Spring 2021

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-chief,
Ryan C. Reinert, Shutts & Bowen LLP

PRESIDENT'S MESSAGE

by Noel R. Boeke
Holland & Knight LLP

As we remain enmeshed in Remote Reality in the comfort of our homes in Florida, I think of our military forces who have been deployed around the globe for so many years – many of whom serve here at MacDill Air Force Base. The United States Special Operations Command (SOCOM) is located in our backyard and provides command, control, and training for all U.S. Special Operations Forces. The most elite members of our armed forces – the Navy Seals, Army Rangers, Green Berets, Marine MARSOC, Air Force SERE personnel, and many others – end their military careers and become Tampa residents. Having been shot at by terrorists, their biggest fear now is what will they do for Act 2 after 25 years of military service. What can we do to honor their sacrifices so they can make a great life for their families in our community?

Abraham Lincoln certainly knew war's high cost, and he predicted that "any nation that does not honor its heroes will not long endure." And while I served for 7 years in the Navy, I still struggle to consider myself a veteran. I struggle because of the hallowed images that come forth when I hear the word veteran - the dough boys of World War I, enduring cold, mud-filled trenches infested with rats, incessant artillery, and mustard gas. A short time later, the Greatest Generation fought from the shores of France and Italy, the deserts of North Africa, and the Pacific. Thousands never returned home. In Korea, service members fought bravely, often while outnumbered and under-equipped. And as I grew up, Vietnam Veterans faced a determined jungle enemy and the struggles of POW camps. The war was wildly unpopular, and yet they went to Vietnam anyway – demonstrating the essence of duty. For me, those previous generations exemplify what a veteran is, and it's hard to accept the same label as those who previously walked such treacherous paths to ensure the many blessings we enjoy today.

Many more Americans have served in Afghanistan, Iraq, and other conflicts. And others are standing watch and at the ready right now. That dedication to duty marks our current professional military. Service members don't serve to defend a person or an office. They swear allegiance to a document – to support and defend the Constitution of the United States against all enemies foreign and domestic. In taking their oath, service members promise to defend the ideals of our forefathers to "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity…." Having such individuals willing to take on the obligation of military service is fundamental to our national defense.

Military families are also quietly heroic. They don't deploy into danger, but they suffer greatly when the bill of freedom comes due. I feel for young children whose mothers or fathers have been gone so long they remember them only as a soldier in uniform. I grieve for the mothers, fathers, and spouses who have come to know the unimaginable pain of a loved one lost in service to our nation. And I can only imagine the bewildered, lost looks of children trying to understand that they will never see one of their parents again. But military families also inspire me by their resilience. After sacrificing so much they continue to serve other military families. They represent the backbone of our nation with the deepest understanding of the cost of freedom.

So, in a nation with so many heroes, from past generations to those serving in harm's way right now as we enjoy winter in Florida, how can we best mark and appreciate

continued on p. 4

The Tampa Bay Bankruptcy Bar Association
2021-2022 Officers and Directors

President
Noel R. Boeke
Holland & Knight LLP
P.O. Box 1288
Tampa, FL 33601

Vice President
Stichter Riedel Blain & Postler, P.A.
110 E. Madison Street, Ste. 200
Tampa, FL 33602

Secretary
Megan Murray
Underwood Murray PA
100 N Tampa Suite 2325
Tampa, FL 33602

Treasurer
Nicole Noel
Kass Shuler, P.A.
1505 N. Florida Avenue
Tampa, FL 33602

Chair/Past-President
Kathleen DiSAnto
Bush Ross, P.A.
1801 North Highland Avenue
Tampa, Florida 33602

CLE Chair
Erik Johanson
Erik Johanson PLLC
3414 W Bay to Bay Blvd, Ste 300
Tampa, FL 33629

CLE Chair
Angela Lim
Johnson, Pope, Bokor, Ruppel & Burns, LLP
401 E. Jackson Street, Suite 3100
Tampa FL 33602

Consumer
Christie D. Arkovich, P.A.
1520 W. Cleveland St.
Tampa, FL 33606

Technology
John Landkammer
Anthony & Partners, LLC
208 N. Franklin St, Ste 2800
Tampa FL 33602

Judicial Liaison
Denise Barnett
Office of the U.S. Trustee
501 E. Polk St., Ste 1200
Tampa, FL 33602

Cramdown
Ryan Reinert
Shutts & Bowen LLP
4301 W. Boy Scout Blvd. Suite 300
Tampa FL 33607

Historian
Daniel Etlinger
Jennis Law Firm
606 East Madison Street
Tampa FL 33602

Community Service & Pro Bono
Ryan Yant
Carlton Fields
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, Florida 33607

Membership
Dan Fogarty
Stichter Riedel Blain & Postler, P.A.
124 E. Madison St, Ste. 200
Tampa FL 33602

In This Issue

Past Presidents

1988-1989 ..... Leonard Gilbert (chairperson)
1988-1989 ..... Don M. Stichter
1989-1990 ..... Douglas McClurg
1990-1991 ..... Richard C. Prosser
1991-1992 ..... Robert B. Glenn
1992-1993 ..... Thomas B. Mimms, Jr.
1993-1994 ..... Edward M. Waller, Jr.
1994-1995 ..... Harley E. Riedel
1995-1996 ..... Roberta A. Colton
1996-1997 ..... Jeffrey W. Warren
1997-1998 ..... Michael P. Horan
1998-1999 ..... Dennis J. LeVine
1999-2000 ..... Russell M. Blain
2000-2001 ..... John D. Emmanuel
2001-2002 ..... Zala L. Forizs
2002-2003 ..... Catherine Peek McEwen
2003-2004 ..... John Lamoureux
2004-2005 ..... Edwin Rice
2005-2006 ..... David Tong
2006-2007 ..... Herbert Donica
2007-2008 ..... Shirley Arcuri
2008-2009 ..... Donald R. Kirk
2009-2010 ..... Luis Martinez-Monfort
2010-2011 ..... Elena Paras Ketchum
2011-2012 ..... Lara Roeske Fernandez
2012-2013 ..... Keith T. Appleby
2013-2014 ..... Stephenie Biernacki Anthony
2014-2015 ..... Edward Peterson
2015-2016 ..... Adam Lawton Alpert
2016-2017 ..... Kelley Petry
2017-2018 ..... Scott Stichter
2018-2019 ..... Lori Vaughan
2019-2020 ..... Jake Blanchard
2020-2021 ..... Kathleen DiSanto

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

President's Message

continued from p. 1

their service? I find the simple words "thank you for your service" meaningful. Some might consider that statement to be trite, but then I think how much Vietnam Veterans would have appreciated a simple “thank you” when they came home. I am thankful to live in a time when so many appreciate our military. But I do think there is something much greater we can do to honor those previous generations of veterans who literally saved the world we live in today.

President Kennedy said that "as we express our gratitude, we must never forget that the highest appreciation is not to utter words, but to live by them." I believe that means not just living words of gratitude but living the ideals that created our nation. The United States is not great because of its military strength. On the contrary, we need our military because America is a special place created for liberty, freedom of expression, and freedom from oppression. So, while we need soldiers, sailors, airman, and marines, we need even more teachers, doctors, nurses, farmers, tradespeople, businesspeople, and countless other occupations – including more lawyers and judges.

There are countless opportunities available in this country given the blessings of personal freedom. If we maximize those opportunities, we can ensure our way of life thrives. We can continue to demonstrate to the world the value of personal liberty and freedom of expression. Our veterans, active-duty service members, and their families have sacrificed greatly to defend these ideals. The best way to demonstrate appreciation is to do our best to thrive in each of our chosen professions and to contribute to our communities. If every day we do our part to improve things and maximize the value of our freedom, then we will better honor our service members and veterans and make their sacrifices worthwhile.

Borrower beware: Don't pledge your retirement away[a]

By Kathleen L. DiSanto
Bush Ross, P.A.

