The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Suzy Tate, Suzy Tate, P.A.

Winter 2014

PRESIDENT'S MESSAGE

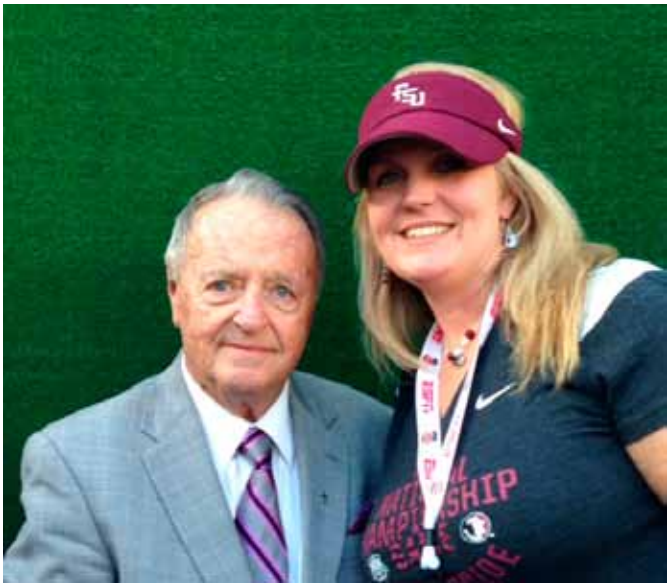
by Stephenie Biernacki Anthony, Esquire, Anthony & Partners, LLC

Celebrating the Beginning of a New Year

As we celebrate the beginning of a new year, and the **Florida State Seminoles winning the National Championship game**, it is a good time to reflect upon the prior year's accomplishments and improvements that can be made in the coming year. In doing just that, I look back at the first half of the 2013 – 2014 bar year and note that our Association has made tremendous progress already. The pro bono clinic is off to a strong start (volunteers staff the clinic on Mondays, 11:30 a.m. – 2:30 p.m., on Wednesdays, 12:00 p.m. – 2:00 p.m., and on Thursdays, 11:00 a.m. – 1:00 p.m.), the monthly CLE Luncheons and the Brown Bag Luncheons at the Courthouse are interesting and informative, and we are all better informed by utilizing our Association's dynamic website, receiving weekly email blasts, and reviewing this wonderful publication. All of this is due to the tireless efforts of the Directors who serve our Association and you, our member volunteers. For this, I am thankful, as it is our members who keep our Association strong! That being said, as we move into the second half of the 2013 – 2014 bar year, I think we can be even better, with your support. So, please, consider volunteering for the pro bono clinic at the Courthouse, get involved with the Credit Abuse Resistance Education Program (C.A.R.E.), write an article for **The Cramdown**, or get involved with the CLE committee! It is going to be a great year, but we need you to make it happen!

Please email me directly at Santhony@anthonyandpartners.com if you have any suggestions or would like to volunteer. And, on behalf of the Tampa Bay Bankruptcy Bar Association's Officers and Directors, I wish all of you a Happy New Year!

Go Noles!!



Inside This Issue

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

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Circuit Breaker: Dismissal of Chapter 7 cases for "Bad Faith" Under Bankruptcy Code § 707(a)

by John W. Landkammer
Anthony & Partners, LLC

Although it is a principle of Constitutional proportions that an insolvent individual is entitled to a "fresh start," it has also been recognized that no debtor is entitled to a "head start." With this in mind, a growing number of courts have been called upon to determine whether debtors who have tremendous net worth, strong income producing history, and lavish lifestyles can thumb their nose at a particular creditor using chapter 7 protections, or whether a pre-planned liquidation of this kind should instead be dismissed under Bankruptcy Code §707(a).

While the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) provided substantial revisions to Bankruptcy Code §707(b) relating to dismissal of chapter 7 cases involving primarily consumer debt, BAPCPA did nothing to resolve the question of whether "cause" under Bankruptcy Code §707(a) can include "bad faith" as a basis to dismiss a case that is not predicated upon the intended discharge of consumer debt. The relevant provision is as follows:

> (a) The Court may dismiss a case under this chapter only after notice and a hearing and only **for cause**, including —
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(Emphasis supplied). On the one hand, the statute is very specific in identifying three (3) bases of dismissal for "cause," and one might argue that Congress could easily enough have added a fourth "bad faith" basis for dismissal if it felt this to be appropriate. On the other hand, it would be a very strange principle of statutory construction to permit a chapter 7 case filed in arguably bad faith to remain pending. The ambiguity of the statute, and the policy reasons against retention of bad faith cases, has created a tension on the issue that now pits the Third,[1] Sixth,[2] and Eleventh[3] Circuits against the Eighth[4] and Ninth.[5] Most significantly for Florida attorneys and their clients, the Eleventh Circuit opinion in Piazza was issued on June 26, 2013, and holds that a debtor's prepetition bad faith can constitute "cause" for involuntary dismissal under Bankruptcy Code §707(a).

The facts underlying Piazza offer very little sympathy for the debtor. Despite the debtor's failure to pay his obligations, the debtor paid the debts of his insiders, transferred thousands of dollars per month to his wife, and made no life-style adjustments. More than half of his debt, approximately $161,383, was owed to a single creditor, who sought dismissal of the chapter 7 case on the grounds that the bankruptcy filing was initiated solely to avoid paying that single debt. The Piazza debtor acknowledged that this was a motivating factor for the filing, but denied that this was tantamount to bad faith. Rejecting the debtor's contention, the bankruptcy court in Piazza determined that "bad faith" does constitute a basis for dismissal "for cause" under Bankruptcy Code §707(a), and ordered dismissal based on an analysis of the fifteen (15) factors set forth in In re Baird, 456 B.R. 112, 116–17 (Bankr. M.D. Fla. 2010), as follows:

> (i) the debtor reduced his creditors to a single creditor shortly before the petition date;
> (ii) the debtor made no life-style adjustments or continued living a lavish

