The Cram-Down

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NEGATIVE NOTICE AND OTHER LOCAL RULE CHANGES TAKE EFFECT

Numerous matters may be considered without hearings by the Bankruptcy Court after negative notice under new amendments to the Local Rules.

By order of Chief Judge Alexander Paskay, the expansion of the negative notice procedure and numerous other amendments to the Local Rules have taken effect. This article will highlight some of the changes to the Local Rules.

Negative Notice

New Local Rule 2.19A provides the procedure for obtaining rulings without hearings after negative notice has been given. This rule codifies the negative notice procedure that has been used up to now in varying degrees, depending in part on the preferences of the particular judge. As stated in the notes of the local advisory committee, the rule is intended to avoid unnecessary Court time in matters that often create no opposition. Any paper filed using the negative notice procedure must be served as required by applicable rule or Court order and must contain a negative notice legend. New Local Rule 2.19A contains the form of the negative notice language.

The negative notice procedure can be used for motions to approve agreements relating to stay relief; the use, sale, or lease of property; adequate protection; cash collateral; or credit. The procedure also may be used for motions to avoid liens on exempt property; motions to use, sell, or lease property not in the ordinary course of business; abandonment; or compromises. In addition, the rule applies to other matters permitted by the presiding judge. The rule will apply, for instance, if the presiding judge authorizes its use for objections to claims.

Service and Filing of Pleadings and Papers

The rule amendments also cover a number of matters related to service of pleadings and papers. For the first time, pleadings or papers may be served by facsimile under Local Rule 2.02(c). To be deemed served on a particular day, the facsimile must be served before 5:00 p.m. at the point of delivery. Facsimile service does not extend, however, to service of summonses or complaints initiating adversary proceedings, motions initiating contested matters, or other papers required to be served in compliance with Bankruptcy Rule 7004 or 9014.

The new rule also requires that an attorney list on each pleading or paper the attorney's facsimile phone number in addition to the attorney's regular phone number and state bar registration number.

Several rules pertaining to particular types of filings have been changed. Under amended Local Rule 2.03, the certificate of necessity filed with a motion requesting an emergency hearing must now set forth sufficient facts to justify the need for an emergency hearing.

Local Rule 2.04(c) now requires that a *pro se* debtor file with the petition an executed statement of assistance. This rule is intended to provide disclosure by the debtor of charges for bankruptcy preparation and to curb abuse by those selling such services.

A new provision in Local Rule 2. 04(e)(1) requires that the master mailing matrix filed with the petition be provided in computer-readable format if the debtor has more than 50 creditors. The Clerk's office has published an instruction sheet for filing computer-readable matrices.

One other new provision in Local Rule 2.04(e)(3) codifies the current practice of substituting for the list of the 20 largest unsecured credi-

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STETSON BANKRUPTCY MOOT COURT COMPETITORS TAKE FIRST PLACE NATIONALLY

In New York City last weekend, a team of three students representing Stetson University College of Law prevailed over eight other teams to win the 1995 Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition. Team members included Angie Corenevsky, Elizabeth Moore, and Sarah Sullivan. The competition, with preliminary rounds on March 23rd and 24th and the semifinals and finals on March 25th, was sponsored by the American Bankruptcy Institute and St. John's University School of Law.

Stetson's team defeated Idaho and Arkansas in the preliminary rounds, another team from Arkansas in the semifinals, and Whittier in the final round. Judge Duberstein, a frequent lecturer at the annual Stetson Bankruptcy Seminars, presided over the competition. The team was coached by Stuart Sanderson, a Tampa attorney and 1987 alumnus of the Stetson University College of Law, and by Stetson law professor Robert Batey.

The Tampa Bay Bankruptcy Bar Association was instrumental in the success of Stetson's team. Elizabeth Moore and Sarah Sullivan participated in this January's intramural moot court competition at Stetson, which the T.B.B.B.A. sponsored; Angie Corenevsky, a member of Stetson's Moot Court Board, assisted in the administration of that competition. Their respective performances in the T.B.B.B.A.-sponsored competition earned these team members places on the team that Stetson sent to New York.

Chief Judge Alexander L. Paskay, Judge Paul M. Glenn, and several local attorneys sat on practice rounds with the Stetson team. The lawyers who participated included Brian Almengual, Terry Boatner, Al Gomez, Ben Lambers, Byron Lorrier, Tom Mimms, Lynn Ramey, Jim Sheehan, Rob Steinbuch, Joyce Stephens, Jay Verona, Jim Vickaryous, and Lan White.