The Eleventh Circuit's decision in *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America* appears to stand for the proposition that the grant of an all-asset pledge includes an individual retirement account.[1] Stripped down to a basic level, the Eleventh Circuit's conclusion seems unsurprising, at least at first blush. Indeed, such a result is entirely consistent with black-letter law and a nearly unbroken line of cases concerning the interpretation and enforcement of security interests and the availability and application of exemptions under the Florida Statutes. Nothing stops a borrower or pledgor from pledging property that would otherwise be exempt under Florida law as security for a loan or an obligation. And a security interest is enforceable between the pledgor and secured party, even if the secured party's interest is not properly perfected. But what seems to be a very straightforward opinion by the Eleventh Circuit gives short shrift to the complex facts underlying the dispute (and the court acknowledges as much).[2] A closer examination of the facts, however, reveals just how extraordinary and, perhaps, groundbreaking the *Kearney Construction* opinion actually is. A review of the decisions below suggests that the actual holding of the Eleventh Circuit may be that if an owner of an individual retirement account pledges that account as collateral, the claim of exemption is destroyed as to any creditor of the account owner, not just the secured party who was granted the lien in the collateral. The opinion also can be extrapolated to impose a steeper evidentiary burden on judgment debtors who wish to preserve their claim of exemption with respect to their individual retirement accounts.

The first clue that the *Kearney Construction* opinion is not what it seems is that the parties named in the case caption are not the pledgor and pledgee with respect to the security interest that is the subject of the opinion. The decision emanates from Travelers Casualty and Surety Company of America's (Travelers) efforts to enforce a judgment it obtained against Bing Charles W. Kearney (Mr. Kearney), a well-known businessman and construction magnate of the Tampa Bay area. Travelers served a writ of garnishment on US-Ameribank, the institution where Mr. Kearney maintained his individual retirement account (the IRA). USAmeribank answered the writ of garnishment, indicating that it was indebted to Mr. Kearney in the total amount of $1,158,037.38, and identified a number of accounts in which Mr. Kearney had an interest, including the IRA, which had a balance in excess of $450,000.00.[3] Mr. Kearney asserted that the IRA was exempt pursuant to section 222.21(2) of the Florida Statutes.

Some years prior to the entry of the Travelers judgment, Mr. Kearney obtained a line of credit from Moose Investments of Tampa LLC (Moose Investments), which was owned by Mr. Kearney's son, yet over which Mr. Kearney himself asserted "considerable control."[4] To secure the line of credit, Mr. Kearney granted a security interest to Moose Investments of "all assets and rights of the Pledgor."[5]

When Travelers sought to enforce its judgment against the IRA, Mr. Kearney took the position that he never intended to pledge the IRA as collateral for the line of credit. Mr. Kearney offered his own affidavit and an affidavit of the manager of Moose Investments to provide evidence of this fact. The Eleventh Circuit accepted the district court's rejection of the affidavits of Mr. Kearney and the manager based on the fact that they were "self-serving ... conclusory, uncorroborated, and indeed contradicted by other evidence record."[6] The other evidence in the record included the manager's prior affidavit and filings by Mr. Kearney, both of which asserted that Moose Investments had a superior lien in the garnished funds.[7] Given the

continued on p. 6

a This article is reprinted with permission of the Out-of-State Division of The Florida Bar. This article was previously published in the Summer 2021 edition of State-to-State.
1 795 Fed. Appx. 671 (11th Cir. 2019).
2 Id at 673 ("Because we write only for the benefit of the parties, who are already familiar with the facts, we mention only such facts as are necessary to understand our reasoning.").
3 *Kearney Constr. Co., LLC v. Travelers Cas. & Surety Co. of America*, Case No. 8:09-cv-1850-T-301BM, 2017 WL 4277164, at *1 (M.D. Fla. Aug. 16, 2017) (the "Magistrate Report").
4 *Kearney Constr.*, 795 Fed. Appx_ at 673,11.3.
5 *Id*
6 Magistrate Report, at *11-12.
7 *Kearney Constr*, 795 Fed. Appx. at 674.

Borrower Beware

continued from p. 5

evidentiary problems with the affidavits, the rejection of Mr. Kearney's argument that he did not intend to pledge the IRA is not terribly surprising.

Mr. Kearney then argued that Moose Investments was not properly perfected as to the IRA because Moose Investments did not have possession or control over the IRA.[8] Keeping in mind that the *Kearney Construction* opinion was written for the benefit of the parties who were well versed in the facts and the legal arguments that had been advanced in the appeal and below, the Eleventh Circuit wrote in judicial shorthand and did not elaborate on or offer any legal analysis to support its conclusion that "the critical issue [was] whether the IRA account was used as security for a loan, not whether the security interest was perfected."[9] That is why parties who may argue the Kearney Construction opinion in the future (or those who may be responding to such arguments) should analyze the decisions from the district court and the parties' briefs to understand why the grant of the security interest by Mr. Kearney to Moose Investments was the key issue to the courts.[10] As explained in the *In re Roberts* case, "[f]rom the clear language of the Tax Code, a pledge of funds in an IRA constitutes a distribution of the funds to the individual," the ef-fect of which is "that the funds are no longer considered to be IRA funds and therefore, that the funds are no longer exempt."[11] However, the Roberts case does not indicate whether the lender was properly perfected as to the account, such that it had actual possession or control of the account at issue in that case. It is clear from the *Kearney Construction* opinion that the Eleventh Circuit did not believe it was necessary to reach the issue, as the court summarily states that "an unperfected security interest is nevertheless enforceable between the parties," even though Travelers, who was not a party to the pledge agreement between Mr. Kearney and Moose Investments, was the party who would benefit from the pledge of the IRA. Nevertheless, it is worth noting that neither the court opinions from the Eleventh Circuit or the district court nor the parties' briefs cite any case law specifically addressing the issue as to whether the secured party must be properly perfected for the pledge of funds in an IRA to constitute a distribution for purposes of the Tax Code or whether the distribution is completed merely upon execution of the security agreement or pledge.

Finally, Mr. Kearney contended that, as a matter of law, the IRA was exempt from creditors' reach pursuant to section 222.21(2) of the Florida Statutes,[12] which provides that 100% of the value of an eligible individual retirement account is exempt.[13] The Eleventh Circuit devoted an entire footnote to rejecting this argument."[14] As explained by the Eleventh Circuit, section 222.21(2)(a)(1) provides that an individual retirement account is exempt from the claims of all creditors if it is maintained in accordance with a plan or governing instrument that has been preapproved by the Internal Revenue Service as being exempt from taxation. Section 222.21(2)(a)(2), in turn, applies to individual retirement accounts that are not subject to preapproval—in that instance, the statute provides that such plan or governing instrument must be determined by the Internal Revenue Service to be exempt from taxation. Interestingly, the Eleventh Circuit did not hold that Mr. Kearney's IRA was not a preapproved IRA under subsection 1. Rather, in rejecting Mr. Kearney's argument that the IRA was exempt under subsection 1, the court found that Mr. Kearney did not put forward any evidence that the IRA was a preapproved individual retirement account. However, that inquiry is usually simple to resolve, based on an examination of the individual retirement account's plan documents or governing instruments. The parties control the evidence that is placed into the record, so one wonders if the necessary evidence was offered.

continued on p. 7

8 *Id* at 674-75.
9 *Id* at 675.
10 The first argument might well be that the Eleventh Circuit's opinion was not selected for publication and, as an unpublished opinion, is not binding precedent on future Eleventh Circuit panels that may be presented with the same issues. While Federal Rule of Appellate Procedure 32.1 provides that a court may not prohibit or restrict the citation of federal judicial opinions designated as "unpublished" and issued on or after January 7, 2007, the use of the opinion is still governed by the local rules of the Circuit. The Eleventh Circuit Rule 36-2 states that unpublished opinions are not considered binding precedent and may be cited only as persuasive authority.
11 *In re Roberts*, 326 B.R 424, 426 (Bankr. S.D. Ohio 2004) (citing *Lewis v. Bank of America*, 343 F.3d 540, 545 (5th Cir. 2003)); see also 26 U.S.C. §§ 408(d) and (eX4).
12 Section 222.21 of the Florida Statutes was enacted in 1987 and was patterned after a Kansas statute. *Dunn v. Doskocz*, 590 So.2d 521, 522 (Fla. 3d DCA 1991) ("[T]he purpose of the statute is to confer on retirement plans a broad exemption from the claims of creditors.").
13 *Kearney Constr.*, 795 Fed. Appx_ at 674-75, n.7.
14 *Id*

