The Cram-Down

VOL. 5 NO. 2 | Tampa Bay Bankruptcy Bar Association Newsletter | November, 1994

American-Hungarian Bankruptcy Symposium 1994: A Great Success

The first American Hungarian Bankruptcy Symposium is now history. The Symposium, sponsored by the American Bankruptcy Institute and by Stetson University College of Law, was co-chaired by Alexander L. Paskay, Chief Bankruptcy Judge, Middle District of Florida, and Dr. Kornelia Nagy-Koppany, resident partner in Budapest of the Kansas City law firm of McDowell Rice and Smith. The publicity and registration in the United States was handled by the Continuing Legal Education Department of Stetson. Hungarian registration and publicity was under the direction of Dr. Nagy-Koppany and Dr. Gyorgyi Viszmeg, also a member of the McDowell Rice & Smith law firm. Travel arrangements in the United States were by Travel Services Unlimited, Inc., and in Hungary by IBUSZ, a recently privatized Hungarian travel agency.

The American contingent, made up of bankruptcy practitioners from Florida, New York, and Kansas City, assembled in the newly redecorated Marriott on Sunday morning, September 18. They visited the Royal Castle and the historical sights on Buda Hill, including the coronation church of St. Mathias and the Fishermen Bastion. A Sunday evening reception was attended the American visitors, their Hungarian counterparts, and numerous Hungarian dignitaries. Those in attendance, including the members of the Hungarian faculty, were hosted by the McDowell Rice & Smith firm. The reception was held at the Monarchia Restaurant, an exquisite restaurant in Buda.

The formal program commenced promptly at 9:00 a.m. on Monday, September 19, at the elegant and classic Hotel Beke. Judge Paskay and Dr. Nagy-Koppany introduced the American and the Hungarian faculty. The introductions were followed by three days of presentations by Judge Paskay, Dr. Gabor Torok (Hungarian), Mr. Claude Rice of the law firm of McDowell Rice and Smith of Kansas City, Dr. Dezso Sugar (Hungarian), Mr. Leonard Gilbert of the law firm of Carlton Fields Ward Emmanuel Smith & Cutler of Tampa, Dr. Andrea Csoke (Hungarian), and Ms. Lynn Ramey of the law firm of Rumberger, Kirk & Caldwell of Tampa.

The presentations were simultaneously translated by two interpreters who alternated every 15 minutes. The interpreters had some initial difficulties with translating certain technical terms like automatic stay, debtor-in-possession, insiders, U.S. Trustee, and (of course) cram-down. After a short course by Judge Paskay, the translators mastered the technical terms of the Bankruptcy Code and no longer had any problem with the translation. According to some, the translators started to speak with accents even when they were translating from English to Hungarian. The program concluded at 1:00 p.m. each day, giving the American participants an opportunity to take sightseeing trips organized by IBUSZ or free guided tours by Judge Paskay.

On Monday evening, the Budapest Bar hosted the American contingent at a sumptuous dinner in a small but elegant and colorful restaurant accompanied with authentic Gypsy music. The farewell banquet, a tremendous success, was held at the world famous Gundels restaurant. However, the social highlight of the trip was the visit organized by IBUSZ to a typical Hungarian ranch in the Hungarian lowland (alford) referred to as the Puszta. The American participants were entertained by the Hungarian horsemen riding wild Hungarian stallions. The horsemen rode bareback, at times standing up on horses galloping 30 to 40 miles per hour. After this demonstration, it was time to sit down to a hearty dinner of unlimited excellent food, wine, and, of course, the ever present Gypsy band.

On Thursday morning, the group visited the Hungarian bankruptcy court at the invitation of Dr. Kiss, the presiding judge. Dr. Kiss gave a guided tour of the court, the clerk's office, and the hearing rooms. The court facility was, frankly, quite spartan and lacked any warmth or decor. The group also visited the law offices of McDowell Rice and Smith located nearby. The day was concluded with the last sightseeing tour conducted by Judge Paskay. The trip included a visit to the newly redecorated giant covered farmers' market resembling the famous market Les Halles in Paris.

It can be said without fear of contradiction that the symposium was a great success. The Florida Bar accorded 14 hours of CLE credit for the program. The participants had a great time after hours in the casinos (even though no one broke the bank), the shopping, and of course, the rich Hungarian food. Perhaps most notably, the American participants appreciated the first class warmth and hospitality extended by their Hungarian hosts.