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1 *In re Tamecki*, 229 F.3d 205 (3d Cir. 2000)
2 *In re Zick*, 931 F.2d 1124 (6th Cir.1991)
3 *In re Piazza*, 719 F.3d 1253 (11th Cir. 2013)
4 *In re Huckfeldt*, 39 F.3d 829 (8th Cir. 1994)
5 *In re Padilla*, 222 F.3d 1184 (9th Cir. 2000)

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life-style;
(iii) the debtor filed the case in response to a judgment, pending litigation, or collection action;
(iv) there is an intent to avoid a large, single debt;
(v) the debtor made no effort to repay his debts;
(vi) the unfairness of the use of Chapter 7;
(vii) the debtor has sufficient resources to pay his debts;
(viii) the debtor is paying debts of insiders;
(ix) the schedules inflate expense to disguise financial well-being;
(x) the debtor transferred assets;
(xi) the debtor is over-utilizing the protections of the Bankruptcy Code to the unconscionable detriment of creditors;
(xii) the debtor employed a deliberate and persistent pattern of evading a single major creditor;
(xiii) the debtor failed to make candid and full disclosure;
(xiv) the debtor's debts are modest in relation to his assets and income; and
(xv) there are multiple bankruptcy filings or other procedural "gymnastics."

On April 26, 2012, the bankruptcy court's dismissal in *Piazza* was affirmed under the "abuse of discretion" standard by the District Court for the Southern District of Florida.[6]

On a second tier of appellate review initiated by the debtor, the Eleventh Circuit affirmed in this matter of first impression. The 11th Circuit defined the threshold issue on appeal as to "whether prepetition bad faith constitutes 'cause' to dismiss a Chapter 7 petition under § 707(a)." The Eleventh Circuit applied the "ordinary meaning" of "for cause," in a broad rather than a limiting manner, to include "bad faith" as a basis for dismissal. In doing so, the Court gave effect to the word "including" as it expands the finite list of three bases for dismissal under Bankruptcy Code §707(a) rather than the narrow. The 11th Circuit then addressed each of the debtors counterarguments to the use of the ordinary meaning of "for cause." First, the Court rejected the debtors argument that the determination of cause should be limited to the three examples listed in §707(a) and those of the "same kind, class or nature," holding that the conduct or omissions as provided in the three examples are reflective of bad faith and that the meaning of the term "for cause" in the context of dismissal throughout the Bankruptcy Code should be read as a consistent definition although the examples may vary. Second, the 11th Circuit precluded the debtor's comparable argument that the interpretation of "cause" to include "bad faith" makes the use of the term "bad faith" elsewhere in the Bankruptcy Code superfluous: the 11th Circuit concluded that the drafting argument was overstated, and the inclusion of "bad faith" as a basis for dismissal under Bankruptcy Code §707(b) does not create "positive repugnancy" under either subsection of Bankruptcy Code §707. Third, the 11th Circuit rejected the debtor's contention that the specificity of the articulated bases for dismissal somehow negates the possibility of dismissal on the more general grounds "for cause," even though more specific provisions of a statute often "trump" the more general ones. Finally, the 11th Circuit rejected the debtor's argument under the "Selective Inclusion Presumption" that Congress's amending Bankruptcy Code §707(b) in BAPCPA to include the term "bad faith" create an inference that Congress had determined that "bad faith" would not be relevant to dismissal under Bankruptcy Code §707(a). In applying the ordinary meaning of "for cause," in a broad rather than a limiting manner, to include "bad faith" as a basis for dismissal, the Eleventh Circuit in *Piazza* rejected contrary conclusions by the Eighth Circuit in *Huckfeldt* and the Ninth Circuit in *Padilla*. The holding comports with similar decisions by the Sixth Circuit in *Zick* and the Third Circuit in *Tamecki*.

Having determined the threshold issue in its affirmative finding that "bad faith" can constitute cause for dismissal of a non-consumer debt based Chapter 7 case, the 11th Circuit next focused on the applicable standard for determining "bad faith" in the context of dismissal under §707(a). The debtor characterized the Bankruptcy Court's application of the multi-part "totality of the circumstances" standard as a mere "sniff test." The 11th Circuit dispelled such

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6 *Piazza v. Nueterra Healthcare Physical Therapy, LLC*, 469 B.R. 388 (2012)

Bad Faith

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proposition stating that debtor's argument was "without merit and his characterization of the bankruptcy court's decision in this case is unfounded. Bad faith does not lend itself to a strict formula."[7] The Court declined to specifically adopt fifteen point framework derived from the *Baird* opinion as the standard for determining "bad faith" leaving the "totality of the circumstances" test as the standard for "cause."[8] Thus the "totality of the circumstances" was generally left undefined and in the discretion of the bankruptcy court. Despite not formally adopting the Baird factors, the 11th Circuit held that the Bankruptcy Court's analysis utilizing the Baird factors as a backdrop to its examination of the "relevant facts of the case to determine debtor's 'intentions' and whether he was 'an honest but unfortunate debtor entitled to a fresh start.'… articulated a reasoned bases for its finding of bad faith and explained that finding in terms of indisputable record evidence." Based the bankruptcy court's application of the *Baird* factors in the context of the totality of the circumstances, the Eleventh Circuit in *Piazza* affirmed the debtor's dismissal for "bad faith" under an "abuse of discretion" standard.

The previous dearth of case law within the Eleventh Circuit provided little guidance to Courts or practitioners attempting to respond to the phenomenon of high net worth individuals expediently discharging their debts in chapter 7 when payment of at least a portion of the debtor's obligations could be effectuated with relative ease. For the time being, lawyers and their clients in Florida have clear direction as they confront cases of this kind. However, with five circuits coming down on two distinct sides of the issue, one cannot help but wonder when the Supreme Court will act as circuit breaker.

