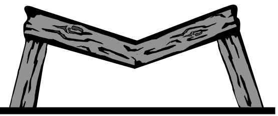

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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

Winter 2012

PRESIDENT'S MESSAGE

by Keith T. Appleby, Esq.
Hill Ward Henderson

Inspire and Be Inspired

Most of us remember the movie JERRY MAGUIRE (TriStar Pictures 1996) and the lines "Show me the money!", "You complete me", "Help me help you", and "You had me at 'hello'". Ironically, the real message of the movie is the sports agent title character's ambition to do what is best for his clients irrespective of financial gain and his frustration with his industry's perceived dishonesty with its clients. When Jerry reaches this epiphany, he writes a mission statement titled "The Things We Think and Do Not Say: The Future of Our Business."

Although his peers applaud him for his "memo," his firm fires him and takes his clients. Jerry starts a new firm with his one remaining client and his disenchanted secretary, Dorothy. At his lowest point, Jerry asks Dorothy why she left a good career at the former firm to join him, and she replies, "I just want to be inspired."

We all need a Jerry Maguire moment. As attorneys, we should be inspired and inspire others. Volunteering and providing pro bono service is your opportunity to achieve both. With busy lives, it can be hard to find time to volunteer. However, the benefits of volunteering are enormous to you, your family, and our community. The right opportunity can help you find new friends, provide leadership in the community, learn new skills, and even advance your career as an attorney.

Many of us became lawyers with the best intentions for helping those less fortunate. Unfortunately, life often gets in the way of our aspiration to volunteer. Pro bono benefits everyone. Taking a pro bono bankruptcy case brings hope of a better future and financial stability for poor and low-income people throughout our community by giving them a fresh start. Pro bono helps our courts and judges to operate more efficiently and fairly. Pro bono creates valuable networking opportunities and improves your legal knowledge and skills. And importantly, pro bono is good for your heart.

Apple founder Steve Jobs gave the commencement speech to Stanford University graduates in 2005. He spoke candidly about his cancer diagnosis and that his outlook allowed him to be fearless. "When I was 17, I read a quote that went something like: 'If you live each day as if it was your last, someday you'll most certainly be right.' It made an impression on me, and since then, for the past 33 years, I have looked in the mirror every morning and asked myself: 'If today were the last day of my life, would I want to do what I am about to do today?' And whenever the answer has been 'No' for too many days in a row, I know I need to change something."

In closing, I offer one last quote from Jerry Maguire's mentor Dicky Fox, "If this [points to heart] is empty, this [points to head] doesn't matter." As we look forward to this holiday season, I hope that your heart will be filled with generosity.

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Everybody Strip! The *McNeal* Decision and Its Impact[1]

by Shane K. Warner and Daniel E. Etlinger

Does the bankruptcy world makes an important distinction between "stripping down" and "stripping off" a lien in a Chapter 7? That is the question that has circuit courts split throughout the country. Stripping down reduces an undersecured lien to the value of the collateral to which it attaches to. For instance, a $200,000 lien secured by a mortgage on property worth $150,000 will be bifurcated into a $150,000 secured claim and a $50,000 unsecured claim. Stripping off removes a wholly unsecured lien in its entirety. For instance, a $50,000 lien secured by a second mortgage behind a $200,000 first mortgage on property only worth $150,000 will lose its secured status entirely, and therefore be treated as an unsecured lien. Chapter 7 bankruptcies had seemingly settled the interplay between these two concepts, that is, until the 11th Circuit decided *McNeal v. GMAC Mortgage, LLC* in May of 2012[2]. However, to truly understand the *McNeal* decision we must first analyze the *Folendore* and *Dewsnup* decisions and their progeny.

Background

In *Folendore v. SBA* the SBA had a junior lien to two senior liens that secured indebtedness greater than the value of the secured property.[3] Thus, the SBA's lien was an allowed claim that was wholly unsecured. The *Folendore* Court relied on the plain language of 11 U.S.C. § 506(d) to void the SBA's lien.[4] Section 506(d) states:

> [t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –
>
> (1) such claim was allowed only under section 502(b)(5) or 502(e) of this title; or
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

Just a few years later the United States Supreme Court heard *Dewsnup v. Timm*, where the Chapter 7 debtors sought to strip down a creditor's $120,000 lien to the $39,000 value of the property.[6] The *Dewsnup* Court first weighed several statutory constructions before advancing that § 506(d) should be read term by term.[7] That is, a claim that is first allowed and then second secured.[8] Thus, the *Dewsnup* Court held that the debtors could not strip down a partially secured lien under § 506(d).[9] Two Justices dissented, having agreed with the debtors' plain language statutory construction approach that guidance for § 506(d)'s "allowed secured claim" must be found in § 506(a).[10] Section 506(a) states in relevant part:

> An allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.[11]