Of course, none of this could have taken place without the generous financial assistance of the American Bankruptcy Institute and the foresight of the Chairman of the ABI, Harry Dixon. Mr. Dixon has recognized and appreciated the importance of educating the newly liberated countries like Hungary during their sometimes painful transition from a state controlled to a free market economy. Judge Paskay has thanked the TBBBA for its support of this effort.

LAW CLERK PROFILE: CHERYL THOMPSON

For this newsletter, the Judicial Liaison Committee profiles Cheryl Thompson, who is a career law clerk with Judge C. Timothy Corcoran, III. Cheryl obtained her undergraduate degree from The State University of New York at Plattsburgh. She obtained a Master of Arts at Syracuse University and graduated from law school at Tulane University, Magna Cum Laude.

Cheryl is a registered dietician. Prior to joining Judge Corcoran in Orlando, she spent four years in Saudi Arabia teaching dietetics at a co-educational university.

Cheryl's husband, Richard, is a computer systems analyst consultant who works in Lakeland. Cheryl and Richard have been married 17 years and are the proud parents of four children, T.J. who is 12, Alicia who is 10, Brittany who is 3, and Kyle who is almost 2. Cheryl lives in Valrico, Florida. Her hobbies include reading and sewing.

Cheryl is very happy with the move to Tampa and is about to celebrate her one year anniversary working in the Tampa Division. Cheryl wants all members of the Bar to know that she is always available to assist by responding to questions regarding compliance with the practice and procedural requirements of Judge Corcoran.

— Jeffrey W. Warren, Co-Chair

PROCEDURAL POINTERS FROM THE BENCH

The TBBBA has undertaken to serve as a liaison between the Bench and the Bar on a wide range of issues during the past ten years. During the past year, the TBBBA has worked with our four bankruptcy judges to unify bankruptcy procedures for the convenience of both the Bench and Bar. The TBBBA has invited our judges to submit procedural pointers that counsel can use consistently to avoid confusion and promote uniformity in the Division. The following procedural pointers are based upon advice received from two of our judges:

Sufficiency of Affidavits in Bankruptcy Court

Bankruptcy practice requires the use of sworn declarations, verifications, statements, and affidavits much more frequently than general commercial litigation. Accordingly, it is especially important for bankruptcy practitioners to understand the proper form of a sworn statement's jurat. Courts confronted with defective affidavits and similar papers sometimes attempt to remedy these defects without impeding the progress of the case; however, the best way to resolve the problem is to refer the Bar to 28 U.S.C. § 1746 and Florida Statutes § 117.05(16)(a). These two statutes provide forms for acceptable jurat for sworn statements, affidavits, and verified pleadings.

One acceptable form of jurat that may be used in Bankruptcy Court is as follows:

> I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on (date).
>
> (signature)

When properly notarized, this form of jurat is acceptable for use in most statements, affidavits, and verified pleadings filed with the Court.

The jurat required for an oath or affirmation under penalty of perjury is completely different in form and purpose from an acknowledgment. Pursuant to Florida Statutes § 695.03, a notarized acknowledgment is required for any instrument concerning real property to be recorded; however, an acknowledgment merely establishes that a signature is in fact authentic. It does not constitute an oath or sworn affirmation that its contents are true and correct. Official forms of acknowledgment are found in Florida Statutes § 695.25. Accordingly, it is of little use to the Court in determining, for example, the disinterestedness of proposed counsel for the debtor, or the amount of the secured party's claim.

A recent review of the record in one mid-size chapter 11 reorganization revealed five pleadings, filed by five separate competent lawyers, all of which included some form of acknowledgment at the base of an affidavit or verified pleading rather than an acceptable jurat.

Please review the above-referenced statutes if you think that your affidavits may actually only be acknowledgments. If any further uncertainty exists as to the appropriate form of jurat, please consult the relevant statute or a judicial law clerk.

Getting In The Vote

In chapter 11, the road to the confirmation hearing is often long and arduous. A confirmation hearing is scheduled with at least twenty-five (25) days' notice to parties-in-interest pursuant to Federal Rule of Bankruptcy Procedure 2002(b). This allows plan proponents sufficient time to prepare for the all-important confirmation hearing. The Court also prepares for the confirmation hearing by reviewing the file in light of the requirements of Bankruptcy Code § 1129. The most obvious confirmation requirement is the vote; however, this is sometimes the most difficult thing for the Court to determine based upon a review of the file. This is because proponents often wait until the day of the confirmation hearing to file the ballot tabulation.

