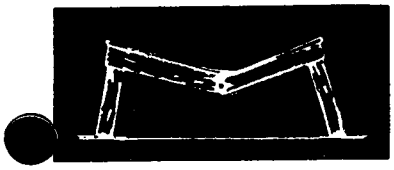

The Cram-Down

Steven M. Berman, Editor

Tampa Bay Bankruptcy Bar Newsletter — Fall 1997

ATTORNEYS' FEES FOR DEBTORS IN CREDIT CARD ADVERSARIES

DENNIS J. LeVINE, ESQ. and D. BRETT MARKS, ESQ.
DENNIS J. LeVINE, P.A.

In recent litigation of dischargeability actions for "credit card fraud" under Section 523(a)(2), courts have increasingly found in favor of debtors.[1] Many of these courts are holding creditors, especially credit card issuers, accountable for what the courts consider "casual and inadequate lending practices" and their "irresponsible" actions in sending unsolicited, pre-approved credit cards out to the general public without any proper investigation.[2] Judge Cristol recently criticized the credit card industry in two opinions, finding:

> With little regard to levels of financial sophistication, the credit card industry has deluged virtually every adult American (and the unemployed minor children of many) with invitations to become a charge customer. Many of these solicitations offer "pre-approved" credit, whose extension requires nothing but a signature...Lending practices almost encourage the misuse of credit, and affirmatively solicit use of the account to pay other existing credit card accounts...Credit card issuers rarely investigate for changes in financial circumstances or to assess whether unsecured debt has grown to imprudent levels.[3]

> What kind of underwriting procedures were used by First Card Services, Inc. in approving an $8,000 cash advance to a customer with over $40,000 in credit card debt and no income for over a year? Where did the Debtor, a 57-year old Cuban refugee with a third grade education get this magic card in the first place? He testified that he never applied for the card. 'They sent it to him in the mail.' Is this a great country or what?[4]

Section 523(d) authorizes an award of attorney's fees and costs to a debtor who successfully defends against a Section 523(a)(2) dischargeability action. Section 523(d) states:

> If a creditor requests a determination of dischargeability of a consumer debt under (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Congress enacted Section 523(d) with the Bankruptcy Code in 1978 to protect the honest consumer debtor who, afraid of incurring attorney's fees, would quickly settle with an aggressive creditor who filed a nondischargeability action. According to the legislative history, the purpose of § 523(d) is "to discourage creditors from initiating meritless actions based on § 523(a)(2) in the hope of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start."[5]

To obtain an award of attorney's fees under Section 523(d), the debtor must prove that:

(a) a creditor requested a determination of dischargeability of debt under § 523(a)(2);
(b) the debt is a consumer debt; and
(c) the debt was discharged.[6]

When the debtor makes a prima facie showing by establishing these three elements, the burden shifts to the creditor to prove either:

(a) the creditor's actions were substantially justified; or
(b) special circumstances exist which would make an award of fees unjust.[7]

Under Section 523(d), the litigation must involve a consumer debt. Section 101(8) defines consumer debt as "debt incurred by an individual primarily for a personal, family, or household purpose." A classic situation where a loan is incurred for consumer purposes is found in In re Jeffares.[8] In Jeffares, Judge Paskay found that the debtor used funds obtained from the plaintiff to pay utility bills, mortgage payments, and to purchase food, lodging, and other miscellaneous items of a consumer nature. The court awarded attorney's fees and costs to the debtor under Section 523(d) after granting summary judgment in his favor. Bankruptcy courts have uniformly held, however, that a credit transaction is not a consumer debt when it is incurred with a profit motive.[9] *(continued on page 2)*

(Credit Card Adversaries continued from page 1)

Standards for Examining Substantial Justification

A creditor can escape the obligation to pay the debtor's attorney's fees under Section 523(d) by showing that the adversary proceeding was "substantially justified". The "substantially justified" language of Section 523(d) has its genesis in the Equal Access to Justice Act ("EAJA"), which governs claims for attorney's fees by litigants against the federal government.[10] Under the EAJA, substantially justified means "justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person."[11] The creditor must show that its challenge had a reasonable basis in both law and fact.[12] Additionally, a court may review the facts the creditor had knowledge of at the time it filed a dischargeability action to determine whether the creditor was substantially justified.[13]

