The Cram-Down

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SUPREME COURT: "NO HOLDS BARRED" BY LENDERS PRESERVING SETOFF RIGHTS

On October 31, 1995, the United States Supreme Court issued its opinion in Citizens Bank of Maryland v. Strumpf, 116 S.Ct. 286, 64 USLW 4001, Bankr. L. Rep. P 76666A (U.S.Md., Oct 31, 1995) (NO. 94-1340). This concise opinion answers the long-disputed question of whether a lender can place a post-petition administrative "hold" or "freeze" on its pre-petition claim. The Strumpf holding provides that an administrative hold is not violative of the automatic stay or otherwise improper unless it is actually tantamount to a setoff. The Strumpf analysis is sufficiently lucid that lenders can now confidently assert their rights and debtors can protect themselves against abuse.

The facts of Strumpf confirm the rationale underlying the holding. A Maryland lender placed an administrative hold on its defaulting borrower's remaining $5,068.75 deposit account when it received notice of his chapter 13 filing. The lender temporarily refused to honor withdrawals as a result of the hold, but filed a stay relief motion five days after the hold was initiated. On the borrower's motion, the bankruptcy court sanctioned the lender, holding that its conduct violated Bankruptcy Code Section 362(a)(7). This Code provision expressly stays any post-petition act of setoff by creditors. Shortly after the hold was released, the lender obtained stay relief from the bankruptcy court so as to exercise its common law setoff rights. But by this time, the borrower had completely withdrawn the available balance.

On appeal to the district court, the decision of the bankruptcy court relating to the administrative hold was reversed. Citizens Bank of Maryland v. Strumpf, 138 B.R. 792 (D. Md. 1992). The Fourth Circuit, in turn, reversed the district court, and reinstated the bankruptcy court's ruling. Strumpf v. Citizens Bank of Maryland, 37 F.3d 155 (4th Cir. 1994). Certiorari was granted on March 27, 1995. Citizens Bank of Maryland v. Strumpf, 115 S.Ct. 1398, 131 L.Ed.2d 286, 63 USLW 3701, 63 USLW 3705 (U.S., Mar 27, 1995) (NO. 94-1340).

Writing for the unanimous court, Justice Antonin Scalia distinguished between a temporary hold intended to preserve the status quo and an actual setoff as stayed under Bankruptcy Code Section 362(a)(7). The Strumpf court concluded that the lender's temporary refusal to honor payments on the account, coupled with the prompt filing of a stay relief motion, did not reflect an intent to exercise a setoff in violation of the automatic stay. In so doing, it adopted as a matter of federal law the three-part test applied under Maryland law to determine whether a setoff has occurred. Applying the test, the Strumpf court determined that the Strumpf lender had not completed all of the following steps: (i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff.

Having addressed the borrower's principal stay argument, the Strumpf court next approached the administrative hold issue from the perspective of seeking consistency with Bankruptcy Code Section 542(b). This Code provision requires turnover of property of the estate to the trustee or debtor-in-possession. This turnover provision requires payment of all debts owing to the debtor on demand; however, the Strumpf court focused on the express statutory exception to turnover of accounts subject to setoff rights under Bankruptcy Code Section 553. Bankruptcy Code Section 553 essentially seeks to preserve in bankruptcy all setoff rights assertable by a creditor under applicable state law. Seeking to reconcile all applicable Code provisions, the Strumpf court concluded that the lender's rights under Bankruptcy Code Section 553, as preserved in Bankruptcy Code Section 542(b), would be "eviscerated" by any application of Bankruptcy Code 362(a)(7) that would consistently produce a zero balance account. The Strumpf court also rejected the borrower's arguments of stay violation pursuant to Bankruptcy Code Section 362(a)(3) and 362(a)(6) on similar grounds.

The Strumpf holding makes clear that lenders can impose administrative holds under appropriate circumstances; but it also would appear to make equally clear that lenders can in fact be found to violate the stay when they do not act cautiously and in good faith. A setoff masquerading as an administrative hold would still presumably expose a lender to sanctions under Bankruptcy Code Section 362(h). In these regards, it may be useful to contrast Strumpf's facts to the facts underlying the Eleventh Circuit opinion in B.F. Goodrich Employees Federal Credit Union v. Patterson, 967 F.2d 505 (11th Cir. 1992).