In the United States Bankruptcy Court for the Middle District of Florida, local rule 3.05 provides as follows:

> b. It shall be the responsibility of the attorney for the proponent of a plan to tabulate the acceptance and rejection for the plan. This tabulation shall be filed and served not later than ninety-six (96) hours prior to the date set for the hearing on confirmation. The tabulation shall list for each class, the total number of claims voting, the total number of claims accepting, the total dollar amount of the claims voting, the total dollar amount of the claims accepting, percentages of the claims voting which accept the plan, and percentage of dollar amount of claims voting which accept the plan. It shall be indicated for each class whether they are impaired or unimpaired and whether or not the requisite vote has been attained for each class.

(emphasis supplied).

Notwithstanding the provisions of the applicable local rule, the Court's ability to prepare for the confirmation hearing is limited by the failure of movants to file ballot tabulations at least four (4) full days prior to the time of the confirmation hearing. For judges who handle all confirmation hearings on Mondays, the final ballot tabulation should be filed and served no later than the Wednesday or Thursday of the preceding week. This enables the movant to abide by the applicable rule, and allows the Court to be fully advised as the confirmation hearing commences.

A BRIEF OVERVIEW OF HIGHLIGHTS OF THE BANKRUPTCY REFORM ACT OF 1994

On October 22, 1994, President Clinton signed into law the Bankruptcy Reform Act of 1994 (the "Act"). The Act will apply to cases filed on or after that date, with some exceptions specified in Section 703 of the Act. In the Tampa Division, In re Collingsworth, Case Number 94-10232-8C7, is the last bankruptcy case to be governed without regard to the Act. The Act applies to all cases with higher case numbers.

The Act has made several major changes in chapter 7, chapter 11, and chapter 13 of the Bankruptcy Code. Examples of specific changes include the following: extension of the residential lien-stripping rule of Nobelman to chapter 11, overruling the Deprizio decision, increasing the dollar amounts for chapter 13 eligibility, providing "fast-track" procedures for small business reorganizations, and establishing rigorous deadlines for certain single asset real estate reorganizations. These are only the more significant of scores of significant features of the Act.

Title I

The Act is comprised of seven specific titles, the first three of which contain the majority of significant new substantive amendments. Title I is entitled "Improved Bankruptcy Administration." Under this title, both commercial and consumer-oriented amendments are present.

Under Section 101, contested matters relating to stay relief must be concluded within thirty (30) days following the conclusion of a preliminary hearing. When read in conjunction with the present Code § 362(e), a motion to lift automatic stay must now be adjudicated within sixty (60) days, unless the parties consent or compelling circumstances exist.

Title I creates an expedited and simplified procedure for reaffirmation agreements in cases where the debtor is represented. A hearing on a reaffirmation agreement will not be required if the agreement complies with the amended Code § 524 and the debtor was represented by an attorney when the reaffirmation agreement was negotiated.

Many special issues are addressed by the Act's "housekeeping" Title. Although it could not seriously have been questioned in the past, this Title grants bankruptcy courts explicit authority to hold status conferences under Section 105. Near and dear to chapter 7 trustees is Section 117, increasing by $15 per case compensation for trustees. There is a specific allowance for reimbursement of creditor committee expenses to the extent incurred in the performance of the committee duties.

The Act reflects an intent to simplify smaller bankruptcy cases. Certain provisions are intended to encourage debtors to file under chapter 13 rather than chapter 7 or 11. Most obviously, chapter 13 debt limits are increased so that non-contingent liquidated unsecured debts must be less than $250,000 rather than $100,000. Non-contingent liquidated secured debts must be less than $750,000 rather than $350,000. This will allow many new debtors to take advantage of chapter 13.

The Act's dollar adjustment for involuntary cases now requires claims aggregating to more than $10,000. The priority amounts set forth in Code § 507(a) have also been increased, as have the exemptions set forth in Code § 522(d). Prospectively, the Act establishes a procedure for automatic adjustment of certain dollar amounts set forth in the Code based upon the consumer price index. The first adjustment will occur on April 1, 1998, with additional adjustments at each three-year interval thereafter.

Section 524 is amended to provide a detailed provision of the right of the bankruptcy court to enjoin specific action against third parties in asbestos related cases, which is to supplement the injunctive effect of discharge. The injunction precludes persons or governmental units from directly or indirectly obtaining payment or recovery on a claim or demand that has been dealt with under a confirmed plan of reorganization by payment from a trust described therein.