Courts have considered the following factors in determining whether a creditor is substantially justified in filing a dischargeability action and therefore immune from an award of attorney's fees:

1) Whether the creditor proved every element of his case.[14]

2) Whether the creditor continued to prosecute the case past the point when it knew or should have known that it could not carry its burden of proof.[15]

3) Whether the creditor conducted discovery.[16]

4) Whether the creditor reviewed the debtor's schedules prior to filing Section 523(a)(2) action.[17]

5) Whether the creditor conducted a formal or informal investigation of claim prior to filing the action.[18]

6) Whether the creditor was negligent in extending credit.[19]

7) Whether the creditor failed to consider controlling case law.[20]

8) Whether the creditor adequately pled sufficient allegations in the complaint.[21]

9) Whether the creditor's sole intent in filing the action is to force a quick settlement.[22]

10) Whether the creditor had a reasonable basis for filing the action.[23]

Special Circumstances to Avoid an Award of Attorney's Fees

Where the court finds that a creditor is not substantially justified in filing a 523(a)(2) action, the creditor has one final argument to avoid paying the debtor's costs and attorney's fees. Under Section 523(d), the creditor may show the court that "special circumstances" exist that would make an award of attorney's fees unjust. In In re Kirkland, the court held that the equitable principles enunciated by the EAJA courts must be applied in light of the purposes for which Section 523(d) was enacted (i.e. deterring creditors from filing unwarranted exceptions to discharge).[24]

Other fact situations where courts have construed the special circumstances language of Section 523(d) include:

1) Creditor's failure to receive notice of trial is not a special circumstance where creditor failed to move for relief from judgment.[25]

2) No special circumstances where creditor failed to assert novel legal theory.[26]

3) Special circumstances found where the debtor comes into court with unclean hands.[27]

Creditor Strategies to Avoid an Award of Attorney's Fees

In determining whether a creditor is substantially justified in bringing an action under Section 523(a)(2), the Courts generally look at the creditor's background investigation conducted prior to filing suit. Thus, a creditor should thoroughly review the account history of the debtor to determine the payment history on the account. When a creditor does not do so, courts tend to be very unsympathetic.[28]

The Bankruptcy Code provides a creditor with several procedural mechanisms to conduct a thorough background check of the debtor prior to filing an action under Section 523)(a)(2). For instance, Section 341 of the Bankruptcy Code allows a creditor to examine the debtor at the Meeting of the Creditors.[29] Additionally, a creditor may take the debtor's deposition pursuant to Bankruptcy Rule 2004.[30] As a rule, every creditor's attorney should conduct a thorough investigation prior to filing a nondischargeability action under Section 523(a)(2) (i.e. look at the Court file; call the debtor's attorney; attend the creditors meeting; review the debtor's account history) prior to filing a dischargeability action under Section 523(a)(2). The subsequent dismissal of the action likely will not save the day, since many courts hold that a judgment in favor of the debtor is not required as a basis for an award of attorney's fees under Section 523(d).[31] ❑

(footnotes available upon request)

PEOPLE ON THE GO

Jules S. Cohn joined Akerman, Senterfitt & Edison, P.A. as head of the bankruptcy department in the Orlando office. Mr. Cohen has practiced bankruptcy law in Orlando for over 20 years, has served as a Chapter 7 and 11 trustee, and is a Fellow of the American College of Bankruptcy. Mr. Cohn represents secured creditors, lessors, landlords, large unsecured creditors, and shareholders.

Vicki Critchlow began clerking for Judge Glenn in the Middle District of Florida. Mrs. Critchlow was a former associate with Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. in its business litigation department.

Donald R. Kirk joined Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. as an associate in its business litigation department. Mr. Kirk graduated with high honors, Order of Coif, from the University of Florida College of Law. Mr. Kirk's practice areas include bankruptcy and creditors' rights, Uniform Commercial Code, contract disputes, real estate disputes, and partnership disputes.

D. Brett Marks began work with Dennis J. LeVine, P.A. Mr. Marks received a B.A. from the University of Florida and a J.D. from St. Thomas University College of Law. Mr. Marks practices primarily in the areas of business and consumer bankruptcy amd state court collection matters.