In the wake of Dewsnup several circuits extrapolated from that decision that a Chapter 7 debtor who could not strip down a partially secured lien also could not strip off a wholly unsecured junior lien. Below is a chart highlighting some of the most important decisions:

continued on p. 4

1 Authored by Shane K. Warner and Daniel E. Etlinger, attorneys at law. Perry Law, P.A., 2502 North Rocky Point Drive, Suite 896, Tampa, Florida 33607. Telephone – (813) 374-2064. Facsimile – (813) 443-0997. The authors would like to thank John Springer, J.D./M.B.A. candidate at Stetson University May, 2012, for his research and contributions.
2 2012 WL 1649853 (11th Cir. 2012).
3 862 F.2d 1537, 1538 (11th Cir. 1989).
4 *Id.* at 1538-39.
5 11 U.S.C. § 506(d).
6 502 U.S. 410, 412-13 (1992).
7 *Id.* at 414-16.
8 *Id.* at 417.
9 *Id.*
10 *Id.* at 420-421 (Scalia, J., dissenting).
11 11 U.S.C. § 506(a)(1).

Everybody Strip!
continued from p. 3

1st	Cannot Strip Off	In re Madjerac, 157 B.R. 499 (Bankr. D. Me. 1993)
2nd	Can Strip Off	In re Lavelle, 2009 WL 4043089 (Bankr. E.D. N.Y. 2009); Howard v. Nat'l Westminster Bank, U.S.A., 184 B.R. 644 (Bankr. E.D. N.Y. 1995)
	Cannot Strip Off	In re Caliguri, 431 B.R. 324 (Bankr. E.D. N.Y. 2010); Pomilio v. MERS, 425 B.R. 11 (Bankr. E.D. N.Y. 2010)
3rd	Cannot Strip Off	Swiatek v. Pagliaro, 231 B.R. 26 (Bankr. D. Del. 1999)
4th	Cannot Strip Off	Ryan v. Homecomings Fin. Network, 253 F.3d 778 (4th Cir. 2001)
5th	Cannot Strip Off	In re Bentley, 2010 WL 786003 (Bankr. E.D. La. 2010)
6th	Cannot Strip Off	Talbert v. City Mortg. Servs., 344 F.3d 555 (6th Cir. 2003)
7th	Cannot Strip Off	In re Arrieta, 2009 WL 1789576 (Bankr. N.D. Ill. 2009)
8th	Cannot Strip Off	In re Fitzmaurice, 248 B.R. 356 (Bankr. W.D. Mo. 2000)
9th	Cannot Strip Off	Laskin v. First Nat'l Bank of Keystone, 222 B.R. 872 (B.A.P. 9th Cir. 1998).
10th	Cannot Strip Off	Richins v. Bank of Am. Home Loans, 469 B.R. 375 (Bankr. D. Utah 2012)
11th	Cannot Strip Off	Armstrong v. Regions Bank, 2011 WL 768080 (M.D. Fla. 2011); In re Hoffman, 433 B.R. 437 (Bankr. M.D. Fla. 2010)

[12]

It's worth noting that several Florida and Georgia opinions from the 11th Circuit treated *Dewsnup* as abrogating *Folendore*, and thus, agreed with the majority that a Chapter 7 debtor could not strip off the wholly unsecured junior lien.[13]

McNeal

McNeal involved the following undisputed facts: 1) first mortgage held by HSBC for $176,413; 2) second mortgage held by GMAC for $44,444; and 3) value of the property at $141,416.[14] The Chapter 7 debtor then tried to strip off GMAC's second priority lien arguing it was wholly unsecured and thus void under §§ 506(a) and 506(d).[15] All parties agreed that GMAC's claim was both allowed and wholly unsecured.[16]

As a starting point, the *McNeal* Court held *Folendore* to be the applicable 11th Circuit precedent.[17] The standard to depart from *Folendore* is if an "intervening Supreme Court decision is 'clearly on point.'"[18] The *McNeal* Court then found that *Dewsnup* was not clearly on point because *Dewsnup* involved a stripping down, not a stripping off.[19] Therefore, even after *Dewsnup*, *Folendore* is the 11th Circuit precedent and a debtor can strip off a wholly unsecured

continued on p. 5

12 There are several cases where a Chapter 7 debtor could not strip off the wholly unsecured lien which are pending appeal.
13 *See e.g. In re Swafford*, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993)("But *Dewsnup* effectively overruled *Folendore*"); *In re Windham*, 136 B.R. 878, 882 n. 6 (Bankr. M.D. Fla. 1992) ("The Supreme Court's decision effectively overrules the contrary position taken by the Court of Appeals for the Eleventh Circuit in *Folendore*.").
14 2012 WL at *1.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at *2 (internal citations omitted).
19 2012 WL at *2.