Significantly, Title I also provides for the establishment of nationwide bankruptcy appellate panels made up of bankruptcy judges of the district in the circuit who are appointed by a judicial council. Bankruptcy appellate panels can adjudicate appeals unless a party to the appeal elects to have the appeal heard by the district court. Prior to the establishment of the bankruptcy appellate panel in a specific district, the district judges within the district must authorize such appellate panel by a majority vote.

Title II

Title II is entitled "Commercial Bankruptcy Issues." Again in this title, the emphasis is on efficiency and streamlining the bankruptcy process whenever possible.

Section 218 of the Act relates to single asset real estate cases with under $4 million in secured debt. Under the Act, the automatic stay in this sort of case shall terminate ninety (90) days after the entry of the order for relief for the benefit of any creditor whose claim is secured by an interest in the subject real estate. Only if the debtor has (a) filed a reasonably confirmable plan of reorganization, or (b) commenced monthly payments to each secured creditor (except judgment lienholders) may the stay continue in effect. If one of these requirements is not met, the automatic stay is terminated without hearing unless the debtor files an objection or requests a hearing.

Also reflecting the legislative intent to simplify smaller bankruptcies, the Act adopts a version of what Judge Small informally refers to as his "chapter 10." Under Section 117, an expedited chapter 11 procedure may be elected by small businesses whose aggregate non-contingent liquidated secured and unsecured debt as to the date of the petition does not exceed $2,000,000. Under this "subchapter," solicitation procedures are simplified, disclosure requirements are relaxed, and the disclosure statement and confirmation hearing are merged. To avoid confusion with the single asset amendments, a small business is defined as a commercial or business activity that does not own or operate real estate as its primary activity.

Title II includes the specific provision overruling the Deprizio line of cases. Section 550 shall be amended to read as follows:

> (c) If a transfer made between 90 days and one year before the filing of the petition—
>
> (1) is avoided under section 547(b) of this title; and
>
> (2) was made for the benefit of a creditor at the time of such transfer was an insider; the trustee may not recover under subsection (a) from a transferee that was not an insider.

By clarifying Congress' past and present legislative intent, this amendment should settle lenders' fears as they prospectively evaluate credit applications of troubled businesses that require additional capital to avoid bankruptcy. Also intended to facilitate normalization of pre-petition lender-borrower relations is Section 203 of the Act, amending Code § 547(c) to afford purchase money security lenders twenty rather than ten days to perfect their liens.

Under Title II, Section 365(d) is amended to require that debtors perform all obligations under equipment leases commencing within sixty (60) days after the order for relief in a chapter 11 case.

Title III

Title III is entitled "Consumer Bankruptcy Issues." Foremost in importance among these amendments are those affording additional protections as against the dischargeability of child support and alimony obligations. Any proposed payment under Section 1123, Section 1222, on Section 1322 must include the amount necessary to cure defaults in accordance with the underlying agreement and applicable non-bankruptcy law.

In a move to be hailed by frustrated bankruptcy judges, Section 308 sets forth a clear statutory basis for penalizing non-attorneys who negligently or fraudulently prepare bankruptcy petitions. For Florida lawyers, this statute comes even as the Florida Supreme Court has liberalized its restrictions on these activities.

Title III includes several additional provisions dealing with fraud and dischargeability issues. Under Title III, criminal fines are now non-dischargeable in chapter 13 cases. The Act also overhauls the bankruptcy crime provisions of 180 U.S.C. 152, 153, and 154.

Concluding Remarks

The preceding summary only highlights some of the specific changes made throughout the Code. The resulting amendments are extensive. Practitioners must be certain to review the amendments to the Bankruptcy Code to determine which provisions are applicable to the pending cases and cases only recently filed. In most instances, the amendments will apply to cases filed on or after October 22, 1994. The Bankruptcy Reform Act is set out in full text in BNA Bankruptcy Law Reporter, Volume VI, Number 39 (October 13, 1994).

A good way to get more familiar with the Act is to attend the next TBBBA monthly meeting, to occur on November 17. At the meeting, Judge Paskay will share his analysis and perspective regarding the Act.

—Wanda H. Anthony

TAMPA BAY BANKRUPTCY BAR ASSOCIATION TO SPONSOR INTRAMURAL MOOT COURT COMPETITION AT STETSON

Robert Batey
Professor, Stetson University College of Law

On behalf of Stetson University College of Law, I would like to thank the leadership of the Tampa Bay Bankruptcy Bar Association for agreeing to sponsor an intramural moot court competition at the College of Law early next year. The competition, which will involve one-on-one oral arguments of a bankruptcy topic, will be open to upperclass Stetson students. The preliminary rounds are set for Saturday and Sunday, January 28-29, 1995, the quarterfinals for Tuesday, January 31, 1995, and the semifinals and finals for Thursday, February 2, 1995; all rounds will be held on the law school campus in St. Petersburg. From the finalists, a three-person team will be chosen to represent Stetson in next March's Duberstein National Bankruptcy Moot Court Competition, sponsored by St. John's University School of Law.