Chip Morse, Steve Berman, and Al Gomez recently formed the law firm of **Morse, Berman & Gomez, P.A.** Mr. Morse formerly practiced as a sole practitioner. Mr. Berman was a partner with Salem, Saxon & Nielsen and has practiced bankruptcy law for over seven years. Mr. Gomez formerly practiced with Stichter, Riedel, Blain & Prosser and has been in practice for over eight years. The new firm will concentrate its practice in the areas of bankruptcy and insolvency.

Contact Donald R. Kirk at (813) 222-2022, 229-8313 (fax), or dkirk@fowlerwhite.com with contributions to this column; include moves, awards, or other happenings concerning members of the HCBBA. ❑

FROM THE DEPARTMENT OF JUSTICE

ATTORNEY GENERAL APPOINTS U.S. TRUSTEE TO OVERSEE BANKRUPTCY CASES IN FLORIDA, GEORGIA, PUERTO RICO AND THE VIRGIN ISLANDS

Washington, D.C. -- Attorney General Janet Reno has appointed C. David Butler as the U.S. Trusee to oversee the administration of bankruptcy cases in the Judicial Dsitricts of Florida, Georgia, Puerto Rico and the Virgin Islands, the Justice Department announced on June 18, 1997.

Butler, whose appointment for Region 21 runs for five years, assumed his duties on June 16, 1997. As U.S. Trustee, Butler will play an important oversight role in the administration of the bankruptcy process -- appointing and monitoring individuals employed to represent bankruptcy estates, assessing the feasibility of plans of reorganization, commenting on the fee applications of attorneys and other professionals, and investigating and assisting in the prosecution of bankrtupcy crimes.

The principal office for Region 21 is located in Atlanta, with district offices in Savannah and Macon, Georgia; Tampa, Orlando, Miami and Tallahassee, Florida; and San Juan, Puerto Rico.

Butler brings nearly 30 years of experience in the bankrtupcy field to his new role as U.S. Trustee. He earned a B.A. from the University of Georgia in 1964 and his Juris Doctor in 1967 from that University's Lumpkin School of Law. Butler spent his career in private practice with an emphasis on corporate reorganizations and bankruptcy litigation. Prior to his appointment, Butler was a Partner in the Atlanta firm of Alston & Bird.

Butler is active in a number of professional organizations, including the Southeastern Bankrtupcy Law Institute where he served as President from 1995 to 1996. In addition, he served on the American Bar Association's Business Bankruptcy Subcommittee of the Business Law Section and he is a fellow in the American College of Bankrtupcy. He is a member of the State Bar of Georgia, as well as the Atlanta Bar Association, of which he is a past President. Butler has been a frequent lecturer on bankrtupcy, speaking at seminars and classes offered by the American Bar Association Division of Professional Education, the Emory Law School, the Georgia Institute for Continuing Legal Education, the Atlanta Bar Committee for Continuing Legal Education, and the Business Law Institute.

Butler is also involved in a number of charitable and community organizations. He sits on the Board of Directors of the Sandy Springs Learning Center, an organization that teaches English and job skills to the Hispanic community; and is also active with the YMCA, serving on the Board of Directors and as Secretary of the Metropolitan YMCA of Atlanta and as Past Chairman of the Downtown Branch of the YMCA.

A native of Georgia, Butler is married with five adult children. □

U.S. TRUSTEE'S OFFICE WELCOMES NEW CHAPTER 7 TRUSTEES TO THE PANEL

The following individuals were selected to act as Chapter 7 panel trustees.

Andrea Pope Bauman

Ms. Bauman is a 1986 honors graduate of Florida Southern College where she received a Bachelor of Science degree with concentrations in accounting, finance and marketing. During her college career, she was active in several organizations and was recognized as the Outstanding Junior Business Student and as a President's Scholar. Her post college career has included portfolio management, actuarial analysis, forecasting and taxation. As a six (6) year employee of the Internal Revenue Service, Ms. Bauman was responsible for the resolution of a wide variety of tax cases and earned considerable recognition including an IRS Special Act Award in 1994 and the IRS Managers Award in 1995. In November, 1996, Ms. Bauman successfully completed the Uniform Certified Public Accountant Exam.