Everybody Strip!
continued from p. 4

lien. The *McNeal* Court then acknowledges that it did not follow the majority analysis in *Dewsnup*, rather, it seemed to apply the dissent's plan language analysis.[20] However, the Eleventh Circuit found that this and this alone is not a reason to depart from a prior decision:

> Although the Supreme Court's reasoning in *Dewsnup* seems to reject the plain language analysis that we used in *Folendore*, "'[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding.'" *Atl. Sounding Co., Inc.*, 496 F.3d at 1284 (citing *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998)). "[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision." *Id*. "As we have stated, '[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Id*. In fact, the Supreme Court – noting the ambiguities in the bankruptcy code and the "difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations" – limited its *Dewsnup* decision expressly to the precise issue raised by the facts of the case. 112 S.Ct. at 778.[21]

Therefore, *McNeal* held that *Folendore* which permits a strip off of a wholly unsecured junior mortgage, and not *Dewsnup*, was on point.

Although not cited to in the opinion itself, the National Association of Consumer Bankruptcy Attorneys filed an amicus brief. That amicus brief cites two policy reasons underlying the decision. First, allowing a Chapter 7 debtor to strip off a wholly unsecured junior lien ensures wholly unsecured creditors are treated uniformly, whether or not they are junior liens. Second, the decision will help stem the influx of knowingly risky high loan to value mortgages by not affording them greater protection in bankruptcy proceedings than otherwise.[23]

Aftermath

The proper context is necessary to fully appreciate the aftermath of the *McNeal* decision. The *McNeal* decision is unpublished. Therefore, it's not binding precedent rather, its persuasive authority.[24] Furthermore, a petition for hearing en banc was filed June 1, 2012. Which means, that the decision may yet be overturned. With those thoughts providing the correct lens, there are three realms of responses to the decision – legislative, judicial and adversarial.

The fact that plausible positions which contradict one another can be advanced demonstrates an ambiguity in the Bankruptcy Code. A fact which did not escape the *Dewsnup* Court when they stated that the "foregoing recital of the contrasting positions of the respective parties and their amici demonstrate that § 506 of the Bankruptcy Code and its relationship to other provisions of that Code do embrace some ambiguities."[25] Thus even in 1992 the *Dewsnup* Court seemingly invited Congress to clarify the Bankruptcy Code. Yet, now twenty years later there has been no legislative clarity. Now that the positions and conflict have intensified, it's possible that Congress (or even the Supreme Court) will have to address the circuit split. However, as of the date of this article, there have been no bills introduced to do just that.

The judicial reaction, on the other hand, has been much swifter in some jurisdictions. Just two weeks after the *McNeal* decision, the United States Bankruptcy Court for the Middle District of Florida revised its negative notice list to specifically address the case.[26] The list now includes a motion for Chapter 7 petitions to determine the secured status and strip off a lien on real property requiring thirty day's notice.[27] It is likely that other districts in the 11th Circuit will follow suit.

Lastly, both debtors and creditors will likely change their tactics moving forward in the post-*McNeal* world. Both parties will place a greater emphasis on the valuation process because this is the lynchpin to the debtor's ability to strip off the junior lien. Debtors may now sense they can forgo with the Chapter 20 process (i.e. filing a Chapter 7 to discharge unsecured debts followed by a Chapter 13 to modify mortgage arrearages) and accomplish the same with the now more debtor-friendly Chapter 7.

Only time will tell the true impact and response to the *McNeal* decision. As it stands, the 11th Circuit's pendulum has started to swing towards a more debtor-friendly outlook. Even though unpublished and a petition for rehearing filed, debtors will immediately begin utilizing *McNeal* for stripping off wholly unsecured junior liens.

20 *Id*
21 *Id.*
22 Brief of *Amicus Curiae* National Association of Consumer Bankruptcy Attorneys at 18, *In re McNeal*, No. 1:10-cv-01612-TCB (N.D. Ga. 2010).
23 Id. at 18-21.
24 11TH CIR. R. 36-2.
25 502 U.S. at 416.
26 Negative Notice List Revised, May 25, 2012, U.S. Bankruptcy Court for the Middle District of Florida, www.flmb.uscourts.gov/announcements (last visited July 15, 2012).
27 United States Bankruptcy Court, Middle District of Florida Permissive Use of Negative Notice (revision effective June 28, 2012), U.S. Bankruptcy Court for the Middle District of Florida, www.flmb.uscourts.gov/negativenotice/list.pdf (last visited July 15, 2012).

Announcements

Please join the TBBBA in congratulating **Kathleen DiSanto** on the birth of the newest addition to her family, **Emily Jane DiSanto**.

Dennis LeVine Available to Act as Mediator in Bankruptcy Cases

Dennis J. LeVine announces his availability to act as a mediator in bankruptcy matters. He has been added to the list of bankruptcy mediators by the Bankruptcy Court for the Middle District of Florida.

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John Paul Getting and Christopher Broussard join Jennis & Bowen, P.L.

John Paul "JP" Getting has joined Jennis & Bowen, P.L., a Tampa law firm specializing in business bankruptcy, commercial litigation and corporate transactions, as an associate. Before joining the Firm, Mr. Getting attended Stetson University College of Law and earned his Juris Doctorate and Masters in Business Administration. While attending Stetson Law, Mr. Getting interned for both the Honorable Caryl E. Delano and the Honorable K. Rodney May, Bankruptcy Judges in the Middle District of Florida.