Borrower Beware

continued from p. 6

Relying on its prior decision *In re Yerian*, the Eleventh Circuit made quick work of Mr. Kearney's arguments under the second subsection of section 222.21(2)(a) of the Florida Statutes.[15] For an individual retirement account to qualify as exempt under section 222.21(2)(a)(2), the Eleventh Circuit tasked the party claiming the exemption with providing evidence of the determination by the Internal Revenue Service that the individual retirement account is exempt.[16] Mr. Kearney failed to offer any evidence that he had obtained such a determination from the Internal Revenue Service with respect to the IRA.[17]

It is important to recognize that the *Yerian* decision involved arguments under 222.21(2)(a)(2) only and a factual scenario where the individual retirement account owner treated the account as his personal piggy bank, making withdrawals to pay for a condominium in Puerto Rico and two cars.[18] Yet, even under those facts, the Eleventh Circuit offered a detailed explanation as to why Yerian's individual retirement account did not qualify for exempt status under the Internal Revenue Code. However, while the Eleventh Circuit's ruling in *Kearney Construction* seems to be an extension of *Yerian*, it has the dangerous potential for collapsing the difference in the analysis between evaluating whether an individual retirement account that is managed by a plan or governing document that has been preapproved is exempt or whether it is exempt based on a determination by the Internal Revenue Service. Nor does the *Kearney Construction* opinion offer the detailed analysis provided by *Yerian* itself, which explains precisely why the individual retirement account in that case did not meet the requirements under section 222.21(a)(2) of the Florida Statutes.

In affirming the decision of the district court, the Eleventh Circuit concluded that Mr. Kearney's IRA was not exempt and was subject to Travelers' writ of garnishment. While the courts may have reached the right result, the oversimplified analysis may threaten Florida's statutory exemption for individual retirement accounts and have the unanticipated consequence of forcing debtors to expend additional resources to meet the evidentiary burden potentially established by the Eleventh Circuit in the *Kearney Construction* opinion, even if the debtor is utilizing a basic individual retirement account product governed by a preapproved plan or other governing instrument.[19]

15 *Id* at 674-75, n_7 (citing In re Yerian, 927 F.3d 1223, 1226 (11th Cir. 2019)).
16 *Id* (citing *Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 197 So. 3d 137, 141 (Fla. 4th DCA 2016) ("[T]he party seeking an exemption from garnishment has the burden of proving entitlement to the exemption.")).
17 *Id*.
18 *Yerian*, 927 F.3d at 1226, 1228-29 ("We start with an observation about the statute's structure. Section 222.21 of the Florida Statutes imposes different exemption requirements on different IRAs, depending on whether and how the Internal Revenue Service has signed off on the IRAs terms.... We are tasked with interpreting only section 222.21(2XaX2), the second of these provisions.").
19 Proposed legislation originated by the Real Property Probate and Trust Law Section and supported by the Business Law Section's Legislation Committee may give borrowers and judgment debtors with individual retirement accounts some hope for the future.

Are We Doing Enough to Protect the Elderly's Finances?: A Look into How Bankruptcy Courts Can Help Spot Elderly Exploitation

By Alexis Ercia
Stetson University College of Law[1]

The elderly are more susceptible to predatory lending, making poor financial decisions,[3] acquiring excessive debt,[4] and being financially exploited.[5] Take Sally Mae:[6]

Sally Mae was the primary caretaker to her children. Her husband, Daniel, was the sole breadwinner. Daniel always went above and beyond to provide for their family. Sadly, in his late seventies, Daniel passed. Sally Mae and Daniel had been married for over 50 years. When Daniel passed, Sally Mae was extremely heartbroken. On the day of Daniel's passing, their daughter, Bridget, asked Sally Mae for $5,000 to pay off some "loans." In a vulnerable state, Sally Mae gave Bridget the money leaving Sally Mae financially exploited.

Many elderly, like Sally Mae, are often financially exploited, especially by those closest to them.[7] For various reasons, many cases go unreported leaving those elderly stranded without recourse.[8] Florida has implemented protection ns, both civilly and criminally, to help combat the abuse.[9] However, while protective statutes exist,[10] financial abusers are seldomly prosecuted[11] and civil litigation often takes too long. Therefore, it is imperative courts consider other ways to prevent financial exploitation and provide recourse for elderly individuals like Sally Mae.

With the help of the Bankruptcy Courts, individuals like Sally Mae could receive the help they need. The Bankruptcy Courts and the Bankruptcy Bar Associations could provide training to government officials and bankruptcy lawyers to help spot elderly debtors who are being financially exploited. The Bankruptcy Courts could also consider working with Florida's Adult Protective Services to provide victims with additional resources. For example, those able to help guide the elderly might be unaware that the State of Florida will assist victims of elderly abuse by providing them with on-going services to allow them to live a more independent life.[12] Additionally, the Bankruptcy Courts could recommend the expansion of research to the Consumer Bankruptcy Project database or the U.S. Trustee's Office. Although not openly available to any researcher, the Consumer Bankruptcy Project collects the age of filers who voluntarily complete their survey.[13] The U.S. Trustee's Office also already collects data on Bankruptcy filers, which is readily accessible to any researcher.[14] Therefore, the Bankruptcy Court could recommend to either the U.S. Trustee's Office or the Consumer Bankruptcy Project to collect more data on elderly filers or analyze the already collected data to focus on current statistics of elderly debtors. Lastly, the Bankruptcy Courts could provide more tailored training to elderly debtors to help make them aware of their financial vulnerabilities. These are potential safeguards in which Bankruptcy Courts could help individuals like Sally Mae.

While these solutions might not all be feasible, they will hopefully spark a dialogue into the need to provide the elderly with better financial opportunities.

1 Alexis Ercia is a J.D. 2022 Candidate at Stetson University College of Law. This article was inspired by the paper, The "Not So" Fresh Start: Are We Doing Enough to Protect the Elderly's Finances?, which will be published in Volume 13 of the Stetson Law's Journal of Aging and Policy.
2 See generally Katline Realty Corp. v. Avedon, 183 So.3d 415 (Fla. 3d DCA 2014) (describing an instance in which an elderly couple fell victim to predatory lending and the couple's mortgage broker violated both the Truth in Lending Act and the Homeownership Equity Protection Act of 1994).
3 Taylor Tepper, America's Seniors In Debt: A Growing Problem, Forbes Advisor (Mar. 29, 2021, 4:28 am), https://www.forbes.com/advisor/retirement/seniors-debt-statistics/; Greg Iacurci, Debt Among Oldest Americans Skyrockets 543% in Two Decades, CNBC, https://www.cnbc.com/2020/02/26/debt-among-older-americans-increases-dramatically-in-past-two-decades.html.
4 Medical Debt: Is Our Healthcare System Bankrupting Americans?: Hearing Before the Sumbcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 11th Cong. 4 (2009) (finding that elderly are more likely to initiate a bankruptcy proceeding because of medical debt).
5 U.S. Trustee Program Annual Report Fiscal Year 2019, U.S. Department of Justice (2019), https://www.justice.gov/ust/file/ar_2019.pdf/download (describing an example where a mortgage broker defrauded several elderly out of millions).
6 For the purposes of this article, this is a hypothetical situation.
7 U.S. Trustee Program Annual Report Fiscal Year 2019, supra note 7.
8 While we will never know the exact number of elderly who are financial exploited on a yearly bases, the National Council on Aging indicates that, "up to five million older Americans are abused every year, and the annual loss by victims of financial abuse is estimated to be at least $36.5 billion." Get the Facts on Elder Abuse, National Council on Aging (2021), https://www.ncoa.org/article/get-the-facts-on-elder-abuse.
9 Fla. Stat. § 825.103 (2020) (creating criminal charges for individuals who financially exploit the elderly); Fla. Stat. § 415.1111 (2020) (creating civil remedies, or the "recovery of actual and punitive damages", for elderly exploited individuals).
10 Id.
11 In 2019, Adult Protective Services, pursuant to the Elder Abuse Prevention and Prosecution Act of 2017, investigated 195,459 potential instances of elder abuse over 32 states which divided equally, would total 6,108 cases per state. EAPPA Data Overview, U.S. Department of Justice (last updated August 30, 2021), https://www.justice.gov/elderjustice/eappa-data-overview#NationalAdult. Of the 6,108 cases per state, not every investigation turns out being a valid case of elder abuse. Id. An even smaller percentage of those cases lead to prosecutions. Id.
12 Adult Protective Services, Florida Department of Children and Families (last visited December 7, 2021), https://www.myflfamilies.com/service-programs/adult-protective-services/protecting-vulnerable-adults.shtml.
13 Consumer Bankruptcy Project (last visited December 7, 2021), http://www.consumerbankruptcyproject.org/.
14 Bankruptcy Data & Statistics, U.S. Department of Justice (last updated Nov. 17, 2021), https://www.justice.gov/ust/bankruptcy-data-statistics.