Ms. Bauman is a member of a Rotary Club Group Study Exchange Team, and spent five weeks in Germany meeting with industry leaders, observing various businesses, and speaking on Central Florida Business and industry. She hosts others who come to the United States for cultural and business exchanges, and serves as a volunteer spokesperson for a United Way of Central Florida Agency.

Carolyn R. Chaney, Esquire

Ms. Chaney is a native Floridian, receiving her elementary and high school education in Bradenton, Florida. She is a 1981 graduate of the University of South Florida, where she received a Bachelor of Arts degree in Criminal Justice, and a 1983 graduate of the Stetson University College of Law. After obtaining her Juris Doctor degree, Ms. Chaney briefly served as a legal assistant for a Chapter 7 trustee and practiced law in both the corporate and private sector. Since September, 1987, Ms. Chaney has been employed by the Federal Deposit Insurance Corporation and/or the Resolution Trust Corporation with primary duties in the area of Bankruptcy. Most recently, Ms. Chaney has served as Section Chief of the Outside Counsel Management Section of the FDIC/RTC in Atlanta, Georgia.

Shari Streit Jansen, Esquire

Ms. Jansen is an attorney who maintains a practice in Sarasota, Florida. Her practice is concentrated in the areas of debtor and creditor representation in bankruptcy as well as state court civil matters. Ms. Jansen is a 1979 graduate of the University of Michigan where she earned a Bachelor of Arts degree, with High Distinction, in Political Science. In 1982, she earned a Juris Doctor degree from Wayne State University in Detroit, Michigan. Ms. Jansen is a member of both the Michigan and Florida Bars, and practiced labor law with a Detroit firm before relocating to Tampa in 1984. She is also a member of the Florida Association of Women Lawyers, Sarasota Chapter, Sarasota County Bar Association and the Tampa Bay Bankruptcy Bar Association.

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WHEN A CREDITOR STEPS IN THE SHOES OF THE TRUSTEE, FOR A CHANGE.

DONALD KIRK, ESQ.
FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL & BANKER, P.A.

An individual creditor is typically at the mercy of the trustee or Creditors' Committee or on his own to protect his claim. The decisions of the trustee or Creditors' Committee do not always, however, favor all creditors or the entire estate. Unfortunately, improper bias may influence a trustee's decision, for example, not to pursue a preference action that, if successful, would benefit the estate. The individual creditor is not without recourse in such situations.

For example, an individual creditor may assert and pursue defenses to other creditors' reclamation claims on behalf of the estate if the Debtor and/or the Unsecured Creditors' Committee has refused to do so. Section 1109(b) of the Bankruptcy Code confers such standing if certain prerequisites are satisfied. Section 1109 states:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, **a creditor**, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

U.S.C. §1109(b) (emphasis added).

Generally, the Bankruptcy Code assigns responsibility for various causes of action, including objections to creditor claims, to the trustee or debtor-in-possession. 7 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶1109.05[1] (15th ed. 1997) (hereinafter "Colliers"). Section 1109(b), however, permits a court to authorize someone other than the trustee to commence litigation on behalf of the estate. "In general, a party in interest must satisfy three requirements in order to override the trustee's decision to refrain from prosecuting a particular cause of action: (1) the trustee must have refused to pursue the litigation after receiving a demand that he or she take action; (2) the refusal must be "justified"; and (3) the claim, if successful, must be one that will benefit the estate." Colliers at ¶1109.05[2].

The first element usually requires the "party in interest" to serve a written demand on the trustee to pursue a certain matter. See Colliers at ¶1109.05[2][a]. Courts recognize an exception to this requirement, however, if demand is presumptively futile under the circumstances. See id. The second element, the trustee's "unjustified" refusal, is satisfied if the "party in interest" demonstrates that the action is colorable and the trustee fails to establish a legitimate reason for refusing to pursue the action. See Colliers at ¶1109.05[2][b]. The final element simply requires that the outcome of the case, if successful, would result in a benefit to the estate not outweighed by the costs of pursuing the matter. See Colliers at ¶1109.05[2][c].