7 The 11th Circuit made a well-reasoned citation to *Natural Land Corp. v. Baker Farms, Inc.* (In re Natural Land Corp.), 825 F.2d 296, 298 (11th Cir.1987) (noting "there is no particular test for determining whether a debtor has filed ... in good faith");
8 The Eleventh Circuit noted that "bad faith does not lend itself to a strict formula." (copious citations omitted)

Obligors Cannot Reduce Their Loan Balances Based Upon "Loss Share Credits" Of Post FDIC Note Holders

by John Anthony
Anthony & Partners, LLC

Borrowers who have witnessed the failure of their bank have in recent years asserted a variety of defensive theories and negotiating strategies predicated upon the proposition that the failure of their bank somehow grants them substantive legal rights or bargaining advantages. Troubled loans of a failed bank are often administered by a successor bank after acquisition through the FDIC with financial inducements generally described as "loss share." Borrowers have attempted to advance the argument they are due the benefit of any "loss share" arrangement with the FDIC as a credit toward that indebtedness. Emergent case law has definitively established that the "loss share" defense is devoid of merit.

Since June of 2009, 422 financial institutions have been closed by the FDIC and various state counterparts and sold to solvent financial institutions pursuant to contracts with the FDIC. Because the expense of liquidating the assets of a failed financial institution are tremendous, the FDIC agrees under its asset purchase agreements with acquiring financial institutions to share in the loss associated with liquidation of problem loans. At the end of a specified "loss share" period, a global "true up" is tabulated, so that the FDIC and the acquiring financial institution receive the aggregate benefit of the bargain as originally documented when the failed financial institution's assets were sold off in bulk.

Several recent cases have arisen in which borrowers premised their defense largely on the proposition that the acquiring bank is due a pro rata reduction of their indebtedness proportionate to any "loss share" payments received from the FDIC. This reasoning would naturally increase the actual amount of the loss experienced by the acquiring financial institution, and increase FDIC exposure for the augmented loss, while producing a windfall to the defaulting borrowers. Significantly, asset purchase agreements are expressly drafted to exclude third party beneficiaries, so that borrowers of the failed bank permitted to take advantage of the failure. Both state and federal courts have rejected the proposition that obligors are partially absolved of their indebtedness when the FDIC acquires and

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Residential Mortgage Mediation - Consumer Bankruptcy

by Constance d'Angelis, Esq.

On January 31, 2013, the Chief Judge of the U.S. Bankruptcy Court for the Middle District of Florida, Judge Jennemann issued an Administrative Order[1] requiring that anyone who would mediate residential mortgages complete an 8-hour course regarding modifying residential mortgages in bankruptcy.

One of the reasons for this requisite education resides in the fact that the frequency and effectiveness of mortgage modifications in bankruptcy is increasing rapidly. This article discusses how the mediation procedure operates in the Tampa Division, and the effectiveness of the Bankruptcy Court Mortgage Mediation process.

MORTGAGE MEDIATION PROCESS

Mortgage Mediation is available to Debtors within the Chapter 13, Chapter 7 and individual Chapter 11 cases. The real property must be residential; and, in most cases the real estate is the homestead of the debtors. Even if a debtor went through the mediation process in a state court foreclosure action, it will not rule out participation in Mortgage Mediation in the bankruptcy court. Nor will bankruptcy court-ordered mediation preclude state court foreclosure mediation.

Generally, the court will grant a motion for referral to mediation and direct the Debtor and Creditor to participate in Mortgage Mediation; and under some circumstances may appoint the mediator.[2] The motion may be ore tenus or sua sponte on the Court's own motion at a hearing. The Court determines that the dispute between the Debtor and Creditor could possibly be resolved through mortgage modification mediation.[3] The Court's Order sets forth specific requirements, and duties of the Mediator, Debtor and Creditor.

If an attorney for the Creditor has not appeared, then within 14 days the Creditor shall file a designation on the record as to who will serve as the Creditor's representative in the Mortgage Mediation process.[4] If the Creditor fails to so designate pursuant to the Court's Order the Court may grant sanctions.

Within 21 days the Creditor is obliged to supply the Debtor, or counsel, with the Creditor's loan modification requirements.

The Debtor, or Debtor's counsel is required to transmit a list of financial documentation to the Creditor's representative. The specifics are set out in the Court's Order. These Debtor requirements apply to both represented and pro se debtors.[5]

The Creditor must review the financial documentation at least 14 days prior to the scheduled mediation and notify the Debtor if there are additional or updated financial records needed. The Debtor has three business days to supply those records.[6]

The Court either sets a specific date within which the mediation is to be concluded or requires the mediation to occur within 60 days.[7]

The Mortgage Mediator is responsible for coordinating a mutually convenient date, time and place for the mediation, and authorizing whether the mediation may be convened through electronic means.[8] In most of the mediation conferences the Creditor representative and counsel are allowed to appear by telephone. Increasingly, there are requests for Debtor and Debtor counsel to appear telephonically, as well. Often, after meeting for the initial mediation; and if the mediation conference is recessed until a later date and time, all parties and counsel may appear electronically.

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1 In re: Administrative Order on Certification of Residential Mortgage Modification Mediators. Administrative Order FLMB-2013-3
2 M.D. Fla. L.B.R. 9019-2
3 Tampa Division Mortgage Modification Mediation Form Order http://www.flmb.uscourts.gov/forms/documents/tampa_mortgage_modification_mediation.pdf
4 See paragraph 2; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation
5 See paragraph 8; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation
6 See paragraph 9; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation
7 See paragraph 6; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation
8 See paragraphs 7 and 10; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation

Residential Mortgage Mediation
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In the Tampa Division, the parties split the Mediator's court ordered fee of $350.00 for two hours of mediation. If the mediation continues beyond two hours, the Mediator is entitled to his/her normal hourly rate.[9]

Debtor's counsel may charge the Debtor additional fees by filing an application for compensation.[10]

There are numerous differences between the divisions within the U.S. Bankruptcy Court for the Middle District of Florida with respect to the court orders associated with Mortgage Mediations.[11] If you are an attorney who practices in the other divisions or in the Northern or Southern Districts it is beneficial to familiarize yourself with those specific orders.