Christopher Broussard has joined Jennis & Bowen, P.L., a Tampa law firm specializing in business bankruptcy, commercial litigation and corporate transactions, as an associate. Before joining the Firm, Mr. Broussard clerked with the Honorable John K. Olson at the U.S. Bankruptcy Court, Southern District of Florida. Mr. Broussard holds a Bachelor of Science in Business Administration (majoring in Economics) from the University of Florida. After graduating from UF, Mr. Broussard spent a year working as a project manager for a global, diversified industrial manufacturer. He left that position to attend Emory Law School. While at Emory, Mr. Broussard was an Executive Editor for the Emory Bankruptcy Developments Journal and received a certificate in Intellectual Property through the TI:GER program – a collaboration between Emory and Georgia Institute of Technology.

In addition to its business bankruptcy and commercial litigation practice, Jennis & Bowen. P.L., serves a broad range of clients in corporate restructuring, mergers and acquisitions, transactional law, corporate insolvency and non bankruptcy workouts. The Firm's office is located in Suite 2540, 400 N. Ashley Drive in downtown Tampa (813-229-1700).

John W. Landkammer joins Anthony & Partners

Anthony & Partners Attorneys at Law is pleased to announce John W. Landkammer has become an associate with the firm's Tampa office and will continue to practice in the areas of banking, commercial litigation, bankruptcy, business law, and lien law

John can be reached at the firm's Tampa office at 201 N. Franklin Street, Suite 2800, Tampa, FL 33602, 813-712-1236, jlandkammer@anthonyandpartners.com

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Chapter 7 Attorney Fees

By Monica Dermarkar

Summer 2012 Intern for U.S. Bankruptcy Court for the Middle District of Florida and J.D. Candidate 2014, Washington University in St. Louis

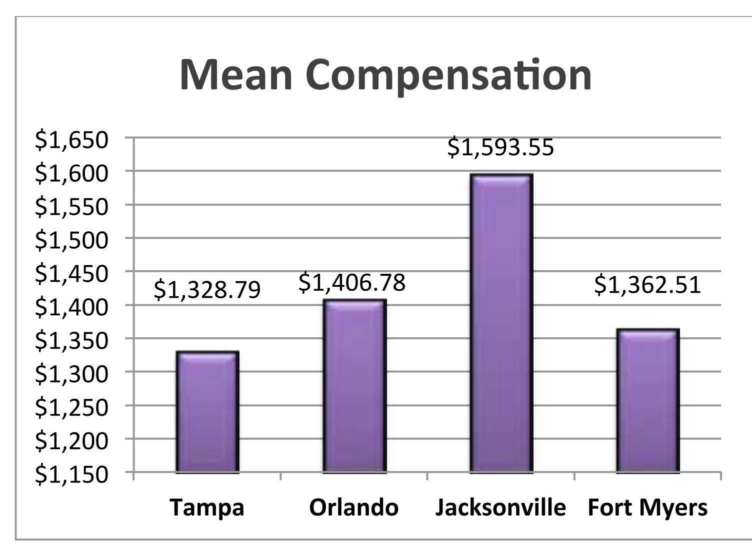
Location, Location, Location! Attorney fees for Chapter 7 bankruptcy cases vary between divisions in the Middle District of Florida.

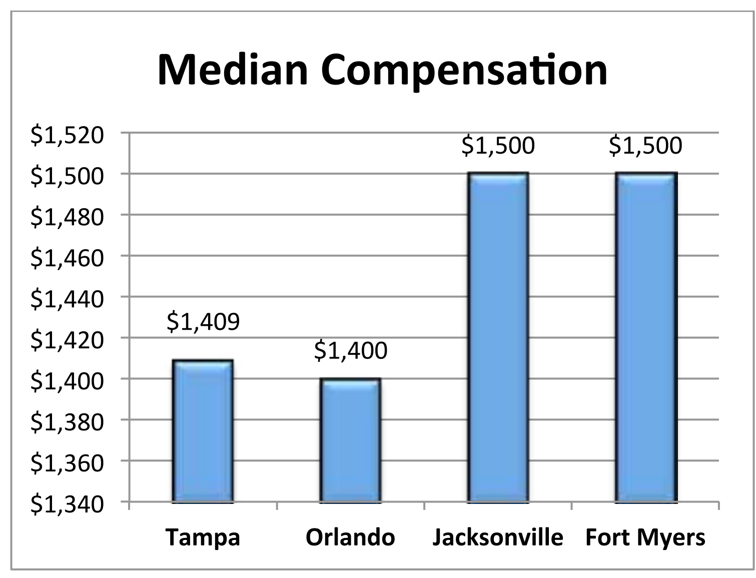
As a summer intern of Judge McEwen, one of my first assignments was to compare attorney fees for Chapter 7 bankruptcy cases in all four divisions of the Middle District of Florida: Tampa, Orlando, Jacksonville, and Fort Myers.