Courts have extended standing to individual unsecured creditors to pursue actions on behalf of the estate. In In re Shelby Hotel Group, Inc., 123 B.R. 98 (N.D. Ala. 1990), the Court permitted an individual creditor to prosecute various preferential transfers and fraudulent conveyances on behalf of the estate. Id. at 103-04. The Debtor-in-Possession had no incentive to collect the transfers and opposed the creditor's motion to prosecute the matters. Id. at 100, 103. The Court conferred standing to the individual creditor, reasoning that §1109(b) extends its implied qualified right to initiate proceedings on behalf of the estate to individual creditors. Id. at 101. Noting that the Debtor-in-Possession had close ties with all entities to whom the alleged improper transfers were made, the court found that the Debtor-in-possession would never bring adversary proceedings to prosecute the claims. Id. at 103. Due to this conflict, the court conferred standing on the creditor to protect the interests of the estate. See id. The court stated "the fiduciary obligation of a debtor-in-possession creates a high degree of responsibility to creditors and cannot be allowed simply to become a license ... to waste estate assets." Id.

In In re Morrison, 69 B.R. 586 (Bkrtcy. E.D. Pa. 1987), the Court discussed the ability of an individual creditor to pursue actions on behalf of the estate. An unsecured creditor filed an objection to a secured creditor's claim. Id. at 588. The issue was whether the unsecured creditor had standing to assert the claim and thereby usurp the trustee's authority to object to claims. Although the court refused to confer standing, its decision is not fatal to all creditors seeking standing to pursue claims on behalf of the estate.

The Court denied the unsecured creditor's motion because the unsecured creditor was attempting to utilize the trustee's exclusive §544 "strong arm" powers, which the Code grants exclusively to the trustee. See id. at 590-92. However, the Court extensively discussed the policy benefits of allowing an individual creditor to pursue matters on behalf of the estate in other situations. The court stated that "unless the Code is clear in stating otherwise, we believe it just to accord any party expending the time and financial resources to raise a claim (and) the opportunity for a disposition..." Id. at 589. Further, the court stated that "'a general creditor of a bankrupt has no right to contest another creditor's claim . . . unless upon application the trustee has refused to do so and that . . . court has authorized the creditor to proceed in the trustee's name.'" Id. (quoting Fred Reuping Leather Co. v. Ft. Greene Nat'l Bank of Brooklyn, 102 F.2d 372, 372-73 (3d Cir. 1939)).

In the Middle District of Florida, Judge Baynes has also discussed the derivative right to institute a suit on behalf of the estate when the Debtor-in-Possession or the trustee fails to act. See In re Florida Group, Inc., 123 B.R. 923 (Bkrtcy. M.D. Fla. 1991). In In re Florida Group, Inc., Judge Baynes found that §1109(b) only confers the right to pursue an action on behalf of a Chapter 11 estate if the Debtor-in-Possession failed to pursue a viable cause of action and a court has approved the filing of that lawsuit by the moving party. See id. at 924. Moreover, the Court noted that even if the Debtor-in-Possession sought to pursue its cause of action, a creditor may still institute an action if the Debtor-in-Possession's action is not taken in good faith. Id. Although the Court denied the movant's motion to institute a suit, and the movant was the creditors' committee, this case exemplifies the Middle District's recognition of a "party in interest's" right to pursue a cause of action or a defense on behalf of the estate pursuant to §1109(b).

In In re The Charter Co., 68 B.R. 225 (Bkrtcy. M.D. Fla, 1986), the Middle District allowed general creditors to object to another creditor's claim even though the general creditors did not first request the Debtor-in-Possession to take action. Id. at 228. The Court

(continued on page 5)

A "RASH" DECISION: SUPREME COURT SETS VALUATION STANDARD FOR COLLATERAL UNDER SECTION 506(A)

ALFRED A. COLBY
KETCHEY HORAN, P.A.