The Eleventh Circuit expands *Espinosa* to include Failure to Give Notice of Third-Party Releases

By Kristina Feher, Esq.
Feher Law, P.L.L.C.

On Nov. 15, 2021, the Eleventh Circuit held that the failure to give notice of non-debtor, third-party releases, as required by Bankruptcy Rule 2002(c)(3), is not fatal when the same information was contained in the plan and disclosure statement sent to the creditor who sought to sue third parties. In *Jackson v. Le Ctr. on Fourth, LLC (In re Le Ctr. on Fourth, LLC)*, No. 20-12785, 2021 U.S. App. LEXIS 33845 (11th Cir. Nov. 15, 2021), the Eleventh Circuit in its decision now expands *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). In *Espinosa*, the United State Supreme Court held that Espinosa's failure to serve United Student Aid Funds with an adversary proceeding to discharge student loans was not a basis upon which to declare the judgment void. In *Le Ctr. on Fourth, LLC*, the Eleventh Circuit expands *Espinosa* to include that service of a Chapter 11 Plan with releases for non-debtors is actual notice even though the debtor did not specifically comply with the procedural requirements of Rule 2002(c)(3). Because the creditors received actual notice of the same information in a different form, the Eleventh Circuit held the Jacksons received actual notice of the information that Bankruptcy Rule 2002(c)(3) required Le Centre to provide. The expansion of Espinosa includes that actual notice is sufficient to satisfy due process, even where a debtor violates procedural requirements for supplying notice prescribed by the Bankruptcy Rules.

Espinosa

In *Espinosa*, the United States Supreme Court considered whether an order that confirms the discharge of a student loan debt in the absence of an undue hardship finding or an adversary proceeding, or both, is a void judgment under Federal Rule of Civil Procedure 60(b)(4). In his Chapter 13 case, Respondent Espinosa's plan proposed repaying the principal on his student loan debt and discharging the interest once the principal was repaid. He did not initiate the required adversary proceeding. The student loan creditor, petitioner United, received notice of the plan from the Bankruptcy Court and did not object to the plan or to Espinosa's failure to initiate the required proceeding. The Bankruptcy Court confirmed the plan without holding such a proceeding or making a finding of undue hardship. Once Espinosa paid his student loan principal, the court discharged the interest.

A few years later, the Department of Education sought to collect that interest. United filed a motion under Federal Rule of Civil Procedure 60(b)(4), seeking to set aside the confirmation order as void. United argued that the plan provision authorizing discharge of Espinosa's student loan interest was inconsistent with the Code and the Bankruptcy Rules. United also argued that their due process rights were violated when Espinosa failed to serve it with the required summons and complaint in an adversary proceeding. The Ninth Circuit concluded that by confirming Espinosa's plan without first finding undue hardship in an adversary proceeding, the Bankruptcy Court at most committed a legal error that United might have successfully appealed. However, the Ninth Circuit held that such error was no basis for setting aside the order as void under Rule 60(b)(4). The Ninth Circuit also held that Espinosa's failure to serve United was not a basis upon which to declare the judgment void because United received actual notice of the plan and failed to object. The United States Supreme Court affirmed the Ninth Circuit's decision.

Expanding *Espinosa*

In the case of *In re Le Ctr. on Fourth, LLC*, the creditors argued that they did not receive notice reasonably calculated to inform them of the third-party releases in the bankruptcy plan, which violated their due process rights. Willie Jackson was traveling in his wheelchair when he was hit by a hotel valet driver and suffered severe injuries. Mr. Jackson and his wife sued the valet company. The owner of the hotel, Le Centre on Fourth, LLC, filed a Chapter 11 petition. The Jacksons obtained a modification of the automatic stay to continue the lawsuit in state court against the hotel owner to recover from insurance. In addition to the valet company, the state court action also included non-debtors that operated and managed the hotel.

The Chapter 11 disclosure statement explained that Le Centre's Chapter 11 plan included the release not only of Le Centre, but also of related non-debtor parties. The debtor sent out the Chapter 11 plan, the disclosure statement, and notice of the confirmation hearing to all creditors, including the Jacksons. The disclosure statement included a four-page disclaimer. The bankruptcy court entered a confirmation order approving the Chapter 11 plan. The debtor then moved in state court, along with the now-released non-debtor entities to dismiss the state court action. The debtor argued that the confirmation order barred the Jacksons claims against them. The Jacksons asked

continued on p. 12

t

continued from p. 11

the bankruptcy court to allow him to proceed against the entities' insurers in state court. The bankruptcy court denied the request and the district court affirmed.

The Jacksons appealed to the Eleventh Circuit on the basis that Le Centre's Chapter 11 plan did not satisfy due process. The Jacksons also argued that the district court erred by upholding the bankruptcy court's interpretation of the confirmation order barring their nominal claims. The Eleventh Circuit affirmed and agreed that the Jacksons received sufficient notice to satisfy due process. The Eleventh Circuit also concluded the there was no abuse of discretion by the bankruptcy court in ruling that the Jacksons could not pursue their nominal claims.

The Eleventh Circuit noted that the procedural notice requirements of the Bankruptcy Rules in this case mirrored the notice requirements of Espinosa. Here, the Jacksons' argument turned on whether due process required that the Jacksons receive notice in compliance with the procedural requirements of Rule 2002(c)(3) even though they received actual notice of the same information in a different form. The Jacksons received actual notice of the bankruptcy plan and the disclosure statement which outlined the third-party releases. The Jacksons failed to object in the bankruptcy court for failure to comply with Rule 2002(c)(3). The Eleventh Circuit held the Jacksons received actual notice of the information that Bankruptcy Rule 2002(c)(3) required Le Centre to provide. The Supreme Court determined in Espinosa that actual notice is sufficient to satisfy due process, even where a debtor violates procedural requirements for supplying notice prescribed by the Bankruptcy Rules. The Eleventh Circuit here found that the District Court did not err in determining that the Jacksons suffered no due process violation.

Conclusion

Failure to give notice of non-debtor, third-party releases, as required by Bankruptcy Rule 2002(c)(3), is not fatal when the same information was contained in the plan and disclosure statement sent to the creditor who sought to sue third parties. Service of a Chapter 11 Plan with releases for non-debtors is actual notice even though the debtor did not specifically comply with the procedural requirements of Rule 2002(c)(3). The creditors received actual notice of the same information in a different form by receipt of the Chapter 11 Plan and Disclosure Statement. A failure to serve creditors in the manners required by Bankruptcy Court Rules is not a failure of actual notice upon which to set aside a confirmation order.

Judge McEwen's Pet Peeves

1. A comma before a dependent clause. (This one pretty much kills any chance of getting a job with me.)
2. Absence of possessive case for a gerund.
3. Absence of a comma before an independent clause.
4. Overcapitalization (unnecessary capitalization).
5. Run on sentences. Instead, break them into short, declarative sentences.
6. Mixing up dispositions, as in using "denied" instead of "overruled" when drafting an order on an objection.
7. Pejorative adjectives, language.
8. Failure to proofread.