The Patterson court found that the actions of the lender credit union against its employee borrower were tantamount to a setoff. This holding was based upon the facts that (i) the lender closed its borrower's accounts in violation of his employment agreement, (ii) the lender then filed a proof of claim reflecting the post-petition application of the account proceeds to the balance of the pre-petition indebtedness, and (iii) the lender did not immediately seek stay relief. Although Patterson caused initial concern among lenders and their counsel, the Strumpf holding certainly enables these lenders to exercise their rights in good faith. Based upon the factual distinctions, it would seem that Patterson is still good law, and should be cited by debtors' counsel to prevent abuse. Accordingly, a significant measure of clarity has been brought to the issue.

--John A. Anthony

CLERK'S CORNER

Old Friend Becomes New Law Clerk

For this edition of The Cram-Down, the Judicial Liaison Committee profiles Cindy L. Turner, who has been a law clerk for Judge Paul M. Glenn since May of 1995.

Cindy obtained her undergraduate degree from Stetson University, with a combination major in English and Social Science summa cum laude (1980). She then obtained her Juris Doctor from Mercer University Law School, magna cum laude (1983).

After law school, Cindy joined the law firm of Stichter & Riedel, P.A., where she practiced until 1992. In private practice, Cindy represented both debtors and creditors, and was an active T.B.B.B.A. member. Having experienced private practice prior to serving in her current clerkship, Cindy is pleased to finish a day's work without completing time slips and editing bills. Additionally, she notes that it is particularly rewarding to have the time and opportunity to analyze challenging and complex legal issues without the practical and advocacy-related constraints imposed by private practice.

In her spare time, Cindy can be observed running throughout downtown Tampa and its environs. Running an average of more than 50 miles per week is considered by her to be a fun diversion. She can fairly be described as the most well-traveled of our members.

Judicial Liaison Committee

Judge Baynes' New Non-Tax Law Clerk

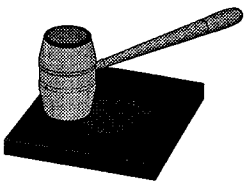
Judge Baynes' new law clerk, Laura Ann Fouraker (pronounced four-acre) comes to us from Live Oak, Florida. The daughter of a soybean farmer, laura has traded the relative quiet of rural Florida for the hustle and bustle of urban life here in Tampa. of course, history tells us that some pretty good lawyers--Thomas Jefferson and James Monroe to name a few--got their start on a farm. Before she found "the Law," Laura worked in a retail sales business, hospital admissions office, and physician's office as an administrative assistant.

Laura graduated with honors from the University of Florida Law School where she served as Editor-in-Chief of its Law Review. Her comment on RICO forfeitures and the Eighth Amendment was published in 1993. No, I have not omitted the obvious. Laura does not have a tax degree.

She enjoys singing, films, and theater when not working. She also likes reading in her Hyde Park apartment when time permits, although she has not had much spare time in recent months due to her move to Tampa and the necessity to study for the Bar exam.

After she completes her two-year stint with Judge Baynes, Laura says she might like to work for a couple of years in the U.S. Attorney's Office as a trial lawyer. But, we all know that once Laura has been exposed to the fascinating and exciting world of bankruptcy law, she will become a life-long member of our bar. In any event, whatever field Laura ultimately chooses, Tampa can always use another excellent "Gator" lawyer. Let's all extend a warm welcome to Laura. By the way, Laura, "Celotex" is a brand-name for insulation, not just a bankruptcy case.

--Mark J. Wolfson



MONEY MATTERS

Fee for Increased Compensation for Chapter 7 Trustees

At its March 1995 session, the Judicial Conference approved a $15 trustee fee surcharge as part of the Bankruptcy Court Miscellaneous Fee Schedule. The surcharge is to fund the increase in compensation of chapter 7 trustees by $15, from $45 to $60 per case, which was mandated by the Bankruptcy Reform Act of 1994.