LAW CLERK PROFILE: CURRAN K. PORTO

For this edition of The Cram-Down, the Judicial Liaison Committee profiles Curran K. Porto, who has been a law clerk with Judge Thomas E. Baynes, Jr., since July 1993.

Curran obtained his undergraduate degree from Virginia Polytechnic Institute and State University in Blacksburg, Virginia. He obtained his Juris Doctorate from the Mississippi College of Law in Jackson, Mississippi, in 1992 and LL.M. in Taxation from the University of Florida College of Law in 1993. While in Law School, Curran clerked with the firm of Brantley and Malone, P.A. in Jackson, Mississippi. During the summer of 1991, Curran was a Federal Student Clerk with the Newark District Counsel, Internal Revenue Service.

Curran recently married the former Sandy Venis, who works for the Home Shopping Network. Curran and Sandy live in St. Petersburg. He is admitted to practice in New Jersey, Pennsylvania, and Florida. Curran is a member of the Business Law and Tax Law Sections of the American Bar Association. He has extensive knowledge of micro computers in DOC and Unix environment.

--Jeffrey W. Warren, Co-Chair
Judicial Liaison Committee

ANNOUNCEMENTS AND CURRENT EVENTS

The T.B.B.B.A.'s next general meeting will occur on April 27, 1995, at The Tampa Club. The title of this month's presentation will be "Bankruptcy Practice and Procedure in the Jacksonville Division." Speakers will include Judge Proctor and Judge Funk, with our own Judge Glenn serving as moderator. Prior to his ascendancy to the bench, Judge Glenn was a lawyer in Jacksonville who regularly appeared before Judge Proctor.

On May 9, 1995, the annual "Current Issues in Bankruptcy" presentation will occur at the Westshore Marriott with David Epstein as our guest speaker for the morning. Our luncheon speaker will be Chief Judge Paskay. Judge Paskay will report regarding his three week visit to Russia to participate in a panel discussion on corporate reorganization plans and the bankruptcy process. Judge Paskay was the sole judge invited by the United States Information Agency to participate in this significant international event. At this meeting, there will be a brief presentation and report relating to the T.B.B.B.A.'s current computer access system.

On February 21, 1995, Judge Corcoran issued a memorandum for the benefit of the bar and other interested professional persons that focuses upon the preparation of affidavits in support of applications to employ professionals. In the first instance, the memorandum notes the importance of keeping in mind the basic requirements for affidavits used in court to establish evidentiary facts as a matter of record, including (a) competency, (b) personal knowledge, and (c) veracity resulting from oath or affirmation. Second, the memorandum focuses on the disinterestedness requirement, particularly as it relates to pre-petition fee claims against corporate debtors or their principals. Third, the memorandum focuses on financial arrangements as to proposed employment. A sample affidavit is attached to the memorandum, for reference in connection with differing facts and circumstances. The memorandum is available at the Clerk's office. Additionally, Cheryl Thompson, Judge Corcoran's law clerk, can be reached at 243-5200 to respond to further questions in these regards. The T.B.B.B.A. is grateful to Judge Corcoran for his efforts in preparing this memorandum and making it available to our members.

The Community Service Committee has recently prepared a pamphlet entitled "Creditors in Bankruptcy," which is available at the Clerk's office at this time. The pamphlet contains general information about bankruptcy for pro se creditors in the context of chapter 7, chapter 13, and chapter 11 cases. The T.B.B.B.A. wishes to thank the Community Service Committee for its efforts in these regards.

On March 22, 1995, Chief Judge Paskay entered his order confirming an amended joint plan of reorganization in the jointly administered case(s) of Hillsborough Holdings Corporation, et al. and its affiliated debtors. Chief Judge Paskay's 82-page opinion marks a successful reorganization of the debtors in the largest bankruptcy case in the history of this district, which has been pending for over five years. Our next edition of The Cram-Down will include a retrospective of the Hillsborough Holdings reorganization, and the case law that developed in the context of that historic reorganization.

DISINTERESTED PERSON AND THE DEFINITION OF A PROFESSIONAL

In a recent decision by Chief Judge Paskay, the Bankruptcy Court overruled the U.S. Trustee's objection to the Debtor's application for authority to employ an environmental consultant in a Chapter 11 case. In River Ranch, Inc., 1994 WL 739002 (11/17/94), the U.S. Trustee filed an objection to the application to employ MDM Services, Inc. as an environmental consultant for the Debtor. The basis of the U.S. Trustee's objection was premised upon the fact that MDM was a pre-petition creditor of the Debtor, and, therefore, MDM was not eligible to be employed by virtue of §327 of the Code.