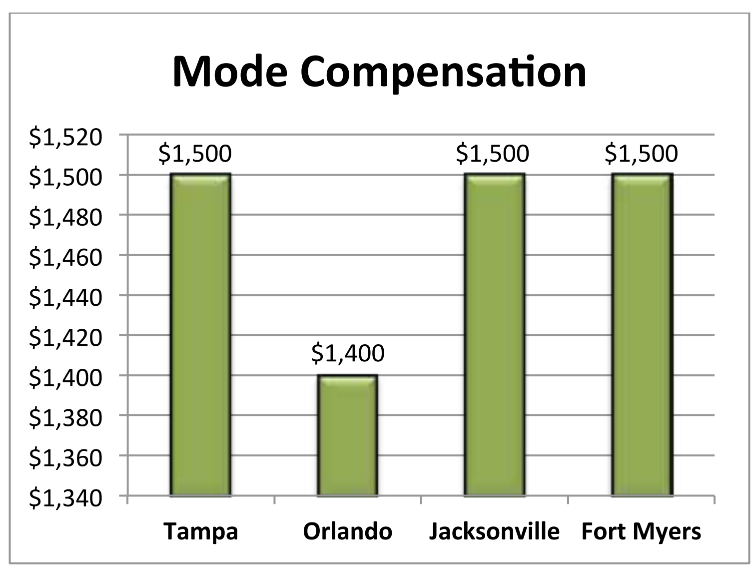
Following last year's averages, Jacksonville attorneys for Chapter 7 bankruptcy cases continue to have the highest compensation average, with attorneys receiving an average $1,593.55 for services. The Orlando division, with an approximate $200 difference, came in second with attorneys receiving on average $1,406.78.

Using CM/ECF, I located the attorney fees of the first 100 Chapter 7 cases from each division filed on June 29 through July 17. When computing the averages, I eliminated all pro se cases, pro bono cases, and the uppermost and lowermost figures from each division in order to provide a more accurate set of data.

Compared to last year's averages, there is an increase in attorney fees in every division except Fort Myers. Despite an increase in attorney compensation, the Tampa division continues to be least expensive for debtors to file Chapter 7.







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New Forms and Procedures Posting of Fee Guidelines for Attorneys in Larger Chapter 11 Cases

Last year, the United States Trustee Program (the "Program") began the process of revising in phases the Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses filed under 11 U.S.C. § 330, which were originally promulgated in 1996 in accordance with 28 U.S.C. § 586 ("1996 Guidelines"). On November 4, 2011, the Program posted proposed guidelines for reviewing applications for attorney compensation in larger chapter 11 cases ("Proposed Guidelines"). After receiving public comment and convening a public meeting, the Program revised the Proposed Guidelines, which have been posted for an additional brief comment period through November 23, 2012. Thereafter, the Program will promulgate final guidelines for attorneys in larger chapter 11 cases.

The Program invites you to review and comment on the current draft of the Proposed Guidelines, which can be found at www.justice.gov/ust.

Please keep in mind that the 1996 guidelines remain in effect for applications for compensation in all cases. Only after promulgation of the final guidelines will applications for attorney compensation in larger chapter 11 cases be subject to review under the new guidelines. All other applications remain subject to the 1996 guidelines.

On December 1, 2012, several updated Official Forms and Director's Procedural Forms will go into effect. A list of those forms is below, along with a URL to the U.S. Courts' website where you can view a more detailed description of the form changes.

Forms being updated include:

Official Forms 7 - Statement of Financial Affairs,
Official Forms 9A - 9I - Notice of Commencement of Case (these are our 341 notices)
Official Form 10 - Proof of Claim Form
Official Form 21 - Statement of Social Security Number or Individual Taxpayer Identification
Director's Procedural Form 200 - Required Lists, Schedules, Statements and Fees
Director's Procedural Form 201A - Notice to Individual Consumer Debtor

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms/BankruptcyFormsPendingChanges.aspx

There are several fee increases that take effect on November 21, 2012.

Efforts to update our case register system, CM/ECF and form changes are underway and will be completed in time the for the November 21, 2012 effective date. The following is a list of the fee increases.

Fee for filing a Chapter 9 case increases to *$1,213.00
Fee for filing a Chapter 11 case increases to *$1,213.00
Fee for filing a Chapter 15 case increases to *$1,213.00
Fee for filing a motion to reopen a Chapter 11 case increases to $1,167.00
Fee for filing a motion by the debtor to divide (sever) a joint Chapter 11 case increases to *$1,213.00.
Fee for converting a Chapter 7 case to a Chapter 11 increases to $922.00
Fee for converting a Chapter 13 case to a Chapter 11 increases to $923.00

*(Includes the statutory fee of $1,167 and an Administrative Fee of $46)

Best Practices

Rule 3002.1 is a relatively new rule having been adopted in December of 2011. Specifically, parts (a), (b), and (c) are of import when it comes to the question of best practices for purposes of this article.