RESIDENTIAL MORTGAGE MEDIATION EFFECTIVENESS:

Although the Tampa Division does not keep statistical records, the Orlando Division Chapter 13 trustee compiles and maintains data regarding mortgage modifications. According to this data, the rate of success in the Mortgage Mediation process is approximately 70%. Additionally, the number of modifications from the inception of the Orlando Residential Mortgage Mediation program has risen from 60 in 2010 to 719 in 2013, data through November 2013.

In addition, the number of cases in November 2013 increased 28% compared to November 2012.

This upward trend in modifications appears to apply to loans being modified without debtors filing motions for mediation.

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9 See paragraph 5; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation
10 See paragraph 11; Order Directing Mortgage Modification Mediation and Establishing Mediation Compensation
11 See http://www.flmb.uscourts.gov/mortgage/ and specific Division (Jacksonville, Orlando, Tampa) court orders

Residential Mortgage Mediation

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As mentioned, there are differences in the Mortgage Mediation process between the Districts, and the Divisions within the Districts. In an attempt to create a more cohesive system, Laurie Weatherford, Chapter 13 trustee in Orlando is convening a Residential Mortgage Modification Mediation Summit set for February 27, 2014.

Wherein, "The goal of the Summit is to create procedures or practices that can be adopted statewide for the good of the various programs. If we could create a State Wide program it would be good for all of the participants."
There are many positive reasons to continue the focus on mortgage loan modifications. If the loan modification is successful, all parties involved benefit: the homeowners are allowed to remain in their homes and have an affordable monthly mortgage payment, the lender has a performing loan, the neighborhood does not have a foreclosed property decreasing the value of the surrounding properties, and the real estate market maintains some degree of stability.

. . . . . .

Constance d'Angelis, Esq. is a Mortgage Mediator in the U.S. Bankruptcy Court, Middle District of Florida, who mediates the modification of residential mortgages in bankruptcy. Ms. d'Angelis is responsible for Modifying Residential Mortgages in Bankruptcy, which is an accredited CLE course and approved as Mortgage Mediator Certification Training. She is a regular speaker at continuing legal/mediation education courses.

Do you want to write an article for *The Cramdown*? Please send an e-mail to Suzy Tate, suzy@suzytate.com, for more information.

Loss Share Credits

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then resells their debt.
In Branch Banking and Trust Company v. Kraz, LLC, et al., 114 So. 3d 273 (Fla. 2d DCA 2013). BB&T initiated litigation in state court to enforce a loan exceeding $5,000,000, that was originated by Colonial Bank, and subsequently acquired from the FDIC when Colonial Bank failed. The borrowers asserted that they were due a credit of as much as $2,000,000 based upon the proposition that the FDIC may have paid this sum in provisional loss share advances to BB&T on account of the loan. The obligors contended that BB&T was "double-dipping" by receiving loss share installments from the FDIC while simultaneously attempting to recover the full legal balance from the borrowers in court. This argument ignored the facts that (a) provisional "loss share" advances are subject to eventual "true up"; and (b) the proposition that defaulting obligors are due a windfall credit is contrary to the FDIC framework for dealing with bank failures. Yet the trial court overlooked both of these facts, and ruled that the borrowers were due a set off by the amount of FDIC loss share payments.

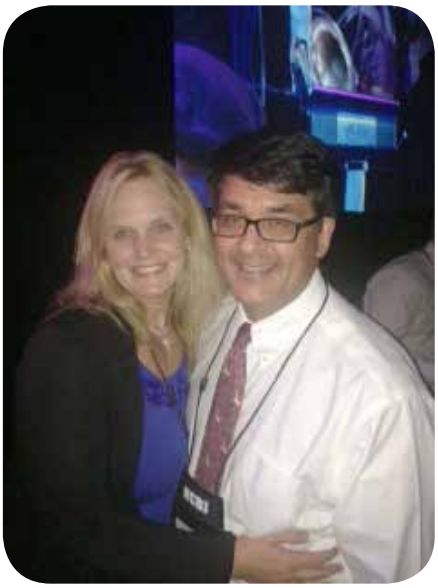
On appeal to the Second District Court of Appeals, the trial court was reversed, with a determination that BB&T would not be required to reduce the indebtedness so as to produce a windfall for the obligors. In reversing this result, the appellate court noted as follows:

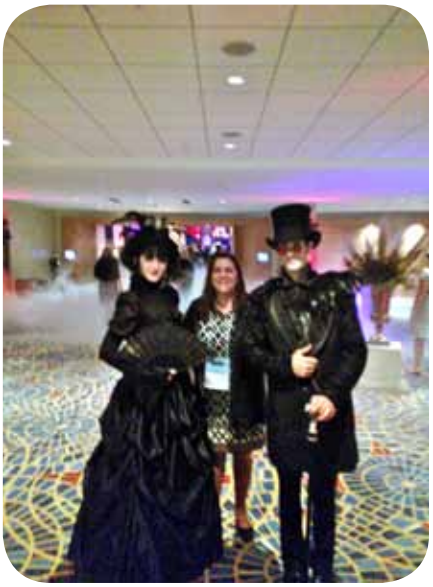
Moreover, we agree with BB&T that if the borrower could have the principal of his or her loan reduced due to a shared loss payment received from the FDIC during the course of foreclosure proceedings, then FDIC-regulated sales of closed banks' assets would come to a halt. If the possibility existed that a trial court, using its legal or equitable powers, could grant the relief given Kraz in this case, no bank purchasing a closed bank's loan would take seriously its responsibility to collect on those loans. Ironically, the relief afforded to Kraz by the trial court actually results in double-dipping in reverse - with the purchasing bank being compelled to both forgive the debtor for that portion of the debt paid by the FDIC and also repay the FDIC for the forgiven amount. Such a result turns the concept of equity on its head.