The United States Supreme Court recently resolved a split among the Circuit Courts by holding that where a Chapter 13 debtor elects to retain and use secured property, the property's value for purposes of Section 506(a) of the Bankruptcy Code is equal to its "replacement value." In Associates Commercial Corp. v. Rash, ____ U.S. ____, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997), debtors in the freight-hauling business elected to retain a truck and attempted to cram down a secured creditor under Section 1325(a)(5)(B). The debtors argued that the creditor's allowed secured claim under Section 506(a) should be based upon a "foreclosure value" of $31,875. Not surprisingly, the secured creditor disagreed, and argued that its allowed secured claim was the truck's "replacement value," or $41,000. The Bankruptcy Court agreed with the debtors, and the District Court affirmed. A panel of the Fifth Circuit reversed, but was overruled upon a hearing en banc.

The Supreme Court reversed the Fifth Circuit and remanded for further proceedings. The Court, relying upon the second sentence of Section 506(a), which provides that the value of secured collateral "shall be determined in light of the . . . disposition or use of such property . . .", reasoned that because the debtors elected in their Chapter 13 plan to retain and use the truck, the creditor's allowed secured claim would be based upon the truck's "replacement value." The Court defined "replacement value" as "the price a willing buyer in the debtors' trade, business, or situation would pay to obtain like property from a willing seller." The Court expressly rejected those Circuit Court decisions that used either "foreclosure value" or "split-the-difference value" in cases where a debtor retains secured collateral under a Chapter 13 plan.

As is often the case, the Supreme Court's decision in Rash raises as many questions as it answers. First, because the decision interprets Section 506(a), which is applicable to all operative Chapters of the Bankruptcy Code, there is an argument that Rash applies in other contexts, such as in connection with a cram down under Section 1129(a)(2)(A)(i) or a redemption of collateral under Section 722. Second, the Court did not address the proper standard of valuation for situations in which a debtor either surrenders secured property or sells it within the context of a Chapter 11 or 13 plan.

Finally, beyond the application of Rash to situations outside of a Chapter 13 cramdown, the Supreme Court left to the Bankruptcy Courts the ultimate determination of "replacement value". At footnote 6 of the decision, the Court attempted to set forth some basic guidelines without committing to any particular valuation method, stating that whether "replacement value is the equivalent of retail value, wholesale value or some other value will depend on the type of debtor and the nature of the property." Although evidence of foreclosure value would obviously no longer be relevant, proper determination of replacement value under Rash will necessarily be fact-intensive, and may be more complex than is currently the case.

For a more in-depth look at the Rash decision and its implications, the author recommends the point/counter-point discussion at pages 18 and 19 of the July/August 1997 ABI Journal. ❑

(Chapter Seven Trustees continued from page 3)

Catherine F. Moss, Esquire

Ms. Moss is a 1985 graduate of the University of South Florida, where she earned a Bachelor of Arts degree in Accounting, and a 1988 graduate of the University of Florida College of Law. After earning the degree of Juris Doctor, Ms. Moss was awarded an L.L.M. in Taxation from the University of Florida in 1989. During her professional career, Ms. Moss has served as a Tax Auditor for the Internal Revenue Service, and a private accountant and tax preparer. She has gained considerable experience in bankruptcy matters both from serving as law clerk to the Honorable Thomas E. Baynes, Jr., as well as representing both debtors and creditors in bankruptcy during her five years in private practice. Ms. Moss is a member of the Florida Bar Association.

FORT MYERS

Thomas S. Heidkamp, Esquire

Mr. Heidkamp is a partner in the Fort Myers law firm of Leasure, Gargano, Marchewka & Heidkamp, and specializes in the areas of bankruptcy law, consumer rights litigation, class action litigation and probate law. Born in Evanston, Illinois, Mr. Heidkamp is a 1987 graduate of the University of Illinois where he received a Bachelor of Science degree in Accounting. Thereafter, Mr. Heidkamp earned his Juris Doctor degree in 1991 from the John Marshall Law School in Chicago. Mr. Heidkamp has practiced law in the Fort Myers area since 1991, and is a member of both the Florida and Illinois Bar Associations as well as the Lee County Bar Association, the Calusa Inn of Courts, the American Bar Association, and the Tampa Bay Bankruptcy Bar Association. ❑

(Creditor Pursuit of Actions for the Estate continued from page 4)

did not apply §1109(b). Rather, the Court found that §502(a), which allows a "party in interest" to object to a claim, grants an unsecured creditor, a "party in interest", the right to object to a claim. See id. at 227.