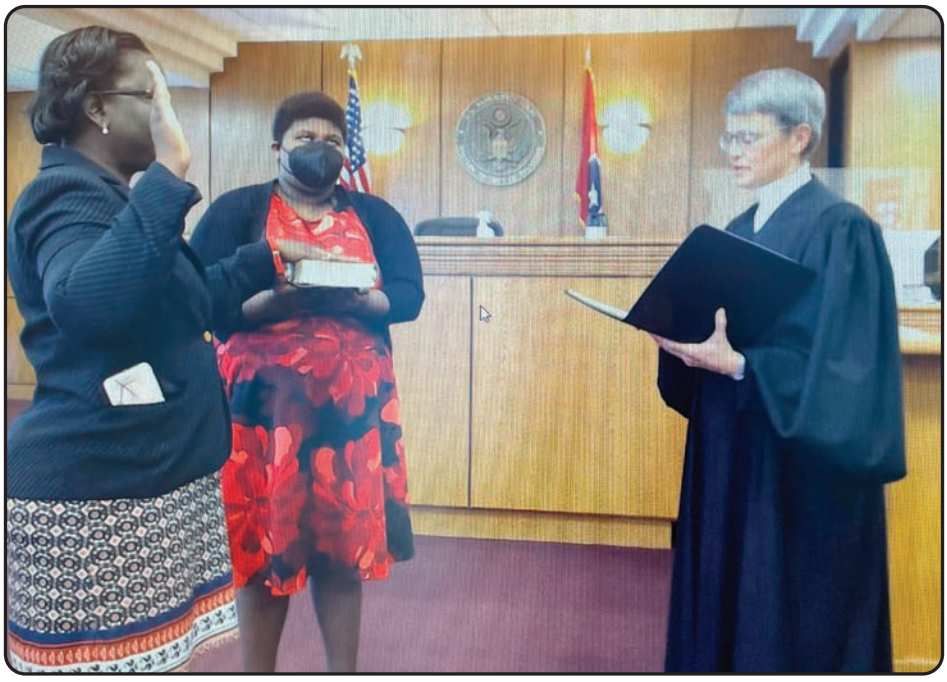
People on the Go

Englander Fischer and Iurillo Law Group Join Forces

Englander Fischer is excited to announce that Iurillo Law Group has merged its practice with Englander Fischer's practice effective August 2, 2021. Camille Iurillo has been a pillar of the St. Petersburg legal community for more than 30 years, and focuses her practice on commercial bankruptcy and bankruptcy litigation, corporate transactions, and commercial and real estate litigation. This partnership will significantly expand the Firm's practice areas in commercial bankruptcy and creditor's rights, providing more arrows in the Firm's business litigation quiver.

Leonard H. Gilbert of Holland & Knight was elected to the American Bar Association Board of Governors. The 38-member board oversees general ABA operations and develops specific plans of action. Gilbert has a long history with the ABA, serving on the House of Delegates and as the director of the American Bar Foundation. His three-year term on the Board of Governors began August 2021.

Judge Denise Barnett
Swearing In / Investiture



Historian's Note - The Cramdown Through the Ages

By Daniel Etlinger
Jennis Morse Etlinger

Recently the Tampa Bay Bankruptcy Bar Association's (TBBBA) Board has endeavored to digitize every historic issue of *The Cramdown*, all the way back to its roots as The Cram-Down! *The Cramdown's* contributions – from local news to national trends to thought-provoking position pieces – should be celebrated. Moving forward, the Historian will help contribute substantive updates and reviews from previous editions. But for now, this article will simply highlight some notable moments through *The Cramdown's* history as 2021 comes to a close.

In the Summer 1999 issue, Michael Markham wrote that the Tampa Bay Bankruptcy Bar Association's First Annual Golf Tournament was a "Swinging Success" and he congratulated the field of 54 participants and the First Place finishers, Larry Foyle, Dan Rock, John Brooke and Clay Brooke. The fact that the tournament has now eclipsed 20 years is a testament to our camaraderie.

The Fall 2002 issue included a "Trustee's Report" introducing the new United States Trustee Trial Attorney, Denise Barnett. Recently the Circuit Executive for the Sixth Circuit announced that the U.S. Court of Appeals for the Sixth Circuit has selected Denise Barnett as Bankruptcy Judge for the Western District of Tennessee with her appointment effective November 8, 2021. We wish Judge Barnett the best of luck in her newest endeavor and note proudly that her appointment is a reflection of the caliber of practice here in the greater Tampa Bay area.

Fast forward to the Fall 2004 issue containing an article announcing the creation of the Historian Committee. The article posits the TBBBA "celebrates its 17th year and has many reasons to take pride in its achievements, not the least of which is its members and their contributions to the Association. As time passes, we run the risk that our collective memory will dim and we will forget about the events and people that have formed the backbone of this Association as it has grown to the present levels . . . In recognition of this, the [TBBBA] has created a committee to compile and collate the records and recollections of the Association's former officers." This is coupled with a piece in the Fall 2006 *Cramdown* titled "What TBBBA Does For You" authored by David Tong (which in some respects was an admitted reboot of John Lamoureux's Spring 2004 article). Among other points, the column highlights CLEs, membership directory, annual dinner, golf tournament (there it is again), holiday party, *Cramdown*, community service, newsblasts and overall community relationships. Here we are some 15 years later still adhering to these laudable efforts.

Finally, I'll end this introspection with an article by Bill Maloney in the Winter 2016 edition called "The Human Side of Bankruptcy". In writing the article, he notes the "typical bankruptcy comes with a lot of pain." The pain is felt not only by the debtors and their immediate family, friends and corporate structure, but by the professionals, attorneys and even judiciary as well. The past year has been particularly trying for many individuals and the Board remains a resource, if nothing more than a friendly ear, for the TBBBA as we have throughout our history.

The Cramdown is published four times per year. Advertising rates are as follows:

Full Page 7.875w x 9.75h	$400/single issue • $1,200/4 issues
Half Page 7.875w x 4.75h	$200/single issue • $600/4 issues
Quarter Page 3.75w x 4.75h	$100/single issue • $300/4 issues
Business Card 3.75w x 2.375h	$50/single issue • $150/4 issues

The Tampa Bay Bankruptcy Bar Association reserves the sole and exclusive right to exclude any advertisement from being published in the Cramdown Newsletter.

Pricing is based on camera-ready computer generated art being supplied by advertiser.

Art Specifications: ALL ART MUST BE 300dpi or higher. Formats accepted: .tiff and print quality .pdf.

Ad Design services are available through Eric West at Office Dynamics • 813-980-3494
eric@officedynamicstampa.com

For information regarding advertising in *The Cramdown*, contact:

Ryan Reinert
813-227-8173
rreinert@shutts.com

Graphic Design & Printing by:

OFFICE dynamics
not your average print shop!

6720 E. Fowler Ave.
Temple Terrace, FL 33617
813-980-3494
www.OfficeDynamicsTampa.com

Be Careful What You Wish For: The Invited Error Doctrine Prevents Appellate Review of a Section 363 Sale

By Bridget Dennis
Shutts & Bowen LLP

In the case of *In re Stanford*, the Chapter 11 debtors appealed the bankruptcy court's decision to approve a sale of the debtors' real estate under Section 363(b), which ultimately occurred while the appeal was pending. 17 F.4th 116, 119 (11th Cir. 2021)

The Eleventh Circuit posed the issue before the Court as the following: "in light of our inability to undo a completed sale to a good faith purchaser under Section 363(m), can we grant the debtors any relief in this appeal?" *Id*. The Eleventh Circuit held that the answer is "no" and further determined that under Section 363(m), an order approving a sale to a good faith purchaser is moot on appeal, regardless of whether the sale was properly authorized under the Bankruptcy Code. *Id*. at 119, 122–23.

To further explain, the Court quoted an Eleventh Circuit case from 1987 – "once a sale is approved by the bankruptcy court and consummated by the parties, the *bankruptcy court's authorization* of the sale cannot be effectively altered on appeal." *Id*. at 123 (emphasis in original) (citing *In re The Charter Co.*, 829 F.2d 1054, 1056 (11th Cir. 1987)).