Judge Paskay analyzed various cases and found that the resolution of the U.S. Trustee's objection would depend upon the interpretation of the term "professional" person. The Court noted that, although the term professional person is not defined in the Code, there are other cases that have interpreted the term. For instance, in In re Bicoastal Corporation, 149 B.R. 216 (Bankr. M.D. Fla. 1993), the Court held that, in considering the term professional person, the Court would look beyond labels to ascertain whether a person is actually a professional person as contemplated under §327. The Court noted that an analysis of the professional's role in the administration of the bankruptcy estate would have to be undertaken. If the professional plays a central role in the administration or reorganization efforts of the Debtor, then §327 and the disinterested (11 U.S.C. §101(14)) rule would be triggered. Judge Paskay went on to note that the disinterested person rule has been designed to prohibit anyone to act in the role of a professional where the interest of the professional is patently and obviously adverse to the interest of the estate. Therefore, as a general rule, a professional who holds a pre-petition claim is not disinterested.

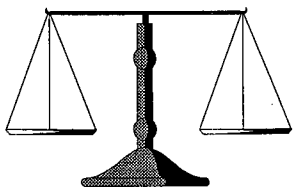
However, in the case of a person who may technically be labeled a professional, but who has no role whatsoever in the administration of the estate or does not play a central role in the Chapter 11 reorganization, the policy reason behind the disinterested rule is no longer present.

In ultimately overruling the U.S. Trustee's objection, the Court cited In re Sieling Associates, Ltd. Partnership, 128 B.R. 721 (Bankr. B.D. Va. 1991), a case directly on point. In Sieling, a Debtor sought to employ an environmental consultant to monitor and to remove contaminated groundwater from the Debtor's property. In Sieling, as in the instant case, the environmental consultant held a pre-petition claim against the estate. In Sieling, the Bankruptcy Court also concluded that the consultant was not a professional person, and, therefore, not subject to the restrictions found in §327 of the Bankruptcy Code.

Conclusion

This decision is important because it further clarifies the requirements of §327 and the disinterested rule when Debtors seek to employ professionals. Moreover, in preparing affidavits that accompany the applications to employ a professional, the affidavitshould recite what representation a professional is anticipated to undertake in the Chapter 11 case.

---- Al Gomez



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tors the names and addresses of the committee members and the committee's counsel after a committee has been appointed.

Proof of Service

Under the amended Local Rules, the term "proof of service" has been substituted for the term "certificate of service" and encompasses a broader means of service compliance. Prior to the amendments, only a party or an attorney could sign a certificate of service.

Under amended Local Rule 2.19, an attorney may still make a certificate of service. Now, a non-attorney may also provide proof of service by making statement under penalty of perjury. Proof of initial service of a motion instituting a contested matter or a complaint instituting an adversary proceeding must still be made by affidavit as provided in Bankruptcy Rule 7004.

A provision in the first draft of the rule amendments would have required service of any objection to a claim upon the officer, managing or general agent, or statutory agent of a corporation or partnership. A late revision of Local Rule 2.10 deleted the requirement of service upon such an agent, and authorizes service of an objection upon the agent or representative who executed the proof of claim if the name and address are legible on the proof of claim.

If the name and address of the agent or representative are not legibly set forth on the proof of claim, however, service of the objection must be made upon the claimant at all addresses given in the proof. In that event, the objection to the claim of a corporation, partnership, or unincorporated association must be mailed to the attention of an officer, managing or general agent, or other authorized agent of the claimant.

Service of objections to claims of governmental entities must still be made in the special manners set forth in Bankruptcy Rule 7004. Local Rule 2.10 now requires that service of objections to claims upon insured depository institutions be made in the specific manner provided in Bankruptcy Rule 7004, thereby implementing the Bankruptcy Reform Act of 1994 requirement of service by certified mail upon such institutions.

Disclosure and Discovery

The December 1, 1993, amendments to the Federal Rules of Civil Procedure brought substantial changes to federal discovery practice. Numerous bankruptcy rules extend the application of the federal discovery rules to adversary proceedings in bankruptcy, and Bankruptcy Rule 9014 extends the application of Federal Rules 26, 30, 31, and 33 to contested matters, unless the Court otherwise directs. The amended Local Rules reflect the decision to "opt out" of certain among the federal rule amendments as they apply to adversary proceedings and contested matters.

As a result of the language of new paragraph (a) of Local Rule 2.15, the disclosure requirements mandated by subdivisions (a)(1) through (a)(4) of Federal Rule 26 are not mandatory and will apply in contested matters and adversary proceedings only if the parties agree or if the Court orders that some or all of the disclosure requirements will apply. Similarly, under Local Rule 2.15(b), the Federal Rule 26(f) requirements of a meeting of the parties and the filing of a proposed discovery plan will apply in contested matters and adversary proceedings only upon agreement of the parties or order of the Court.