The fee will be paid by (1) the petitioner upon the filing of a petition under chapter 7, (2) by the debtor upon filing of a notice of conversion of a chapter 12 or a chapter 13 case to chapter 7, or (3) by the movant upon any motion for conversion of a case to chapter 7.

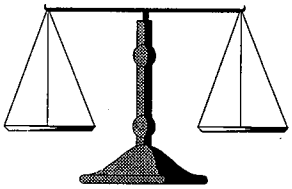
Upon the filing of a chapter 7 case, the new $15 fee shall be paid in addition to the filing fee prescribed under 28 U.S.C. 1930 (currently $130) and the $30 administrative fee, for a total of $175 in fees to be paid at the time of filing.

The new fee, effective October 22, 1995, will apply in any chapter 7 case filed on or after that date and in any case converted on or after that date, regardless of when the case was filed.

Pending Legislation Would Increase Quarterly Fees Due to Chapter 11 Debtors

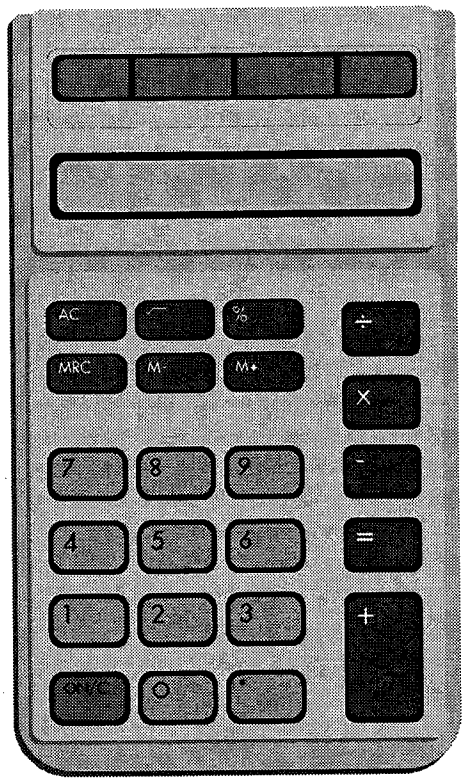
As part of the funding for the Justice Department for fiscal year 1996, the Senate and House approved legislation that affects the timing and amount of quarterly fees paid to the Office of the United States Trustee Chapter 11 cases. The bill extends the requirement for paying the quarterly fees in Chapter 11 until the case is actually closed. Consequently, Chapter 11 debtors would be required to continue payment of the quarterly fees beyond the time of confirmation, until entry of the final decree. At this time, the bill is awaiting the President's approval or veto.

Does any of the foregoing make you wonder about whether your rate should be increased too?



11TH CIRCUIT RULES THAT OVERSECURED CREDITOR NOT ENTITLED TO POST-PETITION INTEREST PAYMENTS AS ADEQUATE PROTECTION

In a recent decision, the Eleventh Circuit ruled that an oversecured creditor is not entitled, as a matter of law, to receive periodic payments representing accruing post-petition interest as adequate protection. The case, Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.), 54 F.3d 722 (11th Cir. 1995), although procedurally complex, involved at its core a motion for relief from stay by Orix Credit Alliance ("Orix"). For purposes of the hearing on the motion for relief from stay, the Bankruptcy Court for the Northern District of Alabama assumed that Orix was oversecured. This assumption was carried throughout the appellate proceedings in the case, even though Orix was eventually determined to be undersecured.



The Bankruptcy Court found that the heavy equipment securing Orix's claim was depreciating, and accordingly granted monthly adequate protection payments pursuant to Sections 362(d)(1) and 361(1) of the Bankruptcy Code in an amount equal to the monthly depreciation. However, the Bankruptcy Court rejected Orix's request that post-petition interest be included as a part of the monthly adequate protection payments.

On appeal, the District Court reversed the Bankruptcy Court, holding that Orix, as an oversecured creditor, was entitled to periodic payments of accruing post-petition interest. The District Court based its decision on the theory that an oversecured creditor has a property interest in its equity cushion which is subject to adequate protection. Accordingly, since accruing post-petition interest depletes the equity cushion, periodic payments of post-petition interest are necessary to adequately protect the oversecured creditor's interest in the equity cushion.