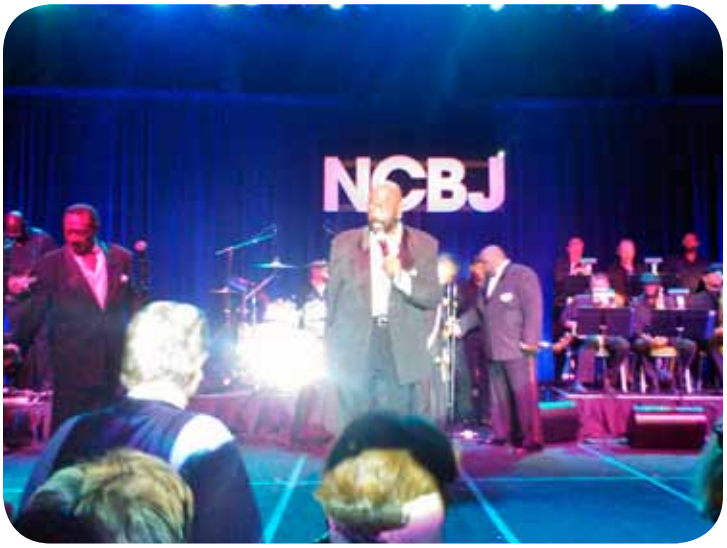
Kraz, LLC, 114 So. 3d at 276. Other opinions have also ruled that borrowers are not entitled to a windfall at the expense of the FDIC or the acquiring financial institution. As case law has dispelled the proposition that obligors can assert a "loss share" defense against acquiring financial institutions, dilatory litigation tactics rooted in this fallacious proposition are likely to be reduced. Moreover, negotiations between acquiring financial institutions and delinquent borrowers will be less bogged down in arguments about loss share entitlements, and will instead focus upon feasible business resolutions that might be effectuated without protracted litigation and the search for a windfall.

Tampa Bay Bankruptcy Bar Association 2013-2014 Membership Applications were sent via e-mail in the TBBBA News. Please renew your membership to continue receipt of *The Cramdown* and other membership benefits.

National Conference of Bankruptcy Judges
2013 Annual Conference
October 30 to November 2, 2013
Atlanta, GA







Bankruptcy Law Educational Series Foundation
Donation to FAMU Law School to fund bankruptcy class to be taught by Judge Briskman
Presented at View from the Bench, Tampa
November 7, 2013
Renaissance Tampa International Plaza Hotel

Remarks by Judge McEwen during the Court's National Celebrate Pro Bono Week reception on October 23, 2013, honoring attorneys who handle pro bono cases in the United States Bankruptcy Court for the Middle District of Florida:

Before I start my remarks to our guests, the lawyers, about this celebration, I have some thank you's to other people. First, I thank Mayor Alvin Brown of Jacksonville, Mayor Buddy Dyer of Orlando, and Mayor Bob Buckhorn of Tampa for the terrific proclamations you will hear in your respective locations after my remarks. I also thank the Hillsborough County Board of Commissioners for its proclamation declaring this week Pro Bono Week in Hillsborough County.

Next, I thank the Middle District of Florida's Bench Bar Fund for providing the funding for the reception that will follow my remarks.

Last, but certainly not least, I thank the Middle District of Florida's Outreach Committee for planning this nice event as well undertaking additional activities in recognizing this week's National Celebrate Pro Bono Week. Our staff members on this Committee across divisions have done a swell job and really live out one of our Court's core values, working as a district-wide team.

Now to the attorneys here, who are really what this event is all about:

On behalf of all the Bankruptcy Judges of the Middle District of Florida and on behalf of all members of the Clerk's staff and all chambers' staff, I give hearty and heartfelt thanks to the attorneys here in the courthouses, which are joined by video, and to those who couldn't be here, for establishing and volunteering in our courthouse clinics for unrepresented parties, for volunteering to take an adversary proceeding or contested matter through our Legal Assistance Program for Low-Income Persons (which is described on our website), and for accepting with a grace the random case assignment when you are drafted to do so in open court.

Now, the lawyers might say to me, "gee, Judge McEwen, why are you thanking us for doing something we gave our word we would do? After all, we are men and women of our word."

For the benefit of our Court staff, let me explain that every lawyer admitted to the Florida Bar, including your judges, took a solemn oath to serve the "cause of the defenseless and oppressed." Translated into practical terms, this oath means that every Florida lawyer has sworn – given his or her word – to provide legal service free of charge to the poor. The Latin term for such service is pro bono publico, meaning for the public good. We in the legal field shorten that phrase to pro bono.

So why are our staff and our judges thanking you lawyers? Two reasons:

First, because not every lawyer keeps his or her word. You did and you continue to do so. If every Florida lawyer kept their word, I daresay we would have very few pro se cases. That means that we could ensure access to the courts, access to justice for all Florida residents. Unfortunately, that is not happening. All we can do is hope that someday everyone will realize what a solemn oath means, and in the meantime thank, and thank, and thank, and thank again every lawyer who does take the oath seriously.

Second, we thank you because what you do helps not just your client but also us – the Court – as well as all litigants and all lawyers representing paying parties.

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National Pro Bono Week Remarks

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You foster the Court's ability to handle its docket in an efficient manner for all involved.