The Federal Rules also preclude the initiation of discovery until after the Federal Rule 26(f) meeting. Because the Bankruptcy Court has eliminated the meeting of the parties requirement, paragraph (c) of new Local Rule 2.15 authorizes initiation of discovery immediately after service of the motion initiating a contested matter or the summons and complaint initiating an adversary proceeding. If the Court orders the application of the meeting of the parties requirement, however, initiation of discovery would be precluded until after the meeting.

The limitations on the number of depositions and of interrogatories imposed by the amended Federal Rules will apply under the amended Local Rules. A party therefore will be subject to the 10-deposition limit found in Federal Rules 30(a)(2)(A) and (31)(a)(2)(A) unless the Court authorizes or the parties stipulate to a greater number.

The Local Rules formerly allowed up to 50 written interrogatories. Federal Rule 33(a) now limits each party to 25 written interrogatories unless leave of court is obtained or the parties stipulate to a greater number. Old paragraph (a) of Local Rule 2.15, which permitted 50 interrogatories, has been deleted. Since Federal Rule 33 applies in adversary proceedings by virtue of Bankruptcy Rule 7033 and in contested matters by virtue of Bankruptcy Rules 7033 and 9014, each party in an adversary proceeding or contested matter will be subject to the 25-interrogatory limitation. Preparation, service, and answering of interrogatories remain unchanged under renumbered paragraphs (e) and (f) of Local Rule 2.15.

Local Rule 2.15 continues the prohibition against filing interrogatories, deposition notices, deposition transcripts, requests for production, requests for admission, and answers and responses to these discovery papers with the Clerk as a matter of course. Moreover, a technical change to the rule clarifies that deposition transcripts may be filed only upon an order of the Court.

The language requiring counsel to confer in a good faith effort to resolve discovery disputes and to file a certificate as to such effort as a prerequisite to filing a motion to compel discovery or for a protective order has been deleted from amended Local Rule 2.16. Those requirements still apply, however, but now derive from Federal Rules 26(c) and 37(a)(2)(A), which are substantially identical to old paragraph (a) of Local Rule 2.16 and are applicable to adversary proceedings and contested matters through Bankruptcy Rules 7026, 7037, and 9014. The deletion of paragraph (a) of the local rule thus eliminates a redundancy.

Adversary Proceedings and Contested Matters

A new paragraph has been added to Local Rule 2.08 to provide for the administrative closing of an adversary proceeding file that has been settled. New paragraph (j) provides that the Court, after being notified that the adversary proceeding has been settled, may enter an order dismissing the proceeding. Any party has a right to file a motion within 15 days for the purpose of submitting a stipulated final order or judgment.

After the proceeding has been administratively closed, the Court upon a showing of good cause may reopen the proceeding. The notes of the advisory committee suggest that a reopening might occur in the event that the parties are unable to satisfactorily conclude documentation of the settlement.

Under the amended rules, a notion seeking to withdraw the reference of an adversary proceeding or contested matter must be filed within 30 days after the filing of the paper commencing the proceeding or matter. The United States or an officer or agency thereof has 35 days from the initial filing in which to file a motion to withdraw the reference. This amendment to Local Rule 1.05 conforms to the time for filing a pleading in response to a complaint.

Mediation

Mediation remains an avenue open to the Court in its discretion, upon the request of a party in interest or the United States Trustee, or upon the Court's own motion. The mediation rule, Local Rule 2.23, has been amended to provide that the parties may stipulate to a particular person from the register of mediators, in which case the Court may appoint that person as mediator.

Yet another amendment to Local Rule 2.23 makes clear that the parties may agree to a shorter notice period for the mediation conference. In addition, a new paragraph (k) has been added to Local Rule 2.23 to clarify that the Court, and the parties if they agree to do so, may designate a mediator not on the mediation register and may conduct mediation in ways different from the procedure set forth in the rule. In any case, however, the confidentiality and compliance provisions of Local Rule 2.23 remain applicable.

Chapter 11 Practice and Small Business Election

Certain other amendments to the rules affect practice under particular chapters. An amendment to Local Rule 3.02 has dispensed with the requirement to file a motion for authority to operate the business of

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the debtor in a Chapter 11 case. The Court will still enter an order setting forth the requirements for operating the business of the debtor, but will do so on a *sua sponte* basis rather than upon a filed motion.