On subsequent appeal, the Eleventh Circuit rejected the District Court's reasoning and reinstated the Bankruptcy Court's decision. It based its decision upon its reading of the opinion of the U.S. Supreme Court in United Savings Association v. Timbers of Inwood Forest Associates, Ltd. (In re Timbers of Inwood Forest Associates, Ltd.), 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988). In particular, the Eleventh Circuit held first that Sections 362, 502 and 506, read together, require that the payment of accrued post-petition interest to oversecured creditors wait until the completion of reorganization or confirmation of the bankruptcy case. It then held that in light of this requirement, the underlying rationale of Timbers applied, and the property interest which must be adequately protected under Section 362(d)(1) is the value of the underlying collateral, and not the equity cushion. Accordingly, the court held that 362(d)(1) did not authorize the awarding of periodic payments of post-petition interest as adequate protection to an oversecured creditor.

This decision is bound to be controversial because it takes away one of the practical tools currently employed by negotiating creditors and debtors and by the Bankruptcy Courts in the early stages of any reorganization case. Its ultimate impact cannot be known, but at least two results seem likely. First, this decision will clearly give debtors increased leverage in the early stages of a Chapter 11 case because the rule announced by the Eleventh Circuit does not take into account a debtor's ability to make adequate protection payments. Accordingly, a debtor, if it so chooses, may refuse to pay post-petition interest (and principal) and use its increased cash flow to fund its reorganization as well as litigation within the bankruptcy case. Second, this decision will likely lead to increased litigation in the early stages of the bankruptcy case since any attempt to pay post-petition interest, however denominated, as adequate protection will be subject to challenge by any interested party as a matter of law.

Perhaps as important as the obvious effects of this decision are the issues it leaves unresolved. For example, because the facts of the case involved non-revenue producing heavy equipment, the issue of how this case applies to determining adequate protection for the use of cash collateral remains. A related unresolved question involves adequate protection in single asset cases generally. Finally, this decision creates an interesting question concerning secondary secured creditors inasmuch as these creditor's secured positions may actually erode as a result of accruing and unpaid post-petition interest. And there will certainly be other impacts as well. For now however, every business bankruptcy practitioner should review this case and keep an ear to the ground for future developments as the bankruptcy courts apply it.

--Alfred A. Colby

KEEPING PACE WITH PACER

Members of the Tampa Bay Bankruptcy Bar ("Bar") have enjoyed remote computer access to information in the Middle District of Florida ("Middle District") Bankruptcy Court Clerk's files for several years. Now Bankruptcy Courts nationally are converting to a uniform system for computer access called PACER. The Middle District was among the last to join this conversion because our old system worked better for the members of the Bar and for the Clerks. Even though we have now joined the rest of the Bankruptcy Courts, the Middle District has been able to adapt PACER to our needs. This article will help you understand how to use the new system.

What is PACER. The Clerk's computers run a software program to enter and retrieve information about cases. That program is PACER. Judges' calendars, case dockets, claims, and matrix information are kept in PACER.

What is Onlan. Members of the Bar who subscribed to computer access in the past were provided with a communications program called Onlan. That communications program is installed on our office computers to call up the Clerk's computers running PACER. There are now ten telephone lines to connect to the Clerk's computers. Six lines are provided and maintained by the Bar for members' only access. Four new lines have been added by the Clerk's office for general public access. Onlan can still be used over the six Bar lines. To call over the four new lines, users must buy a commercial communications program called PCAnywhere. This program is widely available and retails for approximately $125.00.

What Does PACER do in the Middle District of Florida. The PACER program is used in the Middle District for billing only. It tracks the identity of users connected to the Clerk's computers and the time each user is connected. Users are invoiced $.75 for each minute they are connected to PACER. PACER issues logon IDs and passwords for this purpose. To use Onlan on the Bar lines, you must remove the old passwords from your program. Open the option "View/Modify Access Server" in the initial options screen before you log onto the Clerk's office. Delete the old password and logon ID. Leave those lines blank. You can then connect directly to PACER and use your new logon and ID when you see the "EPA" screen.