These sections essentially require the holder of a claim secured by a Debtor's primary homestead to file a notice when there is an increase in the mortgage payment for any reason. It has happened on multiple occasions that Debtor's counsel has objected to the notice of a change in mortgage fees for various reasons. The most common reasons seem to be because the lien is being stripped, the property is being returned to the bank, or the mortgage is being paid outside of the Chapter 13 plan. In each of these circumstances, Bankruptcy Courts have ruled that it is still appropriate for the creditor to file the notice for a variety of reasons. This is true across jurisdictions. It has even happened that a creditor's attorney has filed a motion that included a waiver of the requirement to file such a notice. That motion was rejected because there are not exceptions in the language of the rule or the code section that it refers to (1322(b)(5)) and the requirement is, therefore, a universal requirement.

Therefore, in best practices, it behooves creditor's attorneys to file the notices in compliance with 3002.1 and Debtor's attorneys should not object to the filing for the reasons listed above though there may be other reasons to object.

A search of the rule in either Lexis, Westlaw, or even Google will yield a number of specific cases for reference including an opinion by Judge Delano (*In re. Merino*).

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Scott Silverman is a judge on the Eleventh Judicial Circuit in Miami-Dade County, Florida.

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Three Ways Vendors Can Avoid Delco Pitfalls

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

Introduction

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

Superpriority Administrative Expense Claim

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

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

Line Item on Cash Collateral Budget

The Bankruptcy Code is clear – a trustee or debtor in possession may not use cash collateral without court

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1 *See* 11 U.S.C. § 363(c)(2) (2006).
2 *See Marathon Petroleum, L.L.C. v. Cohen (In re Delco)*, 599 F.3d 1255 (11th Cir. 2010) (permitting a trustee to avoid and recover $1.9 million from a vendor that accepted cash collateral without bankruptcy court approval).
3 Section 364(c) also permits vendors to condition doing business with debtors upon classification as secured creditors, which may be a desirable alternative to accepting cash collateral. *See* 11 U.S.C. §§ 364(c)(2) and 364(c)(3). Depending on the circumstances, vendors may prefer either of those alternatives over receipt of a superpriority administrative expense claim. Nonetheless, this paper will only specifically address § 364(c)(1) claims.
4 It should be noted that electing to pursue a superpriority claim still inheres a certain degree of risk, namely that the estate will be insolvent and make it impossible to pay unsecured creditors. This necessarily requires the vendor to choose between the lesser of two evils – potential 549 avoidance or an insolvent estate incapable of paying unsecured creditors. *See In re Mayco Plastics, Inc.*, 379 B.R. 691, 701 (Bankr. E.D. Mich. 2008) (stating that § 364(c)(1) debt is unsecured debt).
5 *In re AMT Inv. Corp.*, 53 B.R. 274, 276 (Bankr. E.D. Va. 1985).
6 *Id.* at 276-77.
7 *In re Mayco Plastics, Inc.*, 379 B.R. at 702.
8 *In re AMT Inv. Corp.*, 53 B.R. at 276.
9 *In re Mayco Plastics, Inc.*, 379 B.R. at 703.
10 From a vendor's perspective, §§ 364(c)(2) and 364(c)(3) may offer more protections than §363(c)(1) where vendors can condition doing business upon receipt of a security interest in unencumbered property. *See* 11 U.S.C. §§ 364(c)(2) and 364(c)(3) (2006).
11 *See* 11 U.S.C. § 502(h) (2006) (granting a general unsecured pre-petition claim to entities from whom a transfer is avoided and recovered).

Delco Pitfalls

continued from p. 20

approval or consent from each affected party.[12] As noted above, vendors can limit the risk associated with accepting cash collateral by conditioning themselves as superpriority creditors. However, vendors who either cannot or prefer not to condition themselves as superpriority creditors, but nevertheless decide to transact with chapter 11 entities risk suffering the *Delco* pitfalls. To minimize that risk, vendors should take every precaution to ensure that their specific transaction is approved by the bankruptcy court. Absent party consent, the means for obtaining court approval is for the trustee or debtor in possession to adhere to the requirements of Federal Rule of Bankruptcy Procedure 4001(b)(1)(A), which requires them to submit an attachment containing a summary of projected revenues and a line item expense budget.[13] A vendor considering doing business with a chapter 11 entity should first determine whether the funds at issue are cash collateral. If they are, the vendor should ask to be included on the line item expense budget submitted to the bankruptcy court in conjunction with Rule 4001(b)(1)(A). In the event that an unauthorized transfer does occur, inclusion on the line item expense budget will differentiate that particular vendor from other vendors who were not included. Accordingly, vendors included in the line item expense budget can avoid having to raise the equitable good faith and innocent vendor defenses that the Eleventh Circuit refused to apply in *Delco*[14] because transfers made in accordance with the budget are necessarily authorized.