The Court noted that usually a creditor must request a trustee to object to a claim and that the trustee refuses to object before a court may grant that creditor leave to proceed. Id. The Charter Co. court did not require this request, however, because it would be futile under the circumstances. Id. at 228. The court stated:

> To require a creditor in a Chapter 11 proceeding to first request the debtor-in-possession to take action would be an act in futility in most instances. If the debtor-in-possession has not already taken the action it may be because it has entered into a compromise agreement with the non-objecting creditor which is beneficial to the debtor but may or may not be beneficial to the general creditors.

Id. Moreover, the court noted that a Debtor-in-Possession has no law imposed duty to act in the best interests of all creditors; this fact further increased the likelihood that a request would be futile. See id. The strong policy language supporting an exception to the request requirement and the facts supporting the Court's decision to apply this exception may allow individual creditors to institute suits for the estate without a time consuming request. ❑

UPCOMING EVENTS

DATE/TIME	EVENT	LOCATION
September 30, 1997/ Noon	TBBBA LUNCH (Carl Stewart)	Hyatt Downtown
October 10-18, 1997/	Natl Bankruptcy Judges' Conference	Philadelphia
October ____, 1997/Noon	TBBBA LUNCH (Chuck Kilcoyne)	
October 22, 1997/6:00-7:30 p.m.	"View from the Bench" Judges' Reception (Please RSVP to Hilda Portales at 229-0144)	Tampa Club
October 23, 1997/8:25 - 12:30 p.m. (Late Registration at 8:00)	"View From The Bench" Seminar	Camberly Plaza, Sabal Park
November 12, 1997/9:00 - Noon	NBI Fundamentals of Bankruptcy Law and Procedures in Florida	Camberly Plaza, Sabal Park
November ____, 1997/Noon	TBBBA LUNCH (523 topic)	
December 4, 1997/1 p.m.	Special Pre-Seminar Workshop "Primer on Bankruptcy"	
December 5-6,1997/9 am - 5 pm	Annual Stetson Bankruptcy Law Seminar	
December ____, 1997/Noon	TBBBA LUNCH (Confirmation topic)	
January 22, 1998	Meeting BKY/UCC Committee of FL Bar, Business Law Section	Miami
February____, 1998/Noon	TBBBA LUNCH (Mini View from the Bench)	
March ____, 1998/Noon	TBBBA LUNCH (Terry Smith)	
April ____, 1998/Noon	TBBBA LUNCH (IRS)	
May ____, 1998/8:30 - Noon	"Recent Developments in Bankruptcy" Seminar (David Epstein) and TBBBA LUNCH	
June 5, 1997/Noon	TBBBA LUNCH (Evidentiary Issues Topic)	
June 26, 1998/6:30 p.m.-?	TBBBA Annual Dinner	

CONSOLIDATION OF THE BANKRUPTCY AND DISTRICT COURT CLERKS' OFFICES: A TROUBLESOME MOVEMENT

ALEXANDER L. PASKAY
CHIEF BANKRUPTCY JUDGE

Prior to the Bankruptcy Reform Act of 1978, the bankruptcy court operated without its own clerk or clerk's offices. The "clerk" of the bankrupcy court was not even an adjunct or a unit of the district court. Rather, the deputy clerks, hired by the clerk of the district court were also supposed to process bankrupcy cases. The functions of the bankrupcy clerk were performed by individuals without special qualifications or expertise, such as a jury commissioner or a probation officer, appointed by the judges of the district court. The bankrupcy court had no control or authority over these clerks. I served for sixteen long years under this system.

When it enacted the Bankrupcy Reform Act of 1978, Congress explicitly provided that bankrupcy clerks' offices are to be maintained separate and apart from the office of the district clerk. See Pub. L. No. 95-353; S. Rep. No. 984, 95th Cong. 2nd Sess., 2 (1978).

In 1983, a movement began in the Central District of California to attempt to abolish the office of the clerk of the bankrupcy court by consolidating that office with the office of the clerk of the district court. I and others became concerned with this development. We prevailed on Senator DeConcini and Congressman Rodino to propose an amendment of §156 of Title 28 by adding sub-section (d). This provision, which became effective on October 27, 1986, states:

> (d) No office of the bankruptcy clerk of court may be consolidated with the district clerk of court office without the prior approval of the Judicial Conference and the Congress.