How to Use the PACER Manual for the Middle District. You receive a user's manual from PACER along with your new passwords. The manual explains the restrictions and limitations of the PACER system. In the Middle District Bankruptcy Court, most of these restrictions do not apply. For instance, connection is still direct to the Clerk's computers so the information we receive is current, not a day old. We can disregard the procedures to track "update" entries. The Clerk's office will not cut users off the system after a fixed time, and they will not limit the number of times an individual user can connect each day. The Bar's six phone numbers are not listed in the manual; they are for subscribers only. Because the numbers and communication programs may be different, PACER assistance personnel may not always give accurate information about connecting in Tampa. If you doubt the advice you receive over the 800 number on the "EPA" screen, you can call the Clerk's office locally for assistance. Their number is 813-243-5109. Follow the manual for connecting to other District and Bankruptcy Courts through PACER.

PACER replaces the system in the Clerk's computers to enter and retrieve case information. We can still connect to PACER over the Bar lines using Onlan without our old passwords or we can connect over the general public lines with the PCAnywhere communications software. Thanks to the local Clerk's office, access in the Middle District is more current and less restricted than access to other Courts, and we have more technical support. We should have no trouble keeping pace with PACER.

--Ginnie Van Kesteren

ACCOUNTANT'S FRAUD RESPONSIBILITIES

After a fraudulent transfer or concealment of assets is suspected, investigators are called in to trace the funds and locate the assets. Where were the accountants? What are the independent auditor's responsibilities to detect fraud or perhaps, what aren't the independent auditor's responsible for in an audit?

SAS 53 - Auditor's Responsibility to Detect and Report Errors and Irregularities:

This auditing statement provides guidance on the independent auditor's responsibility for the detection of errors and irregularities in an audit of financial statements in accordance with generally accepted auditing standards. It describes factors that influence the auditor's ability to detect errors and irregularities and explains how the exercise of due care should give appropriate consideration to the possibility of errors or irregularities. It also provides guidance on the auditor's responsibility to communicate detected matters both within and outside the entity whose financial statements are under audit.

The auditor is not responsible for:

- Insuring or guaranteeing that all material misstatements will be discovered.
- Finding intentional misstatements concealed by collusion by using procedures designed to find unintentional misstatements.
- Detecting and reporting errors and irregularities in areas outside the scope of an engagement limited to parts or elements of financial statements.

SAS 54 - Illegal Acts by Clients

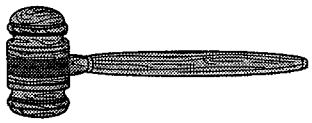
This auditing statement prescribes the nature and extent of the consideration an independent auditor should give to the possibility of illegal acts by a client in an audit of financial statements in accordance with generally accepted auditing standards. The section also provides guidance on the auditor's responsibilities when a possible illegal act is detected.

The auditor is not responsible for:

- Personal misconduct by an entity's personnel unrelated to their business activities.
- Assuring that illegal acts will be detected or that related contingent liabilities will be disclosed.
- Designing specific procedures to detect illegal acts in the absence of specific information brought to the auditor's attention.

Clearly, when a manipulation of assets has occurred, the financial audit does not and cannot always detect the deception. The Association of Certified Fraud Examiners reports that only about 20% of frauds are detected. The "horses" (so to speak) have already left the barn; fraud is suspected. The need to investigate and what to investigate is determined by the facts. Understanding what information can be relied upon and what should be reevaluated is critical to the successful conclusion of any case.

-- Steven S. Oscher, CPA, CFE
Managing Director
Oscher Consulting



FLORIDA SUPREME COURT LIMITS EFFECTIVENESS OF USURY SAVINGS CLAUSES

Recently, the Florida Supreme Court resolved a conflict among the District Courts of Appeal as to the effect of the inclusion of a usury savings clause in a loan document that otherwise provides for a usurious rate of interest. Jersey Palm-Gross, Inc. v. Paper, 1995 WL 424434 (Fla. 1995).