Comfort Order

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

Conclusion

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

12 11 U.S.C. § 363(c)(2).
13 Fed. R. Bankr. P. 4001(b)(1)(A) (2006).
14 *See Marathon Petroleum, L.L.C. v. Cohen (In re Delco)*, 599 F.3d 1255 (11th Cir. 2010) (refusing to disregard the plain language of the Code to the vendor's detriment).
15 11 U.S.C. § 105(a) (2006).
16 *In re Hill*, 364 B.R. 826, 831 (Bankr. M.D. Fl. 2007).
17 *Id.*

Stripping Down Your Spouse: A Discussion of Tenancy by the Entirety Property Ownership under Section 506 of the Bankruptcy Code

by: Nicole M. Mariani
Kass Shuler, PA

Since 2008, real estate property values in many parts of the country have declined. As a result, bankruptcy courts around the country have been asked to resolve motions in which the Debtor seeks to strip down or strip off a creditor's lien. While numerous issues can arise under the Bankruptcy Code, one issue which continues to be litigated is whether an individual debtor, as only one of two tenants by the entirety, can strip off a fully unsecured second priority mortgage lien when the remaining tenant is not before the court.

Tenancy by the entirety (TBE) is a type of concurrent estate which can only exist between husband and wife where each spouse owns the undivided whole of the property. Grant S. Nelson, William B. Stoebuck & Dale A. Whitman, *Contemporary Property* 314-315 (2d ed. West Group 2002). This unique property right is not recognized by all states and certain states recognize the right as to real property only and do not allow TBE for personal property. Property held by husband and wife as TBE does not belong to either spouse individually, but instead each spouse is said to own the entire estate. Neither spouse may transfer or encumber their interest without the other's consent. *See Wilson v. Florida Nat'l Bank & Trust Co.*, 64 So.2d 309, 313 (Fla.1953); *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45, 53 (Fla. 2001).

"Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v U.S.*, 440 U.S. 48, 99 S.Ct. 914 (1979); See also *U.S. v. Craft*, 535 U.S. 274, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002). Under *Butner*, courts must first look to the applicable non-bankruptcy law to determine what rights a non-debtor owner of real property would have to effect a strip down or strip off of the mortgage in question. *Id.* Absent a bankruptcy court exercising jurisdiction in a bankruptcy case, a lien strip off could not be done, because there is not a remedy available under state law. After making the state law determination, the Court must, in applying the provisions of the Bankruptcy Code to the issues, respect the underlying state law concerning TBE.

One of the first cases to examine this issue was *In re Hunter*, 284 B.R. 806 (Bankr.E.D.Va.2002). In *Hunter*, the Court examined both the state law and Bankruptcy Code implications of TBE property, and ultimately concluded that TBE does not permit a lien against only one spouse's share in the tenancy and therefore the individual debtor could not strip off a fully unsecured lien on TBE property. *Id.* After an in depth analysis of the nature of TBE, the Court determined that such tenancy is an all or nothing proposition, where TBE offers the benefit of certain protections, it also requires the tenants to live with its burdens. *Id.* The Court concluded that it would be improper to allow one spouse to lien strip and benefit the non-filing spouse who is not before the Court and not eligible for the very relief sought. *Id.*

After *Hunter*, the Bankruptcy Court in *In re Strausbough* 426 B.R. 243 (Bankr.E.D.Mich. Mar 25, 2010) took a contrary position holding that an individual debtor could strip off a wholly unsecured second mortgage lien without participation from the non-filing spouse. The Court reasoned that where a second mortgage was fully unsecured, the creditor had an unsecured claim for the purposes of section 506(a), citing the 2002 6th Circuit decision of *In re Lane*, 280 F.3d 663, 664 (6th Cir.2002). *Id.* at 246. The Court further determined that none of the prohibitions mentioned by the Court in *Hunter* precluded the individual tenant from unilaterally "enhancing" the TBE property such as paying a mortgage payment, paying taxes or making an improvement to the property without the other spouse's necessary joinder. *Id.* at 250. Specifically, the Court stated that enhancing the entireties estate "…was certainly not an action to alien, convey or encumber" either tenants interest in the property. *Id.*

With the split between *Hunter* and *Strausbough*, the next case to examine the issue was *In re Erdmann*, 446 B.R. 861 (Bankr.N.D. Ill., March 2011). The facts in the *Erdmann* case were unique as both spouses were before the Court, but only one spouse was eligible for a chapter 13 discharge as the other spouse had received a discharge in a chapter 7 case within the past four years. *Id.* at 5. The spouse who received a chapter 7 discharge had already discharged his personal liability as to the second lien on the TBE property, but was not