We at Stetson appreciate the generous donation of the Tampa Bay Bankruptcy Bar Association, which will provide prize money to the finalists and will also defray the travel expenses of the prestigious panel of judges we hope to recruit for the final rounds. But I must call on the Association membership to make a further donation of their valuable time. To staff the judicial panels for the preliminary rounds, it will be necessary to recruit approximately sixty lawyers, each willing to devote three hours on either the morning or the afternoon of either Saturday, January 28th, or Sunday, January 29th. (To further complicate matters, January 29th is Super Bowl Sunday — but I promise that all the Sunday afternoon rounds will be completed at least two hours before kickoff!)

If you are willing to commit three hours of your time that weekend, please detach and fill out the form below and mail it to me at 1401 61st Street South, St. Petersburg, FL 33707 (or fax it to me at (813) 347-3738). At the appropriate time, I will provide all those who volunteer with further information regarding judging, including a bench brief. Once again, please accept the sincere thanks of the College of Law for your support of our efforts to provide a sound educational experience for our students.

I would like to judge the preliminary rounds of the Stetson Intramural Moot Court Competition sponsored by the Tampa Bay Bankruptcy Bar Association next January. My preference regarding time slot is indicated below:

_____ Saturday, January 28th, 9:00 a.m. to 12:00 noon
_____ Saturday, January 28th, 1:00 p.m. to 4:00 p.m.
_____ Sunday, January 29th, 9:00 a.m. to 12:00 noon
_____ Sunday, January 29th, 1:00 p.m. to 4:00 p.m.

Name (please print):_____

Address: _____

_____

_____

Telephone: _____

Please return this form to Robert Batey, 1401 61st Street South, St. Petersburg, FL 33707, or fax it to (813) 347-3738.

Movers And Shakers

United States Trustee, Middle District of Florida, Tampa Division has recently welcomed two new Attorney Advisors as follows: T. Patrick Tinker, who relocated from the Executive Office/Washington, D.C. and Theresa M. Boatner, who relocated from the U.S. Trustee's Office, Pittsburgh, Pennsylvania.

United States Trustee, Middle District of Florida, Tampa Division has recently welcomed new staff members as follows: John O'Flanagan, Paralegal Specialist, relocating from the U.S. Trustee's Office in Boston, Massachusetts; Loring Daniel, Bankruptcy Analyst, relocating from the U.S. Trustee's Office, Memphis, Tennessee; and Diane Petty, Legal Clerk, relocating from the U.S. Trustee's Office, Indianapolis, Indiana.

Russell S. Bogue of Holland & Knight in Tampa has relocated to Holland & Knight's newly established Atlanta Office. The new address is as follows: 1201 W. Peachtree Street NW, IBM Tower, Suite 3100, Atlanta, Georgia 30309.

Michael Brundage has left the firm of Honnigan Miller Schwartz and Cohn to join the bankruptcy practice of Hill, Ward & Henderson, P.A., Barnett Plaza, 101 East Kennedy Boulevard, Suite 3700, Tampa, Florida 33602; (813) 221-3900.

Lisa Castellano has left the firm of of Mike J. Echevarria, P.A. to join the bankruptcy practice of Salem, Saxon & Nielsen, P.A. Her new address is as follows: Barnett Plaza, 101 East Kennedy Boulevard, Suite 3200, Tampa, Florida 33602; (813) 224-9000.

Steven Dupre' has left the firm of Baynard, Harrell, Ostow & Ulrich, P.A. to join the bankruptcy practice of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. His new address is as follows: One Progress Plaza, Barnett Plaza, Suite 2300, 200 Central Avenue, St. Petersburg, Florida; (813) 821-7000.

Richard McIntyre has left the firm of Kass Hodges, P.A. to join the firm of Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A. His new address is as follows: 2700 Barnett Plaza, 101 East Kennedy Boulevard, P.O. Box 1102, Tampa, Florida 33601; (813) 223-7474.

Laura E. Prather has left the firm of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A. to join the bankruptcy practice of Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A. Her new address is as follows: 2700 Barnett Plaza, 101 East Kennedy Blvd., P.O. Box 1102, Tampa, Florida 33601; (813) 223-7474.