The rule amendments clarify certain procedures for handling ballot tabulations in Chapter 11 cases. Amended Local Rule 3.05 now requires that the ballot tabulation be served on the United States Trustee and the Chapter 11 trustee, if one has been appointed. The amended rule also now requires that the ballot form contain the address of the court and direct that completed ballots be received and retained by the Clerk.

Post-confirmation filings are affected by amendments to Local Rule 3.06. Now, within 30 days after entry of the confirmation order, the debtor must file, not only objections to claims, but also any adversary proceedings or contested matters contemplated by the plan. Also, adversary proceedings and contented matters must be concluded before entry of a final decree. Local Rule 3.06, as amended, requires the debtor's attorney to file a certificate of substantial consummation, together with a motion for final decree and a proposed final decree, within 30 days after disposition of all adversary proceedings, contested matters, and claims objections.

A new paragraph (d) has been added to Local Rule 3.06 to make clear the requirement that a Chapter 11 debtor who desires to convert a case after plan confirmation may do so only on motion and a hearing with notice to all creditors and parties in interest. This provision is consistent with Bankruptcy Code §1112, which precludes conversion as a matter of right if the debtor is not a debtor in possession, and with Bankruptcy Rule 2002, which requires that parties in interest receive 20 days' notice of a hearing on conversion of a case from one chapter to another.

The Bankruptcy Reform Act of 1994 among other things amended Chapter 11 to expedite the process for small businesses to reorganize under that chapter. For a "small business," certain time frames are shortened and conditional approval of a disclosure statement and a combined hearing on the disclosure statement and plan confirmation are authorized.

To implement the small business provisions of the 1994 Code amendments pending revision of the Bankruptcy Rules, the Advisory Committee on Bankruptcy Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended the adoption of a suggested interim bankruptcy rule as a local rule. That interim rule language became new Local Rule 3.04B.

Under the new local rule, a debtor that is a small business under the code definition elects small business treatment by filing a written statement of election within 60 days after the date of the order for relief. The Court for cause may fix a later date.

If the debtor fits within the small business definition and has made a timely election to be considered a small business, the Court under Code §1125 and Local Rule 3.04B may conditionally approve the disclosure statement and fix the time for accepting or rejecting the plan, the time for objecting to the disclosure statement, and the date for the confirmation hearing.

If, after conditional approval, an objection to the disclosure statement is timely filed, the Court will hold a hearing to consider final approval either before or combined with the confirmation hearing. According to the note accompanying the recommended rule, if no timely objection is filed, it is not necessary for the Court to hold a hearing on final approval of the disclosure statement.

New Local Rule 3.04A, also adopted at the behest of the rules advisory committee of the Judicial Conference, implements the new Code §1104(b) provision for election of Chapter 11 trustees. Under the new Code provision and the new local rule, a request to convene a meeting of creditors for the purpose of electing a Chapter 11 trustee must be filed and served within 30 days after the Court orders the appointment of a trustee. The election is conducted using the Chapter 7 trustee election procedure sat forth in Bankruptcy Rules 2003(b)(3) and 2006. Disputes are to be reported to the Court in accordance with the procedure of Bankruptcy Rule 2003(d). If there is no dispute or if all disputes have been resolved, the United States trustee is to appoint the elected person to be trustee and file an application for approval of the appointment together with a verified statement of the appointee so that the person can be determined to be "disinterested" under the Code.

Fees and Costs

Local Rule 2.24 has been added to make provision for claiming taxable costs or attorney's fees that are preserved by the filing of an appropriate pleading or by a pretrial stipulation. A separate bill of costs or a motion seeking allowance of the fees or costs under the rule must be filed within 14 days following the entry of judgment.

One rule change affects fee applications in Chapter 11 and 13 cases. The amendment to Local Rule 3.04 requires that applications of professionals for fees and costs be served on the debtor, the debtor's attorney, and any trustee who has been appointed.

Practice Before the Court

The Ocala Division has been abolished as a freestanding division of the Court. Citrus, Marion, and Sumter counties, which were part of the Ocala Division, have been reassigned to the Jacksonville Division. Bankruptcy court proceedings have not been conducted in Ocala for quite some time, so this amendment will not change actual practice.

A new Local Rule 1.06A requires the party filing a notice of removal of a case to file with the Clerk copies of all pleadings and papers on file in the state court action from which the claim or cause of action was removed.

The Local Rules continue to prohibit the use of recording and photographic equipment inside or outside courtrooms. A new provision has been added to Local Rule 1.09, however, to make clear that the use of dictation and computer equipment in reviewing files in the Clerk's office and the use of the computer equipment in the courtroom, subject to Court control, are permitted.