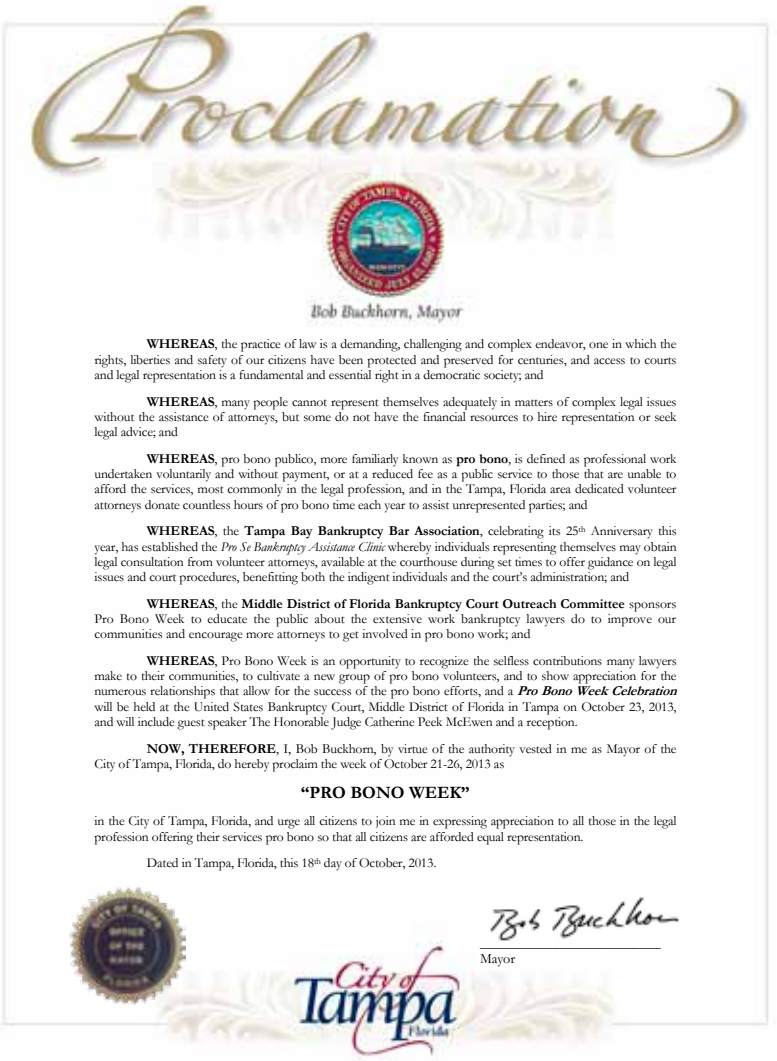
You help our case managers by cutting down the time it takes to interpret and handle papers. Our case managers, already pushed to the max due to budget-driven downsizing suffered by all bankruptcy courts, have to devote more time to process pro se cases, which consumption of time slows down their processing of all other cases even more. Even if you don't represent a party throughout the entire case, you in the clinics help the judges by educating the unrepresented party on how to present their issues in Court, thereby helping us to move through our court calendars more efficiently. At hearings, unrepresented parties slow the pace of other hearings set at the same time or afterwards on the same day's docket.

To repeat for emphasis: Cases involving unrepresented litigants consume more bench time and Clerk of Court staff time than when all parties are represented by counsel. In their papers and in Court, unrepresented litigants can be unduly prolix or, at the other end of the spectrum, too terse to make it obvious just what relief is requested and why. So it takes more time for the Court and its staff to ascertain how to handle these filings. Unrepresented parties also tend to seek reconsiderations more often than their represented counterparts. And their unfamiliarity with evidentiary rules makes for a snail's pace trial. Because courts generally are lenient to unrepresented parties – in the Eleventh Circuit we are required by our case law to be lenient – and accord unrepresented parties some leeway both in open court and in the volume of papers they file, unrepresented parties impact any court's processing of all cases. The result of the policy of deference to pro se parties is that the opposing party generally experiences a disproportionate amount of attorney's fees and delay.

Let me show you in very real terms what we are facing in the Middle District of Florida's Bankruptcy Court by using the statistics of FYE 2013's pro se filings for our Court alone, and please recognize this data does not include pro se creditors. [See accompanying table.] Almost 20 percent of Orlando's filings are pro se. On whole, the district is at 15 percent. Those numbers aggregate 6,309 pro se cases. That's a lot of folks who need to get lawyered up. There are more bankruptcy attorneys practicing in our Court than this number of pro se filers. We could resolve this if everyone stepped up.

But you lawyers here do provide pro bono assistance to pro se litigants – you walk the walk, not just talk the talk. As substantial as they are, our numbers would be much worse without you. So for your cases, the drain on the Court's judicial and staff time and the trickle down consequences to the parties in those cases and, indeed, all other cases are avoided. So the judges, the Court's staff, and all practitioners and parties are grateful beneficiaries of your pro bono work.

To conclude, we thank you and we thank you again and we will continue to do so over and over again because we know you live your oath and will continue to do so.



Proclamation

Bob Buckhorn, Mayor

WHEREAS, the practice of law is a demanding, challenging and complex endeavor, one in which the rights, liberties and safety of our citizens have been protected and preserved for centuries, and access to courts and legal representation is a fundamental and essential right in a democratic society; and

WHEREAS, many people cannot represent themselves adequately in matters of complex legal issues without the assistance of attorneys, but some do not have the financial resources to hire representation or seek legal advice; and

WHEREAS, pro bono publico, more familiarly known as **pro bono**, is defined as professional work undertaken voluntarily and without payment, or at a reduced fee as a public service to those that are unable to afford the services, most commonly in the legal profession, and in the Tampa, Florida area dedicated volunteer attorneys donate countless hours of pro bono time each year to assist unrepresented parties; and

WHEREAS, the **Tampa Bay Bankruptcy Bar Association**, celebrating its 25th Anniversary this year, has established the *Pro Se Bankruptcy Assistance Clinic* whereby individuals representing themselves may obtain legal consultation from volunteer attorneys, available at the courthouse during set times to offer guidance on legal issues and court procedures, benefitting both the indigent individuals and the court's administration; and

WHEREAS, the **Middle District of Florida Bankruptcy Court Outreach Committee** sponsors Pro Bono Week to educate the public about the extensive work bankruptcy lawyers do to improve our communities and encourage more attorneys to get involved in pro bono work; and

WHEREAS, Pro Bono Week is an opportunity to recognize the selfless contributions many lawyers make to their communities, to cultivate a new group of pro bono volunteers, and to show appreciation for the numerous relationships that allow for the success of the pro bono efforts, and a ***Pro Bono Week Celebration*** will be held at the United States Bankruptcy Court, Middle District of Florida in Tampa on October 23, 2013, and will include guest speaker The Honorable Judge Catherine Peek McEwen and a reception.