Recently, the office of the clerk of the bankrupcy court in the Southern District of West Virginia was effectively abolished by the District Court. The clerk placed the entire operation of the bankrupcy court under the authority of the clerk of the district court demoting the clerk of the bankrupcy court to the position of a sort of "chief deputy" to the clerk of the district court. In order to justify this blatant violation of the law, the district court stated that it was done voluntarily and it did not amount to a "consolidation." One need only recall, however, that well known adage that if it has feathers like a duck, a bill like a duck, walks like a duck and sounds like a duck, it is fair to infer that it is a duck. Interestingly, the Chief District Judge of the Southern District of West Virginia, in his letter of May 17, 1997, wrote to the Chief District Judge of the Western District of Washington, "It remains to be seen, however, since we are in the seminal stages, how this experiment will work out when we have a year or two history of consolidation under our belts." (emphasis supplied).

The West Virginia experiment is not an isolated aberration. At a recent meeting of the Chief District Court Judges sponsored by the Federal Judicial Center, the issue of coordination of the delivery of administrative services in each district was on the agenda. As part of the discussion of the administrative relationship between the district courts and bankrupcy courts it was noted that by and large bankrupcy courts have been unwilling to enter into arrangements with the clerks of the district court to combine administrative functions like automation, procurement, etc., viewing them as a first step toward "consolidation." One can only wonder what the "etc." means.

Since that meeting, the Administrative Office of the United States Courts received inquiries from over twenty district courts as to the procedure to follow to consolidate the clerks' offices or "otherwise reorganize." The Director of the Administrative Office of the United States Courts, in his letter of May 14, 1997, to Chief Justice Rehnquist, noted that Chief Judge John Parker of the District Court for the Middle District of Louisiana directed the "unit heads"; i.e., court's probation and pretrial services and the clerk of the bankrupcy court to get together to make proposals leading to consolidation of their administrative functions. It appears that there is a similar attempt underway in the District of North Dakota.

It is my considered opinion that any attempt to reorganize for the sake of efficiency would be, in fact, a de-facto consolidation expressly prohibited by the statute. Moreover, I am satisfied that the present system--that is, an independent office of the bankrupcy clerk--serves the public and practicing bar satisfactorily. Based upon my past experience, I am also satisfied that if the processing of bankrupcy cases becomes staffed by district court clerks it would result in a substantial detriment to the public and bankrupcy bar. I believe that the threat of consolidation is real and it would be in the best interest of the organized bar to have its voice heard opposing this backhanded attempt to abolish the office of the clerk of bankrupcy court in the name of efficiency and cost savings. ❑

At a meeting of the TBBBA Board of Directors on August 18, 1997, the Board voted to amend the Tampa Bay Bankruptcy Bar Association Bylaws to include two new membership categories.

The first category is for Chapter 7 Panel Trustees who are not attorneys. Such trustees may become regular members and can enjoy all of the benefits of membership, except the right to vote.

The second category is for law students. Such students may also become regular members and enjoy all the benefits, except for the right to vote.

The Middle District Court is considering amending Local Rule 4.11, which governs use of photograph and broadcast equipment in the Middle District Courts. Changes include the addition of computer and cellular equipment to the list of forbidden items, unless allowance is ordered by the Court. Says Lisa D. Rosenthal, Chief of Operations of the Court, "The amendment is intended to clarify the types of electronic devices allowed and who may possess such items while in Court or in any part of a building where federal judicial proceedings are conducted." Comments or suggestions regarding the proposed amendment are solicited by the Court and should be directed to Lisa D. Rosenthal, Chief of Operations, Office of the Clerk, United States Courthouse, 611 North Florida Avenue, Room 413, Tampa, Florida 33602, no later than September 19, 1997. The amendment will become effective without further order on October 1, 1997, unless substantive changes are made.

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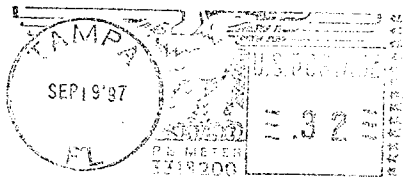

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