The language in Local Rule 1. 10 has been to provide that any person may review files and other records in the Clerk's office. This change comports with the existing practice in the Clerk's office.

* * * *

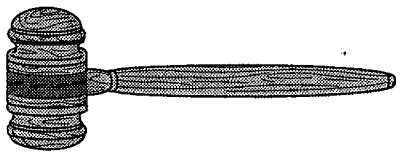
The amendments, adopted by vote of the eight bankruptcy judges in the Middle District, reflect the first systematic revisions to the Local Rules of the Bankruptcy Court for the Middle District of Florida since 1992. The changes reflect in part the work of the Local Rules Lawyers' Advisory Committee, which was reconstituted in 1994 to study the impact of the December 1993 amendments to the Federal Rules of Civil Procedure. Judge Timothy Corcoran served as the judicial liaison to the advisory committee. After the advisory committee completed its study and made recommendations on numerous matters, the judges of the Middle District studied the recommendations, made some further changes, and issued a set of proposed amendments.

The Court then solicited comments from the public and from the Bar. A number of comments and suggested revisions were received by the Court. In addition, the advisory committee at the Judicial Conference level recommended several proposed rule changes to the Federal Rules of Bankruptcy Procedure to implement various provisions of the Bankruptcy Reform Act of 1994. That committee's proposed interim rules on election of trustees in Chapter 11 cases and small business Chapter 11 cases thus became Local Rules 3.04A and 3.04B.

After incorporating into the proposed amendments certain of the changes suggested by the public and the two interim rules implementing the Bankruptcy Reform Act changes, the Court approved the final version of the amended Local Rules.

----- Russ Blain

The Editorial Board would like to thank Judge Corcoran for his service as Judicial Liaison to the Local Rules Lawyers' Advisory Committee, and his suggestions in connection with the preparation of this article.



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PIONEER IN THE TAMPA DIVISION: THE EARLY RETURNS

The Bankruptcy Rules provide that a motion to enlarge time made after the expiration of the time period to be enlarged must be supported by a showing that the movant's failure to timely act was the result of "excusable neglect." Fed. R. Bankr. P. 9006(b)(1). Until recently in the Eleventh Circuit, this required proof that the delay was caused by circumstances beyond the movant's reasonable control. ITT Commercial Finance Corp. v. Dilkes (In re Analytical Systems, Inc.), 933 F.2d 939 (11th Cir. 1991). However, with the United States Supreme Court's decision in Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, __ U.S. __, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), the standard for determining excusable neglect has been relaxed, at least in the context of late filed Chapter 11 claims.[1]

In Pioneer, the Supreme Court rejected the narrow test previously adopted by the Eleventh Circuit and other circuits, replacing it with a two-step analysis. First, the movant must show that the claim was untimely because of "neglect," a term the Court held "encompasses both simple faultless omissions to act and, more commonly, omissions caused by carelessness." Pioneer, 113 S. Ct. at 1495. Second, the neglect must be "excusable." Here, the Court adopted an equitable "totality of the circumstances" analysis, setting forth the following non-exclusive factors: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact upon administration of the case; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) movant's good faith. Pioneer, 113 S. Ct. at 1498.

In spite of the binding nature of Supreme Court precedent upon lower courts, a handful of bankruptcy courts have attempted to retain the prior excusable neglect analysis by limiting Pioneer to its facts. For example, In re New York Seven-Up Bottling Company, Inc., 153 B.R. 21 (Bankr. S.D.N.Y. 1993) (Schwartzberg, J.) holds that excusable neglect only exists when the delay in filing a claim is beyond the movant's reasonable control or when the bar date notice is inadequate, relying upon the Supreme Court's emphasis upon the unusual form of claims bar date notice in Pioneer. See also In re Eagle-Picher Industries, Inc., 158 B.R. 713 (Bankr. S.D. Ohio 1993) (no excusable neglect in case nearly identical to Pioneer except for the form of bar date notice). Notwithstanding these cases, the vast majority of bankruptcy courts have followed the Pioneer analysis in determining whether to allow late filings due to excusable neglect.

In the Tampa Division, the only published opinion to date which deals with excusable neglect in connection with late filed Chapter 11 claims since Pioneer is In re Hillsborough Holdings Corporation, 172 B.R. 108 (Bankr. M.D. Fla. 1994) (Paskay, C.J.). Hillsborough Holdings involved a known state court personal injury claimant. Although the debtor did send a copy of a motion seeking establishment of a bar date to the claimant's personal injury attorney, the debtor failed to send a copy of the order setting the bar date to either the claimant or the claimant's personal injury attorney. Id. at 109-110. As a result, no proof of claim was filed until four months after the bar date. Id. at 110. When the debtor attempted to have the claim declared untimely, the claimant argued lack of notice, or alternatively, excusable neglect. Id. As to the first argument, Judge Paskay found that debtor's failure to provide actual notice of the bar date constituted a violation of claimant's procedural due process rights. Id. at 111. Even though this finding was probably sufficient to decide the issue of timeliness, Judge Paskay also addressed the excusable neglect argument.