Circuit Judge Adalberto Jordan, concurring in part and concurring in the judgment, agreed with the Court's ultimate ruling and added, among other things, a quick but meaningful discussion on the invited error doctrine. *In re Stanford*, 17 F.4th at 126. "Generally speaking, parties cannot appeal an order, action, or ruling that they invited or requested." *Id*. at 127 (citing *Ford ex. rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1293–94 (11th Cir. 2002) ("It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.")).

It seemed to Judge Jordan that the debtors were doing just that – appealing a sale they requested.. *In re Stanford*, 17 F.4th at 127. After acknowledging that the invited error doctrine applies to all debtors, Judge Jordan concluded that the debtors here could not subsequently argue that the bankruptcy court's approval of the sale was error. *Id*.

Practically speaking, whether you represent the debtor, a creditor, or purchaser involved in a Section 363 sale, you will want to try and obtain the consent of all parties involved to provide further certainty that the sale will not be challenged. While most practitioners try to achieve a sale agreeable to all parties, *In re Stanford* supports the idea that working to obtain consent on the front end will further limit the risk of the sale being challenged on the back end.

Save the Date

TBBBA's 2022 CLE Luncheons:

March 8, 2022
April 19, 2022
May 10, 2022

Paul M. Glenn Memorial Golf Tournament:

April 22, 2022

Student Loan Sidebar

by: Christie Arkovich
Christie@christiearkovich.com

Student loan debt continues to remain a problem for many. The Covid forbearance is scheduled to end May 1, 2022 and federal student loan payments are expected to re-start.

Some new developments over the past few weeks and months have included:

Navient/Attorney General settlement: 39 Attorneys General entered into a settlement which includes a small payment to those who have federal loans and were put into forbearance instead of an Income Driven Plan. More importantly, those borrowers with private loans that meet the following criteria will be automatically forgiven:

1) The loans must have been originated by Sallie Mae;
2) The loans must be dated after January 1, 2003;
3) The loans must be for attendance at one of the named schools – there is a list located at: https://navientagsettlement.com/Common-Questions? #6.
4) The loans have to have been in charge off status as of June 30, 2021;
5) The borrowers must currently reside in one of the states covered by the settlement OR if in the military, the residence requirement is waived.

Update on Navient/AG Settlement, PSLF Waiver and the Middle District's SLMP new Admin Order

Unfortunately, the charge off status is something that will hurt borrowers who chose to remain current for credit reasons even though the debt would otherwise have been forgiven. This settlement has not yet been approved by the Court and any objections should be submitted to the State AG.

For further info, please see our Navient/AG settlement video https://www.youtube.com/watch?v=0m5rmBoj8eg – and please subscribe for further updates.

PSLF waiver: this is a major development for certain borrowers. Those public service borrowers whose payments did not count because they had the older Federal Family Education Loans (FFEL), previously consolidated to a FFEL consolidation loan instead of Direct, were in the wrong repayment program (Graduated or Extended), who made payments at the wrong time (paid ahead status or late), or who paid the wrong amount (any payments will count) now will receive the benefit of PSLF credit for those months.

Some nuances:

1) If the loans are still FFEL, or a FFEL Consolidation loan, borrowers have until October 2022 to consolidate to Direct or they will NOT receive the benefits of the temporary waiver;
2) Payments made to FFEL loans prior to a consolidation to a Direct loan will now count – they never used to;
3) If a borrower bifurcated their education (i.e., obtained an initial degree, and then obtained another degree five years later), the consolidation will allow for full forgiveness even though 120 payments are made on the first batch of loans, but not yet on the second batch.

Student Loan Sidebar continued

There is more, but it's too much for this short column so please see our one-hour webinar for the Florida Bar located at: https://flayld.org/2021/12/whats-new-with-public-service-loan-forgiveness-and-how-to-get-your-loans-forgiven/

A new Administrative Order for the Middle District of Florida containing updated rules for the Student Loan Management Program became effective February 2, 2022.

The goal of this Order is to address concerns raised by the Department of Education while facilitating the consensual resolution of student loan borrowers and to avoid litigation. As such, the procedures are outlined with more specificity for debtors and their attorneys as to how to take advantage of this SLMP and avoid years of forbearance with higher loan balances when the bankruptcy case is over.

Is it possible to just settle federal student loans and be done with them?

Guidance allows FFEL loans to settle at a 30% discount. Direct loans can be resolved at 10% of the full balance OR if interest has accumulated for years, the Department of Education will also settle for Principal plus 50% of the interest. The 25% collection cost is also typically waived.

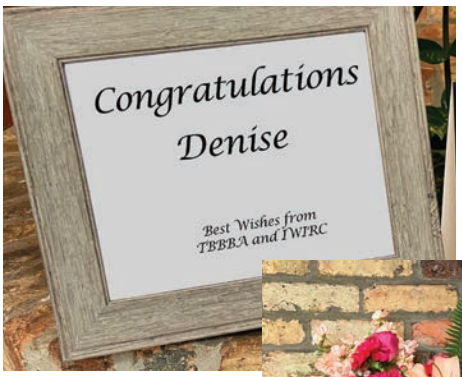
Recertification changes: Borrowers can self-certify their income without providing documentation through July 31, 2022. Also, if a borrower's recertification date is before Nov. 2022, the borrower can use the last income on file rather than recertify with higher income earned during Covid.

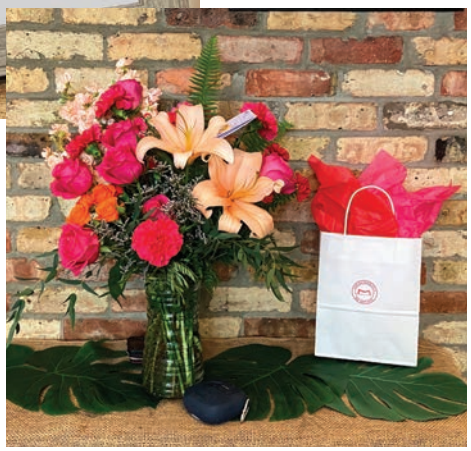
Tax Forgiveness. It bears repeating: the American Rescue Plan signed into law on March 11, 2021 provides that all student loan forgiveness, whether federal or private, is tax free for loans forgiven through December 31, 2025.

Alexander L. Paskay Bankruptcy Seminar is a GO for March 19-21, 2022. This will include an in person panel presentation on student loan strategies, tax issues and dealing with the Chapter 7 trustee. It will also include discussion of the discharge injunction and an update on Taggert.

Hope to see you there!