NOW, THEREFORE, I, Bob Buckhorn, by virtue of the authority vested in me as Mayor of the City of Tampa, Florida, do hereby proclaim the week of October 21-26, 2013 as

"PRO BONO WEEK"

in the City of Tampa, Florida, and urge all citizens to join me in expressing appreciation to all those in the legal profession offering their services pro bono so that all citizens are afforded equal representation.

Dated in Tampa, Florida, this 18th day of October, 2013.

Bob Buckhorn

Mayor

City of Tampa Florida

10 Mediation Tips for Young Lawyers

by Sabrina C. Beavens and Gina M. Pellegrino
Iurillo Law Group, P.A.

From our experience, we thought it would prove helpful to offer the following 10 mediation tips for young lawyers. Each mediation session provides an opportunity to grow and refine your skills. As a young lawyer, you may be asked to accompany a senior lawyer to mediation or you may be charged with handling the mediation on your own. Regardless of your role, you must strategically approach mediation and set aside adequate time to properly prepare yourself, your client and your case.

1. Approach Mediation Preparation with Optimism. Sometimes you begin mediation preparation thinking that there is no way the case will settle, only to be later surprised with a mediated settlement. Therefore, you should approach the preparation for every mediation with the belief that the case could settle.

2. Choose Your Mediator Wisely. We have many talented mediators in this State. However, choosing an unfamiliar name off of a list of mediators or choosing a mediator because you have used that person in the past is a missed opportunity to designate someone whose background, experience and style may be particularly suited to your case. For example, suppose your case is a dispute over money between family members, in that case, it may be helpful to select a mediator who has experience resolving not only civil disputes but familial disputes, as an important role of the mediator in that case will be understanding the emotions of the parties. It may be useful to ask for recommendations for mediators from your colleagues and get feedback on mediators suggested by the opposing party before agreeing to any mediator.

3. Timing. The timing of mediation should be carefully considered and discussed with your client and the opposing party. Many times your client may not want to spend money on discovery and would prefer to hurry to the mediation table. This is a mistake. You must educate your clients about the importance of completing the tasks you deem necessary (discovery, motions, etc.) prior to mediation in order to improve the likelihood of a resolution. For example, without certain information obtained through discovery, the client may not feel comfortable agreeing to a settlement or may not be able to properly analyze its risks. Or perhaps you feel that the client has a strong chance of prevailing on a dispositive motion and therefore filing it prior to mediation will provide the client with leverage at mediation. In short, do not close your eyes and pick a date on the calendar. Think strategically when selecting a mediation date.

4. Prepare Yourself. It goes without saying that you must know the file inside and out for mediation. If you are accompanying a senior lawyer to the mediation, you will likely be relied upon to know the details of the file. Often times, we over prepare for issues that never come up during the mediation, but we have never regretted being over prepared. Identify the key documents or research that you may need and have those readily accessible either in hard copy or electronically. These may include documents you have not produced in discovery that you are willing to share for mediation only, such as the financial documents of your client, particularly if you are arguing that your client is unable to fund a settlement. If the file is too large to bring to the mediation, or you maintain electronic files, make sure you can access the file remotely or you have someone available at your office to email or fax a document to you. Talk to your colleagues about your case and get their thoughts on potential strategies and settlement ranges. If you are making an opening statement (see #5), prepare an outline of it in advance and practice it. Also plan to bring your laptop, tablet or other gadget that can easily access your legal research provider in the event the opposing side raises an argument you want to research during the mediation.

5. Prepare Your Client. Meeting with your client prior to the mediation is critical, even if your client has participated in mediation in prior cases. Ideally, you should meet with your client in person a few days prior to the mediation. Some clients may want to prepare over the phone – insist that they meet with you in person by explaining the importance of mediation to their case. Sometimes your client may be coming from out of town and arriving the evening before the mediation or the morning of the mediation. In those instances, schedule a detailed telephone conference prior to the mediation and arrange to meet in person before the mediation starts to go over final questions or other preparation items.

During this meeting with your client, you should explain the mediation process to your client. In some instances, you will need to address routine issues such as what to wear. Will there be an opening session? What will your tone be? Why aren't you going to storm out at the first insulting offer? Share your strategy and theme and ask the client for additional input. Talk about the opposing party's mediation statement and ask for your client's thoughts. Most importantly, discuss your client's goals, whether they are realistic and how they might be achieved at mediation.

6. Carefully Prepare a Mediation Statement. In our experience, mediations are more productive when the mediator has had the opportunity to review and give thought to the parties' respective views of the case. Prepare a Mediation Statement to the mediator in advance of the mediation. In the Mediation Statement, emphasize your strong arguments, abandon or minimize your weak arguments so they do not become distractions. Also, what are the key documents that should be included? Mediation statements should attach copies of your key documents if it will enable the mediator to better understand your case. Avoid attaching unnecessary documents such as copies of invoices if you could easily

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TBBBA Luncheon
October 8, 2013
University Club of Tampa
When is a Good Settlement Actually a Bad Deal?
Income Tax Aspects of Forgiveness of Indebtedness Income

10 Mediation Tips for Young Lawyers

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reference the total in your Mediation Statement. Be clear and concise. Also, if there are issues or facts you need to bring to the mediator's attention that you do not want in the general brief, consider preparing a "pocket brief". Most of the time, however, you can simply discuss the matter you want to remain confidential with the mediator prior to mediation or during the mediation session.