In his analysis of excusable neglect in Hillsborough Holdings, Judge Paskay used the equitable inquiry and factors set out in Pioneer. Because the debtor was months from confirmation and because the claims resolution process was still ongoing, Judge Paskay found that allowing the delay would neither prejudice debtor nor impact the Court's administration of the case. Hillsborough Holdings, at 111. In addition, Judge Paskay found that the delay was caused by debtor's failure to properly notify either the claimant or claimant's attorney of the bar date.[2] Id. Finally, although no specific finding of good faith was made, Judge Paskay did find that the claimant filed a claim promptly upon learning of the bar date. Id. Accordingly, any neglect on the part of claimant to timely file a proof of claim in this case was excusable, and the claim was deemed timely.

Since his decision in Hillsborough Holdings, Judge Paskay has had at least one opportunity to fine tune his analysis of excusable neglect under Pioneer. In a thus far unreported opinion in the Bicoastal case, Judge Paskay rejected a claimant's attempt to file an indemnity claim four years after the bar date. In the interim, the debtor's plan of reorganization had been confirmed and consummated, with thirteen distributions to general unsecured creditors. In analyzing the claim, Judge Paskay first determined that the claimant and his attorney had consciously decided not to seek indemnification from the debtor when the issue first arose just after the bar date had passed. Thus, the delay in filing was not attributable to neglect. Furthermore, Judge Paskay found that allowing the extension of time would prejudice the debtors and significantly impact the administration of the case, given confirmation of the debtor's plan and distributions under the plan.

In conclusion, it is clear the Supreme Court's decision in Pioneer represents a potentially significant loosening of the standard for determining excusable neglect in the Eleventh Circuit. Although the vast majority of bankruptcy courts have followed the Pioneer analysis, several have attempted to narrowly interpret its scope. Moreover, since a determination of excusable neglect under Pioneer is an equitable inquiry based upon the circumstances of each case, there are likely to be inconsistent results from court to court. Thus, although Judge Paskay has indicated in the Hillsborough Holdings and Bicoastal cases that he will engage in the equitable inquiry set forth in Pioneer, it is not yet clear the extent to which the other Tampa Division judges will do the same, or, if they do, the extent to which their analysis will mirror that of Judge Paskay or any other bankruptcy judge.

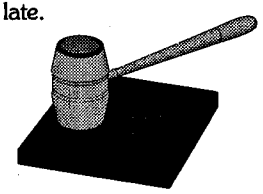
--- Alfred A. Colby

ENDNOTES

[1] The Pioneer case dealt with a late filed claim in a Chapter 11 case. Since then, courts have applied the Pioneer standard in other contexts involving Rule 9006(b)(1). In addition, some courts have applied the Pioneer standard to other instances where a showing of excusable neglect is required, such as Bankruptcy Rule 8003 and Federal Rule of Civil Procedure 60.

[2] Judge Paskay further supports his finding that the delay was beyond the claimant's reasonable control by citing Linder v. Trump's Castle Associates, 155 B.R. 102 (D.N.J. 1993) for two somewhat troublesome propositions. The first is that the claimant should not be punished for the mistakes of counsel. This proposition is in apparent conflict with the Supreme Court's opinion in Pioneer. Pioneer, 113 S. Ct. at 1499. The second Linder proposition is that the business sophistication of a claimant and the bankruptcy experience of claimant's attorney are factors in determining whether a delay is beyond the reasonable control of claimant. While in accord with Pioneer's statement that the inquiry is an equitable one, examining these factors runs the risk of creating differing standards between claimants, and of more concern, between bankruptcy and non-bankruptcy lawyers.

Editorial Note: In connection with this issue, see B. Harrill, Equitable Standards of Excusable Neglect: A Critical Analysis Of Pioneer Investment Services Co. vs. Brunswick Associates Limited Partnership, XI Bankr. Dev.J.1 (1995); also see In re Dartmoor Homes, Inc., 175 B.R. 659 (Bankr.N.D.Ill. 1994). This very recent decision is not cited in Ms. Harrill's article, but probably contains the most thoughtful post-Pioneer Investment analysis. This case involved a proof of claim that was only two weeks late.