Judge Denise Barnett Investiture





ROY KOBERT

CERTIFIED MEDIATOR

CELL: 321-945-2888 | DIRECT: 813-273-5262

ROY.KOBERT@GRAY-ROBINSON.COM

Board certified in Business Bankruptcy Law for nearly 20 years

Practical approach to mediation that draws on 30+ years of legal experience

Certified Federal Court Mediator, Middle District of Florida

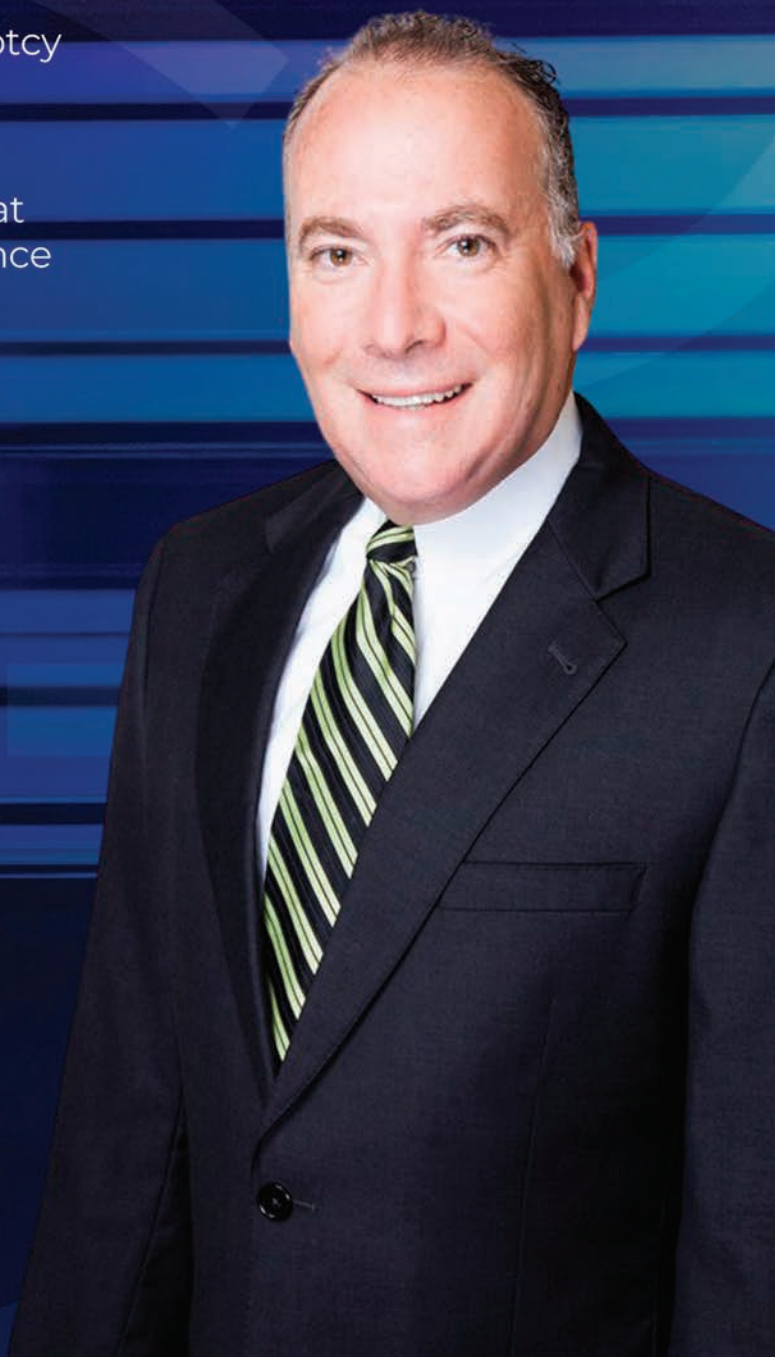
Florida Supreme Court Certified Mediator

Diplomate, National Academy of Distinguished Neutrals

Complimentary use of my Tampa mediation conference center

For more details please visit:

gray-robinson.com/docs/roy-kobert-mediator-bio.pdf



GRAYROBINSON

Thanks for the Memories

Reprinted with permission of Judge Karen S. Jennemann

Over 28 years ago, on November 3, 1993, Eleventh Circuit Judge Gerald Tjoflat swore me in as the first woman bankruptcy judge in Florida. Thirteen years later, in 2006, Laurel Isicoff joined me as a female colleague in the Southern District of Florida. On February 2, 2022, I will retire with an expected six women serving as bankruptcy judges in just the Middle District of Florida, and countless more throughout the 11th Circuit and the United States. This is just one change I lived.

The first time I held court in Orlando I had to sit on a telephone book to see the litigants. The chairs were too short for me to see over the bench! We were in a commercial building where I rode the same elevator as the disgruntled parties, I would soon make very happy or very sad. We used typewriters and had paper files. Staff had to paperclip relevant pleadings to put on multiple carts holding the many files needed to prepare for a hearing. I signed every single order, including thousands of discharges. We got a lot of exercise, but we got it done.

In 2003, we thankfully converted to electronic filing and the paper and carts disappeared, as did many of the staff who retired as we became more efficient. When the Bankruptcy Code was revised in 2005, we were ready for the influx in filings, serving cookies to the many people waiting in line to file their case before the new restrictions were implemented.

After the real estate crash and recession of 2008, we were busier than ever trying to help folks survive and keep their homes. In 2009, one of our creditor lawyers suggested we start a formal program to encourage debtors and their lenders to consensually modify their mortgages. And the Mortgage Modification Mediation program was born. Today it is the national model used in numerous courts across the country. The program has helped thousands of families stay in and, more important, pay for their homes.

In 2011, I was honored and selected as Chief Judge for our district. During these years, I got the privilege of meeting and learning the jobs of our court family district wide. I also learned how important the bankruptcy bar associations are to our mission and saw the depth of professionalism, devotion, and talent of our attorneys. We collectively worked hard to unify our procedures and work together. As Judge Williamson coined the term, we are now "One Court, One Team."

I presided over thousands of cases, saved numerous families from foreclosures, discharged untold millions in debts individuals could not pay, and kept businesses open for their employees. But more than that, the job brought challenges, joys, and meaning to my life for over 28 years.

As I leave, I want to thank every one of you who have enriched my life and upheld the integrity and importance of the work of the bankruptcy court. Special thanks go to:

- Every law clerk who worked in chambers as an intern, a term clerk, or a career clerk. I could not have issued our thousands of opinions without your help. I loved watching your careers and lives blossom.

continued on p. 25

Thanks for the Memories

continued from p. 24

• To the bankruptcy court staff, many of whom stayed with the court family for decades, doing whatever needed doing. A special thanks goes to Maggie Moyet, who supervised the Orlando office, and my personal chambers' staff, including Kathy Deetz (in many roles), my trusted courtroom deputies, most recently Gena Whitsett (who figured out how to switch to remote hearings virtually overnight), and my longtime judicial assistant, Cindy Courtney.

• To my judicial colleagues, from those who I was invested with in 1994, Jerry Funk and Bill Glenn, to those who I serve with today under Chief Judge Delano's leadership, including one of my former law clerks, Lori Vaughan, who will now preside over the Orlando Division. I leave the Court in very good hands.

• To all the attorneys who practice in this court and who make our bankruptcy court excel, whether it is by volunteering for a pro bono case, working with a bankruptcy bar association, especially the wonderful Central Florida Bankruptcy Law Association, or mentoring a new lawyer. You are the best of the best.

• And, finally, I want to thank Arthur Briskman who taught me the ropes of judging, mentored me for years, and will remain a true and dear friend. We always agreed to rule similarly and never once in 28 years on the bench together ever disagreed. It was a joy to serve with him.

So, as I start a new adventure, whatever that may be, I will close with the lyrics Bob Hope made famous:

