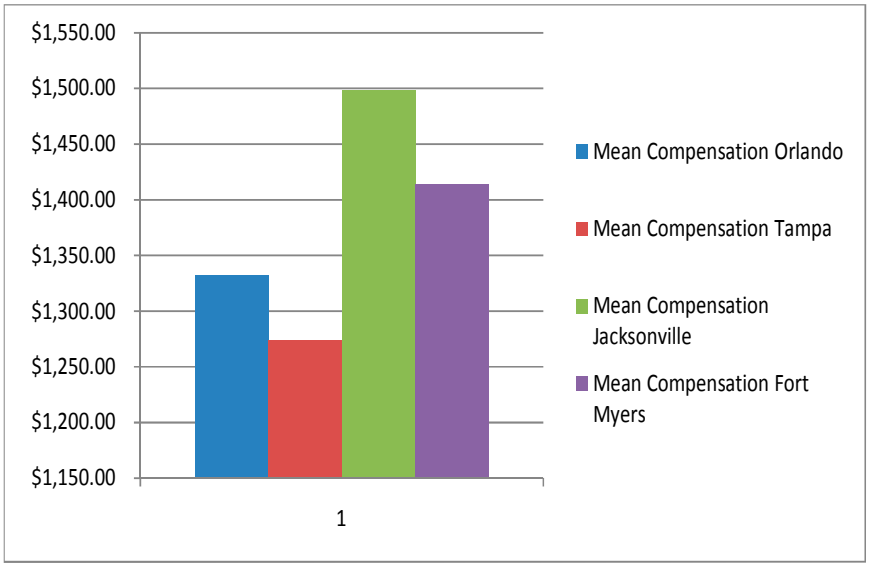
Evidently all Chapter 7 attorney fees are not created equal. Chapter 7 attorney fees vary from division to division in the Middle District of Florida.

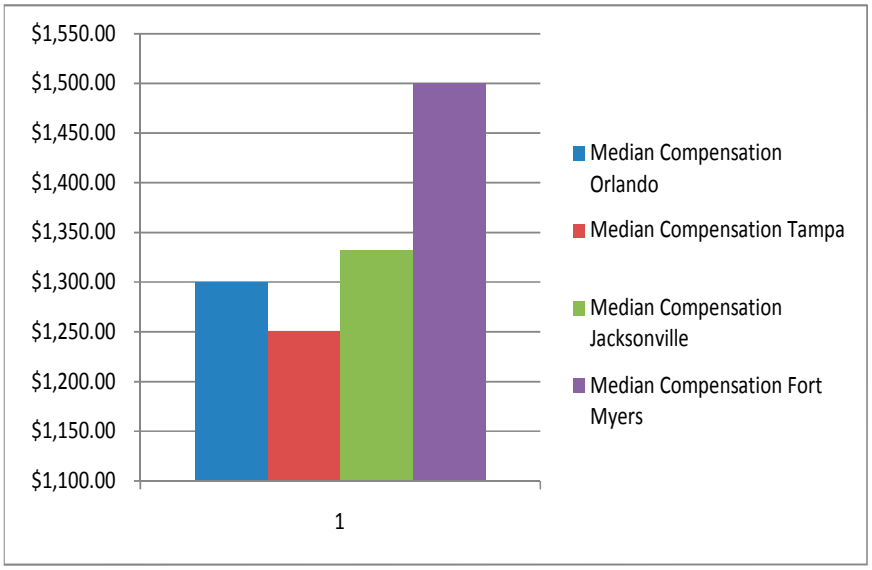
As a summer intern of Judge McEwen, I was asked to compile data comparing the attorney fees for Chapter 7 bankruptcy cases in four different divisions in the Middle District of Florida: Tampa, Orlando, Jacksonville, and Fort Myers. In order to do this, I took a sampling of the first 100 Chapter 7 cases from each division filed during the week of July 25-29.

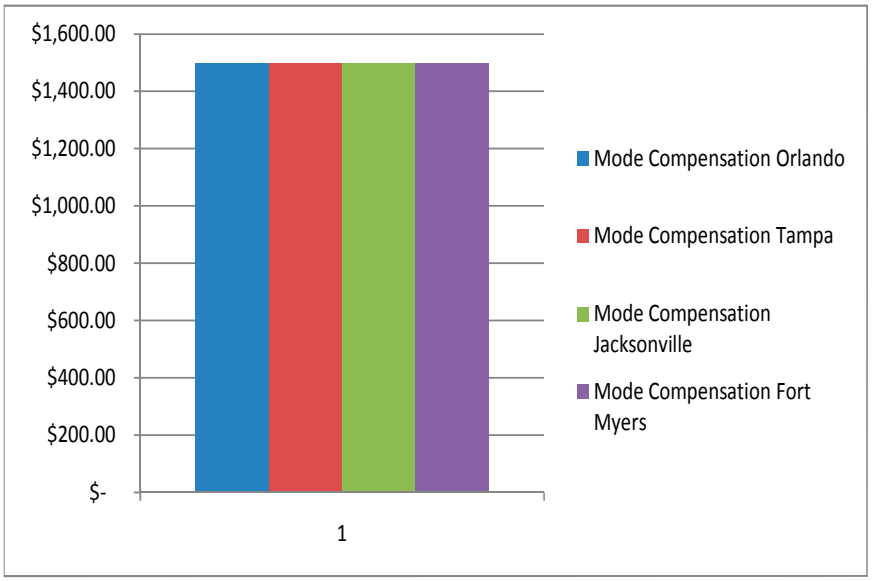
I used the CM/ECF system to access the docket reports for each case, and I reviewed the disclosure of attorney compensation. After obtaining this information, I input all the data into a spreadsheet for each division. I omitted the pro se cases as well as the highest and lowest figures from each division so as to minimize the effect that outliers would have on the mean compensation. I used the mean (average), median, and mode functions in Microsoft Excel to quickly calculate the values. Accompanying this article are graphs demonstrating the results.

Surprisingly to this non-lawyer, the average compensation for an attorney for a Chapter 7 bankruptcy case varied significantly from division to division. Jacksonville came in with the highest average compensation, with attorneys receiving $1,497.82 for services rendered on a Chapter 7 case. The second highest average compensation was Fort Myers with $1,413.62, followed by Orlando at $1,331.88, and Tampa at $1,273.60.

Based on these findings, it appears evident that debtors undoubtedly get a better bargain in Tampa. That could be due to competition: The Tampa sampling had from two to fifteen more lawyers in the mix than the other divisions.







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