David R. Punzak has left the firm of Baynard, Harrell, Ostow & Ulrich, P.A. to join the bankruptcy practice of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. His new address is as follows: One Progress Plaza, Barnett Plaza, Suite 2300, 200 Central Avenue, St. Petersburg, Florida (813) 821-7000.

Paula M. Sicard, also formerly of Baynard, Harrell, Ostow & Ulrich, P.A. has recently been appointed Chief Staff Attorney for the Second District Court of Appeal. His new address is as follows: 1005 E. Memorial Boulevard, P.O. Box 327, Lakeland, Florida 33801; (813) 499-2290.

Lonnie L. Simpson, also formerly of Baynard, Harrell, Ostow & Ulrich, P.A. has recently relocated to Tampa to join the bankruptcy practice of Rudnick & Wolfe. New address is as follows: Barnett Plaza, 101 East Kennedy Boulevard, Suite 2000, Tampa, Florida 33620; (813) 229-2111.

The following law firm has had a name change as of September 1, 1994:

Gaynor, Decker, Young, Malchon, Dickson, Schumaker & Bernstein, P.A., formerly known as Robbins, Gaynor & Bronstein, with offices located in St. Petersburg and Tampa as follows: 150 Second Ave. North, 17th Floor, P.O. Box 14034, St. Petersburg, Florida 33733; (813) 895-1971; and 100 North Tampa Street, Suite 2120, Tampa, Florida 33602; (813) 221-8027.

Florida's Wage Exemption: Safe as Money in the Bank?

Florida has long exempted the wages of a head of household from the reach of judgment creditors. Fla. Stat. § 222.11 (1993). In 1985 and again in 1993, the Legislature revised the wage exemption statute. These two sets of revisions merit close attention, both from debtors' counsel in the context of pre-bankruptcy planning, and from creditors' counsel and trustees in the context of objecting to claimed exemptions.

At first blush, the 1993 revision of the wage exemption statute appears to supersede the 1985 version. However, the 1993 statute only applies to judgment debts which arise from transactions occurring on or after October 1, 1993. 1993 Laws of Florida, ch. 93-256, § 6. Accordingly, the careful practitioner will need to determine which version to apply on a case-by-case basis. This is especially so in determining whether a debtor who deposits wages into a financial institution account can receive the full benefit of the wage exemption.

Historically, wages were only exempt from the reach of judgment creditors while they were held by the judgment debtor's employer. See Fla. Stat. § 222.11 (1983); Ellis Sarasota Bank & Trust Company v. Nevins, 409 So. 2d 178 (Fla. 2d DCA 1982). In 1985 the Legislature extended the traditional wage exemption to apply to any traceable wages "deposited in any bank account maintained by the debtor." Fla. Stat. § 222.11 (1985). Several cases decided under the 1985 revision have addressed this bank account language peripherally. See In re Rosenquist, 122 B.R. 775, 784 (Bankr. M.D. Fla. 1990) (Corcoran, J.) (ERISA plan is not a bank account); In re Lancaster, 161 B.R. 308, 309 (Bankr. S.D. Fla. 1993) (Mark, J.) (tax refund held by IRS is not in a bank account). Not until this Spring did a court finally construe the bank account language of the 1985 statute.

On February 10, 1994, Judge Paskay ruled directly on the meaning of the term "bank account" as it is used in the 1985 statute. In re Rutenberg, 164 B.R. 683 (Bankr. M.D. Fla. 1994) (Paskay, C.J.). In Rutenberg, the debtor placed wages in a cash management account with Merrill Lynch, and a creditor obtained a pre-petition writ of garnishment against the account. In the bankruptcy case, the debtor attempted to avoid the creditor's judgment lien as impairing the debtor's exemption in the wages held in the account. The sole issue before the court was whether Merrill Lynch was a "bank" under the 1985 statute. Judge Paskay found that under Florida law, a bank is any entity which is authorized to receive demand and time deposits and to pay checks. Fla. Stat. §§ 658.12(2) and (9) (1993); accord 12 U.S.C. § 1841(c). Merrill Lynch, as a "broker-dealer" in securities, clearly did not qualify as a bank. Rutenberg, at 685-86. Accordingly, the debtor was not permitted to avoid the creditor's judgment lien.