7. Call the Mediator (and maybe Opposing Counsel). Prior to mediation, call the mediator, especially if you have never met him/her. This conversation provides the opportunity to give the mediator a "head up" on issues with client management and other issues you may have elected not to discuss in your Mediation Statement. For example, does your client have unrealistic expectations? Are you unsure how to handle a particular issue in the context of mediation? We have never had a mediator refuse to speak with us prior to mediation and most mediators we have worked with have been more than willing to talk through the foregoing. The key is to be candid – this is not the time for pride or posturing.

As you prepare for mediation, think about whether a joint session is appropriate for the case. Our experience is that clients generally do not want to be in the same room with the opposing party and opening sessions filled with "we're sorry for your loss" type of sentiments that only solidify the client's emotions and are counterproductive. That being said, there are cases where a joint session may be productive such as when the parties' positions are not far apart, the emotion meter is low, etc. Therefore, we do not automatically reject the notion of a joint session. Regardless, you should communicate with the mediator and opposing counsel prior to mediation to discuss this issue.

8. Be Prepared to Go the Distance and Reach a Settlement. It is often impossible to predict how long a mediation will last. Mediations only scheduled for a half day frequently go beyond that time. If at all possible, be prepared to stay as long as needed to attempt to resolve a case, including clearing your calendar of any obligations after 5 p.m. During the mediation, avoid non-strategic extended breaks which slow the momentum of the session. Have lunch delivered and continue working. If a settlement is reached, do not leave the mediation without a signed Mediation Settlement Agreement. Although you may be tired and mentally exhausted, find the energy to focus on the all important task of carefully preparing the Mediation Settlement Agreement. Remember, this is the document that the Court will look to if there is a dispute as to what terms were agreed upon. Bring a template Mediation Settlement Agreement that has the caption and signature lines already set up in addition to the boilerplate clauses and releases on a thumb drive or on your laptop. You will be glad you did this, as it will save a significant amount of time preparing the Mediation Settlement Agreement at the end of the day.

9. Be Flexible, Patient and Creative. Mediation requires a lot of patience in addition to preparation. Opposing parties are also making strategic moves designed to send a message to your client. "Bottom line" offers are often not final. The initial offers are frequently way off target. Try not to react – you know they are coming and you should have prepared your client for them. Offers and counteroffers at mediation are frequently small and take time. Consider the mediator's advice, but do not be afraid to disagree with the mediator at times. During the breaks, talk to your client about where you are in the process and their perception of how things are going. Try to encourage the client to remain optimistic if there is still a potential to settle. However, always be mindful that the decision to settle at the end of the day belongs to the client. Be thoughtful of the words you choose when summarizing an offer for the client and the risks and fees/costs if the case continues. Sometimes it is necessary to continue a mediation to provide a party the opportunity to think about a settlement offer. In that event, still get the terms that are on the table in writing and the agreed upon window to accept them. Also, think creatively. You will be surprised how often a case that seems to be purely about money settles with non-monetary agreements between the parties, such as an apology or payments directed to a charity rather than the plaintiff.

10. Post-Mediation Follow-Up. Finally, after mediation, call the mediator for constructive feedback on how you handled the negotiations. Most of our mediators are experienced trial counsel and/or retired judges. Their observations and feedback will help you improve your skills for the next mediation. Then share what you've learned with your peers. Good luck at mediation!

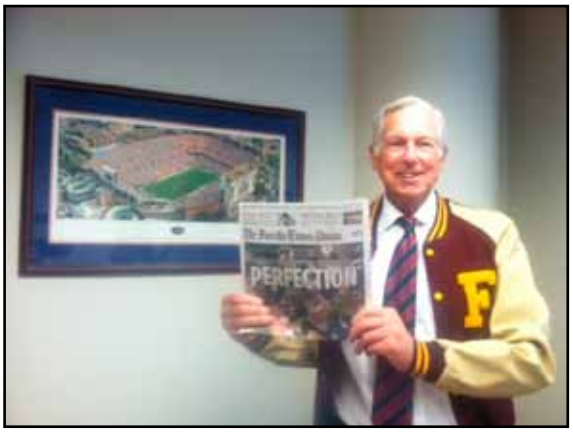
People on the Go

We proudly announce Erik Johanson has joined Jennis & Bowen, P.L. as an Associate Attorney

Erik Johanson has joined Jennis & Bowen, P.L. as an associate attorney. Jennis & Bowen, P.L. is a Tampa law firm specializing in business bankruptcy, commercial litigation and corporate transactions. Before joining the Firm, Mr. Johanson graduated cum laude from Stetson University College of Law and interned for the Honorable Michael G. Williamson, Bankruptcy Court, Middle District of Florida as well as the Honorable Elizabeth A. Kovachevich, U.S. District Court, Middle District of Florida. Mr. Johanson graduated magna cum laude with a Bachelor of Science Degree in Finance and Philosophy from Florida State University.

After 30 years of practicing law, Constance d'Angelis is embarking on a new venture. Her first continuing legal education (CLE) course is entitled *Modifying Residential Mortgages in Bankruptcy*, which is accredited for 8.5 hours, 1.0 ethics. The course is approved by the U.S. Bankruptcy Court for the Middle District of Florida as a Mortgage Mediator Certification Training. This success has sparked Constance's interest in creating additional courses. She launched CLEanytime.com and CMEanytime.com.

The Honorable Paul M. Glenn, a Florida State alumni, poses proudly with an announcement of Jameis Winston's BCS Title-Winning touchdown.



The Cramdown is looking for information to add to its **"People on the Go"** section. Please send any personal and career updates by e-mail to Suzy Tate, suzy@suzytate.com.

The Cramdown
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