SUPREME COURT UPDATE: MORE ON ADMINISTRATIVE FREEZES

On March 27, 1995, the United State Supreme Court unanimously granted petition for certiorari in Citizens Bank of Maryland v. Strumpf, 195 U.S. Lexis 2257; 63 U.S.L.W. 3705. At issue is the question of whether a bank may administratively freeze the account of a depositor who enjoys the benefits of the automatic stay pursuant to Bankruptcy Code § 362. In Citizens Bank, depositor Strumpf defaulted on a loan and filed a voluntary bankruptcy petition shortly thereafter. Citizens Bank placed an administrative freeze on Strumpf's checking account, and sought bankruptcy court relief to effect a setoff with respect to $3,200 remaining in his deposit account. While Citizens Bank's stay relief motion remained pending, Strumpf was unable to make withdrawals.

Upon consideration of the issue, the Maryland bankruptcy court ruled that the administrative freeze was violative of the automatic stay. By the time that Citizens Bank had obtained stay relief, Strumpf had predictably withdrawn all the funds from the deposit account. On appeal, the district court reversed the bankruptcy court's opinion, finding that no violations of the sty had occurred. Citizens Bank of Maryland v. Strumpf, 138 B.R. 792 (D. Md. 1992). However, the Third Circuit reinstated the bankruptcy court's opinion, creating a conflict among the circuits. Strumpf v. Citizens Bank of Maryland, 37 F.3d 155 (4th Cir. 1994).

The Supreme Court's consideration of the administrative freeze issue has drawn keen interest from the bankers' lobby. Although the bankers' lobby may have a bias with respect to this issue, even the Department of Justice has taken the position that an administrative freeze only maintains the status quo. Regardless, it should soon be clear whether or not an administrative freeze constitutes a de facto setoff under ordinary circumstances.

For lawyers practicing within the Eleventh Circuit, the Supreme Court's consideration is particularly important. Lawyers in the Eleventh Circuit have looked primarily to one recent Eleventh Circuit opinion for guidance. B.F. Goodrich Employees Federal Credit Union v. Patterson (In re Patterson), 967 F.2d 505 (11th Cir. 1992). In Patterson, the Eleventh Circuit held that a credit union's administrative freeze was tantamount to a setoff, and was therefore violative of the automatic stay. But the facts of Patterson were atypical. Since Patterson, bank lawyers have advised their clients in a manner that accounts for Patterson's analysis; however, the Supreme Court's decision with respect to a true administrative freeze will be more useful to the bar in the great majority of situations.

The Cram-Down will report on the Supreme Court's opinion in this case when the decision is announced.

MOVERS & SHAKERS

Chief Judge Alexander L. Paskay spent three weeks in Russia participating in a panel discussion on corporate reorganization plans under bankruptcy. Judge Paskay was the only judge that the United States Information Agency invited to participate on the panel. The panel's goal was to assist Russia in forming a free enterprise economy. A more complete report will appear in the next issue of The Cram-Down.

Danelle Dykes, formerly of Salem, Saxon & Nielsen, is now with Hill, Ward & Henderson.

Dennis Levine, formerly of Kramer, Haber & McDonald, is now with Kass, Hodges.

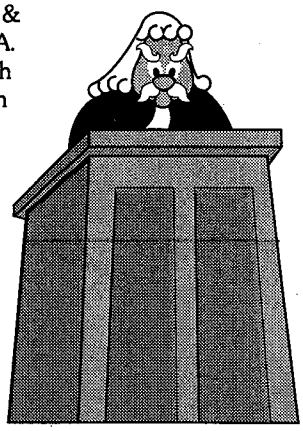
Cindy LoCicero, formerly of Foley & Lardner, is now with Gibbs & Runyan, P.A.

Kathy Mills Ross, formerly with Rudnick & Wolfe, is now a Law Clerk with Judge Thomas E. Baynes.

Lynn Ramey, formerly with Rumberger, Kirk & Caldwell, is now with Salem, Saxon & Neilsen.

Cindy Turner, formerly with Watkins & Principe, is now a Law Clerk with Judge Alexander L. Paskay.

Brian Burden, formerly of the firm Eddy & Burden, P.A., has left the firm to continue his practice as a sole practitioner.



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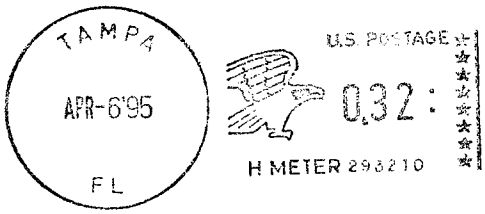

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