Judge Paskay's decision in Rutenberg raises two important issues regarding the applicability of the wage exemption. First, Judge Paskay found that the intent of the Legislature in expanding the wage exemption to bank accounts was not to "protect funds which were used to purchase securities from a broker." Rutenberg, at 686. While this rationale clearly makes sense in the case of a broker-dealer, it raises the issue of money market and other securities-backed accounts offered by banks. Second, Judge Paskay's analysis of the statutory definition of bank would lead to the conclusion that credit unions and savings and loan associations do not qualify as banks. Fla. Stat. § 658.12(2) (1993). Presumably, traceable wages held in such institutions would not qualify for the exemption under the 1985 statute.

This latter problem appears to have been resolved by the Legislature in its 1993 revision to the wage exemption statute. In addition to allowing process against wages in limited circumstances, Fla. Stat. § 222.11(2) (1993), the 1993 statute provides that traceable exempt earnings remain exempt for up to six months if such wages "are credited or deposited in any financial institution." Fla. Stat. §§ 222.11(3) (1993).

The 1993 revision appears to expand the scope of the exemption in two significant ways. First, the use of the term "financial institution" instead of "bank" allows exempt earnings deposited in credit unions and savings and loan associations to be exempt from process. Fla. Stat. § 655.005(l)(h) (1993); compare 11 U.S.C. § 101(22) ("financial institution" includes savings and loans, but not credit unions). Second, to the extent that certificates of deposit might not qualify as accounts under the 1985 statute, the 1993 revision's exemption of earnings which are "credited or deposited" appears to broaden the exemption to include non-account credits such as certificates of deposit.

For bankruptcy counsel, the 1993 wage exemption statute and the Rutenberg decision define the issues for debtor and creditor alike. For debtors' counsel, the best way to assure exempt status of wage accounts is to open them in a commercial bank. If this is not feasible, then careful analysis of the applicable version of the exemption statute is necessary. For creditors' counsel and trustees, these recent developments provide a road map to the availability of an objection to wage account exemptions.

— Al Colby

Supreme Court Update

The United States Bankruptcy Court will consider at least twenty bankruptcy-related petitions for certiori this term. To date, certiori has been denied in six, and has been granted in three. Of all bankruptcy cases to be considered by the Supreme Court this term, perhaps the most significant is that of U.S. Bancorp Mortgage Co. vs. Bonner Mall Partnership. The Supreme Court granted certiori in Bonner Mall following the Ninth Circuit's 1993 opinion upholding the continued existence of the so-called new value exception to the absolute priority rule.

The new value exception is a creature of Justice Douglas' 1939 opinion in Case vs. Los Angeles Lumber Products Co. Yet the 1988 Supreme Court opinion in Norwest Bank of Worthington vs. Ahlers raised serious questions as to its continued validity under the Bankruptcy Code. Our Division's bankruptcy judges, like most others, are in accord that the exception continues to exist even though it was not codified under the Bankruptcy Code. A contrary ruling by the Supreme Court would radically affect chapter 11 confirmation in this Division and most others.

The Bonner Mall appeal regarding the absolute priority rule was mooted by the litigants' confirmation of a consensual plan on March 10, 1994. However, the so-called Munsingwear rule was not applied at the Circuit level to vacate the Ninth Circuit opinion. It is argued that the Munsing

.wear rule should not be overbroadly applied to require vacatur in all mootness situations. This is the threshold question on appeal in Bonner Mall. Due to the unusual procedural history, and the primacy of the issue relating to vacatur upon mootness, it is therefore possible that the Bonner Mall decision will not reach the enduring question as to whether or not the new value exception survives under the Bankruptcy Code.

In the coming months, The Cram-Down will monitor the Bonner Mall case, as well as other cases currently pending before the Supreme Court. In particular, the Supreme Court will report the eventual decision in Celotex Corp. vs. Edwards. This case involves a question of whether the Fifth Circuit properly refused to defer to Judge Baynes' injunction issued pursuant to Bankruptcy Code § 105(a) as against pre-petition judgment-creditors seeking to execute upon Celotex's supersedeas bond.

During August of this year, five additional petitions for certiori were filed that will also merit our continued attention. These cases, and the corresponding questions presented by each, are as follows: Toti vs. U.S., (Are tax obligations non-dischargeable merely because the debtor has failed to file tax returns?); Billing vs. Ravin, Greenberg and Zackin, P.A. (Does a debtor waive his constitutional rights to jury trial simply by exercising a constitutional right to bankruptcy relief?); International Business Machine Corporation vs. Sims (What standards apply for evaluating the "horizontal test" aspect of the ordinary course of business exception?); Boston Post Road Limited Partnership vs. FDIC (May a chapter 11 plan separately classify an undersecured lender's deficiency claim as a matter of law?); Invex Holdings, N.V. vs. Equitable Life Ins. Co. of Iowa (Is an oversecured creditor in bankruptcy entitled as a matter of law to recover default-rate interest as provided pursuant to underlying loan documents?).