continued on p. 23

Stripping Down Your Spouse

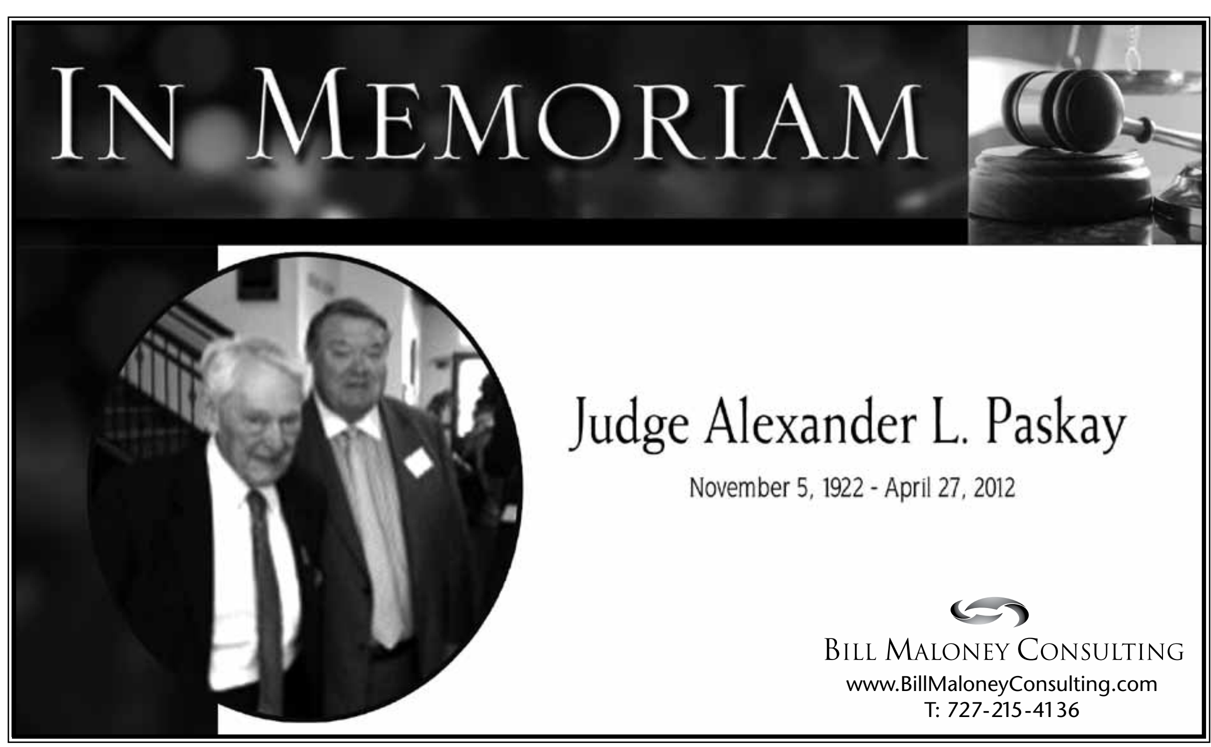
continued from p. 22

eligible for a chapter 13 discharge and therefore was not able to strip off the wholly unsecured lien under section 1325(a)(5). *Id*. The Court determined that the nature of TBE property precluded one tenant from receiving different treatment from the other tenant and as a result, even though the spouses were willing to act in concert, they could not effectuate lien stripping. *Id*. Upon the creation of a TBE, husband and wife lose their separate interests, and the property is held by the tenancy as a single entity. Id. All interest in the property is vested in the marital unit and an individual spouse cannot unilaterally take any action or achieve any result with respect to the property. *Id*. One spouse may not act to sever the TBE and may not alienate the tenancy or affect the rights of third parties. *Id*. at 6. It is only when both of the tenants act in concert that any results may be obtained. *Id*.

The most recent Court to examine this issue is the Middle District of Florida in *In re Pierre*, 468 B.R. 419 (Bankr.M.D.Fla. 2012). In *Pierre*, both the chapter 13 debtor and her non- filing spouse had previously filed and received chapter 7 discharges, the chapter 13 debtor then reopened her chapter 7 case and vacated her prior discharge in order to seek a strip off of her second mortgage lien in her individual chapter 13 case. *Id*. at 423. In *Pierre*, the Court's well-reasoned analysis takes the reader through the intricacies of not only the TBE issue, but also what is commonly called the "chapter 20" issue and whether eligibility for a chapter 13 discharge is a requirement to lien stripping in a chapter 20 case. *Id*. at 424 – 426. Specific to the TBE issue, the Court reasoned that "any type of ownership change requires joint action by both spouses" and held that in order for the debtor to strip off or strip down a mortgage held as TBE, both spouses must be debtors in the chapter 13 case and eligible to receive a chapter discharge. *Id*. at 427. The Court then correctly points out that the *Strausbough* decision ignores the fact that section 506 of the bankruptcy code cannot act by itself to accomplish a lien strip down or strip off result. *Id*. One must, according to *Dewsnup v Timm*, 502 U.S. 410 (1992), still find the power in the bankruptcy code to strip off and strip down a lien. *Id*. That power only exists when section 506 can act in tandem with another code section. *Id*.

While the TBE set of issues may be unique to those states which still acknowledge the validity of such form of property ownership, the underlying issue concerning how to deal with lien stripping when not all of the property owners are before the court is not unique. The issue must be correctly considered and addressed in all forms of co-owned property. The bankruptcy court must acknowledge that the co-ownership rights of a non-debtor may create a burden on the bankruptcy estate which may preclude the debtor in bankruptcy from seeking to strip down or strip off a mortgage lien.

Editor's note: This article was originally published by the American Bankruptcy Institute in the September 2012 edition of the Young and New Members Committee Newsletter



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