Awfully glad I met you

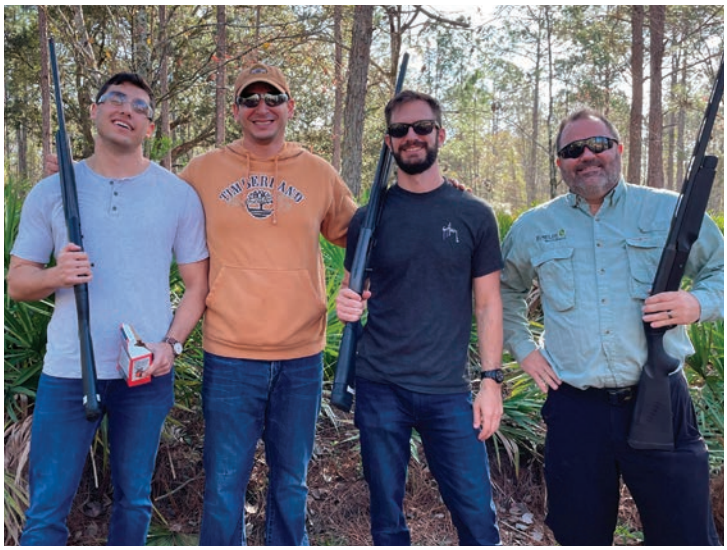
Cheerio and toodle-oo

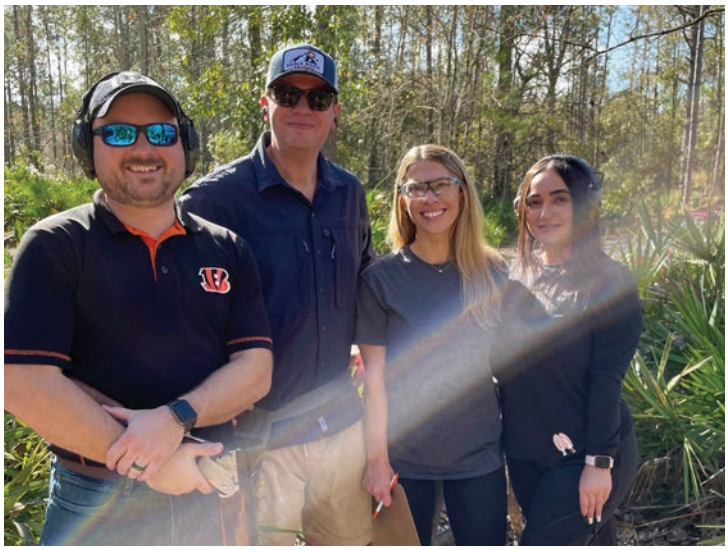
Thank you

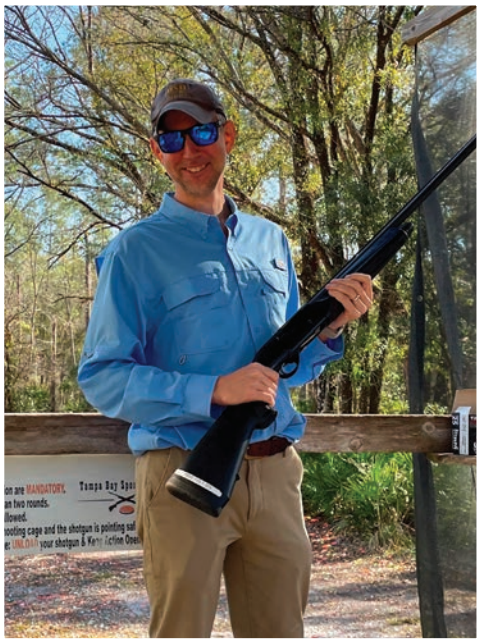
Thank you so much

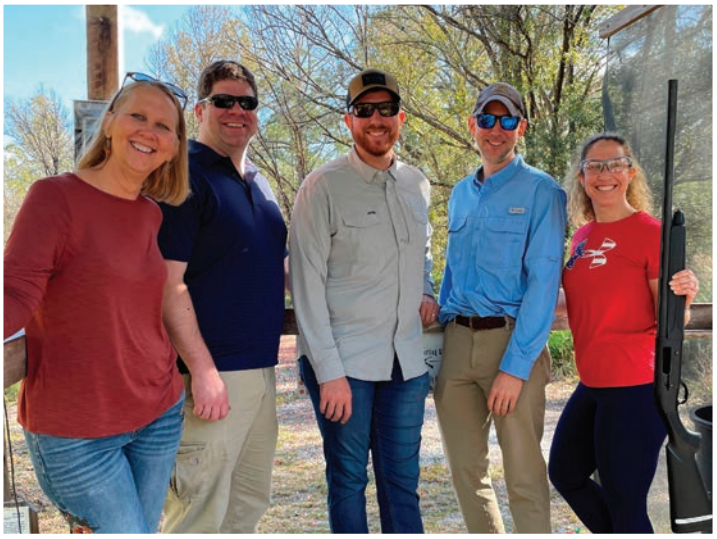
For the memories.

TBBBA Clay Pigeon Shoot

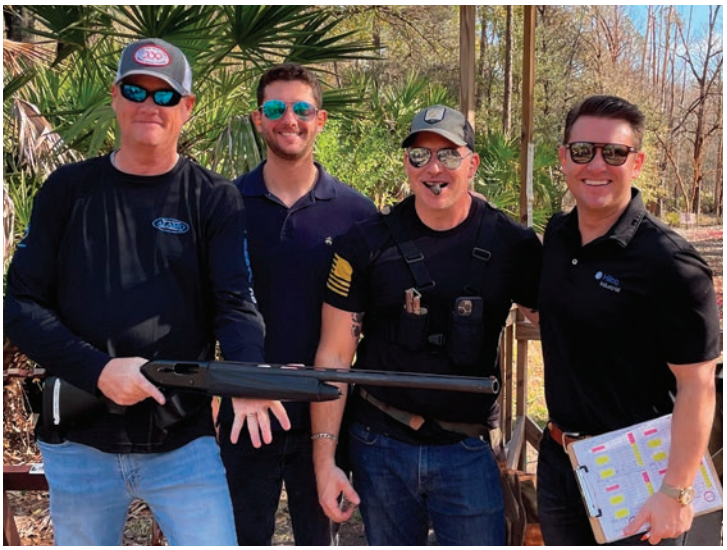


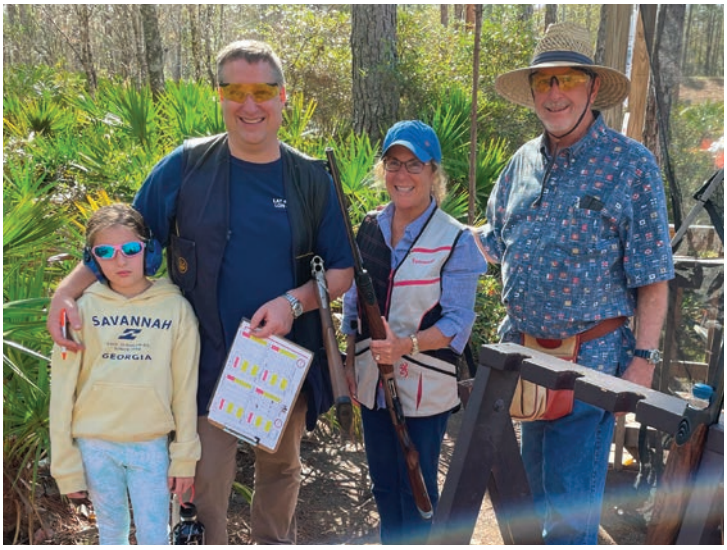


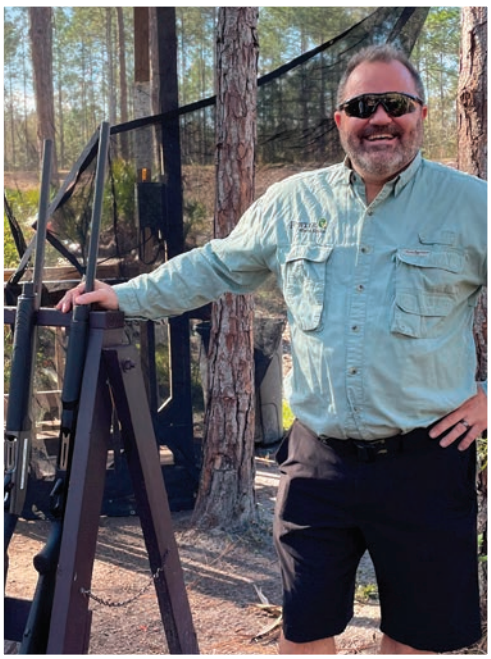


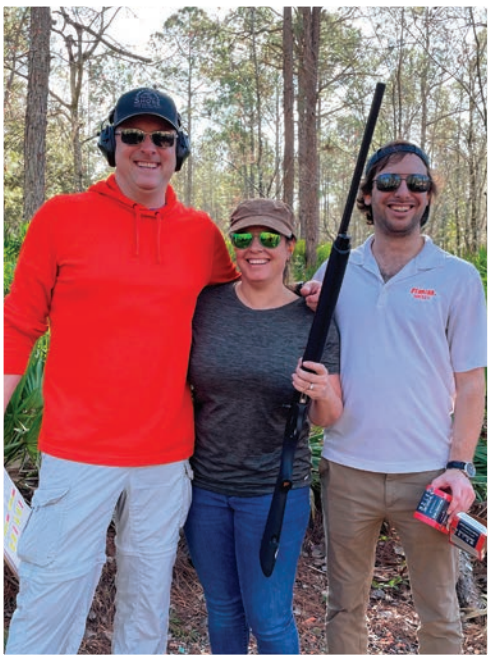


TBBBA Clay Pigeon Shoot









The Cramdown
PO Box 1438
Tampa, FL 33601