For more information regarding pending Supreme Court bankruptcy cases, consult the American Bankruptcy Institute Journal, Volume 13, No. 9 (November, 1994).

FINAL THOUGHTS ON 1994 VIEW FROM THE BENCH

On September 29, 1994, the Business and Commercial Law Section of The Florida Bar held its annual View From The Bench Seminar. Due to the addition of several new judges, the seminar was split into two panels. Judges Paskay, Baynes, and Glenn participated on the panel discussion relating to chapter 11 bankruptcy cases. Judge Corcoran was unable to attend due to an illness.

Throughout the panel discussion, Judges Glenn, Paskay, and Baynes were in agreement as to a number of matters. They concurred that the absolute priority rule survived the enactment of the Bankruptcy Code, that a pre-petition retainer belongs to the law firm (subject to the Bankruptcy Court's oversight as to the reasonableness of the retainer), and that a debtor loses its right to reinstate and cure mortgage after the sale of the property.

With respect to the payment of officers' salaries, Judges Baynes and Paskay will not require a hearing unless a party in interest objects. However, each of the three judges devote particular attention to the budgets attached to motions for authorization to pay officers' salaries. Judge Glenn generally will not hold hearings regarding the payment of officers' salary absent an objection or an unreasonable request. However, he does require the debtor demonstrate that it has positive cash flow and is meeting its post-petition obligations.

With respect to confirmation of chapter 11 plans, the three judges generally will not require testimony in connection with an uncontested confirmation hearing. However, each indicated that he had special concerns with respect to chapter 11 plans which provide for deferred payments to creditors. Judge Baynes stated he reviewed the pro formas attached to disclosure statements even in uncontested confirmation hearings. In the event that a creditor contests the confirmation, the debtor files a motion for cramdown, the participating judges treat the matter as evidentiary. Judge Baynes will automatically reschedule the confirmation hearing to consider the motion for cramdown.

Professionals seeking to be paid from the estate need to file applications with the Court. With respect to chapter 11 debtors who own property, Judge Paskay considers realtors, consultants and management companies to be professionals as defined by the Bankruptcy Code.

None of the three judges have had an occasion to consider Florida's new assignment of rent statute, Florida Statutes §697.07. However, Judge Paskay stated that if a final judgment is entered in state court, he believes that the property (including rents) belongs to the mortgagee.

At the conclusion of the seminar, all judges were asked about their "pet peeves." Judge Baynes indicated that as a result of his experience with his Celotex litigation, he expects attorneys to be more familiar with the evidentiary rules. Judge Paskay believes that an attorney representing an individual in a chapter 7 procedure remain counsel for the debtor until he permitted to withdraw from the case by the Bankruptcy Court. Judge Glenn indicated that he is pleased with the local bar, and its overall courtesy and professionalism as displayed to date.

— Al Gomez

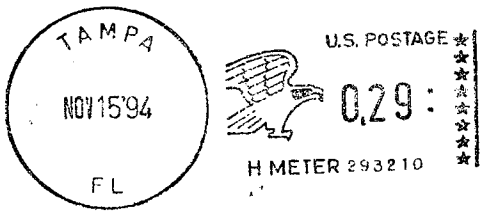
Other Announcements

The TBBBA's general meeting will be held at 12 p.m. on November 17, 1994, at the Tampa Yacht and Country Club. This month's program will feature a presentation by Chief Judge Alexander L. Paskay regarding the Bankruptcy Reform Act of 1994. For more information, call Lynn Ramey at 223-4253.

The inaugural meeting of the Turnaround Management Association's Central Florida Chapter will be held at 5:30 p.m. on November 17, 1994, at the Tampa Marriott Westshore. For more information, call Laurence Briggs in St. Petersburg at 813/894-7505.

Next month, the TBBBA Membership Committee will be preparing the 1994-1995 Membership Directory for the TBBBA. This directory is used by many members to contact one another, and is based upon the current membership as of the date of preparation. If you have not already renewed your membership for this year, now is the time to do so. This will entitle you to receive your copy of the directory, and to make sure your name is in it. For more information, call Dennis LeVine at 876-8320.

The Cram-Down
P.O. Box 2405
Tampa, Florida 33601-2405



Catherine Peek McEwen
Akerman, Senterfitt, et al.
P.O. Box 3273
Tampa, FL 33601-3273