Usury, under Florida law, requires proof of four elements consisting of: (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) there must exist a corrupt intent to take more than the legal rate for the use of the money loaned. Clark v. Grey, 101 Fla. 1058, 132 So. 832, 834 (1931). The penalty for violation of Florida's usury law depends upon whether the violation is of a civil or a criminal nature. In the case of civil usury, where the rate of interest exceeds 18% per annum on a loan of $500,000 or less, the penalty is the lender's forfeiture of all interest due under the loan and the payment of double the interest actually paid or reserved under the loan. The penalties for criminal usury, where the interest rate exceeds 25%, are more severe, as such obligations are unenforceable as a matter of law and result in the complete forfeiture of all principal and interest due thereunder.

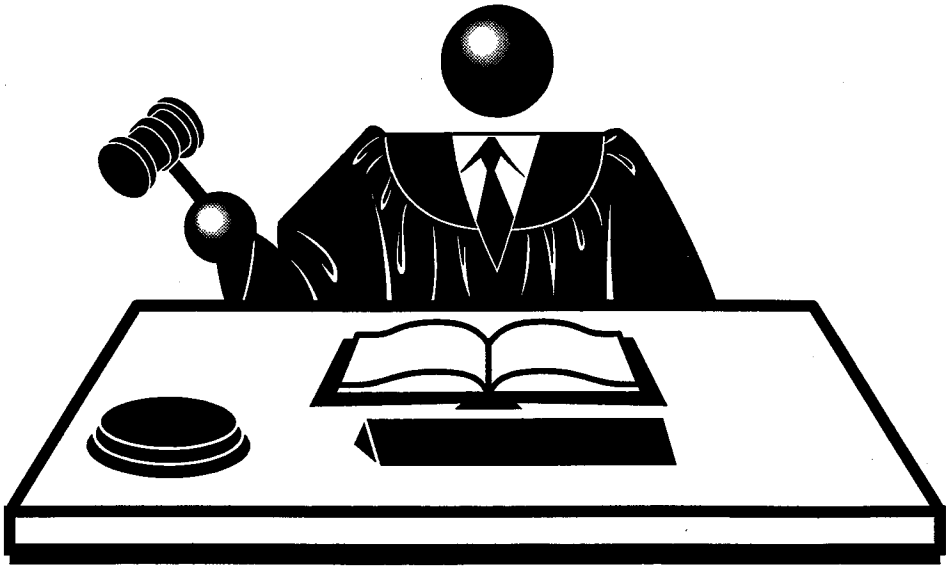
Prior to the Court's ruling in Jersey Palm-Gross, the Fifth District Court of Appeals and other courts had held that the inclusion of a usury savings clause (whereby an otherwise usurious agreement is automatically revised to lower the interest rate and obviate any violation) presumptively barred an action for usury. Forest Creek Development Co. v. Liberty Savings & Loan Association, 531 So.2d 356 (Fla. 5th DCA 1988).

Briefly, the facts of Jersey Palm-Gross involved a real estate general partnership which owned land in West Palm Beach, Florida worth $1,700,000 which was encumbered by a maturing $1,100,000 purchase money mortgage ("PMM"). While the partnership obtained a take-out loan commitment, this amount was $200,000 less than the amount needed to satisfy the PMM. Enter Mr. Walter Gross, a real estate developer, who offered to become an equity partner for an "investment" of $200,000 bearing interest at a stated rate of 15%. However, on the date of closing, Gross demanded an additional 15% equity interest in the partnership as consideration for his investment. As they were in extremis, the partners acceded to Gross' demand. During Gross' subsequent foreclosure action, the trial court sustained the partnership's defense of criminal usury finding that the actual interest charged by Gross, including the recharacterization of his equity interest as debt, exceeded 45% per annum.

In so holding, the Jersey Palm-Gross Court rejected the proposition that the inclusion of a usury savings clause constituted an absolute bar to the partnership's usury claim. Rather the Court held such a clause would be considered as a "factor" in evaluating whether the lender possessed the requisite intent to commit usury at the time of making the loan. The Court also intimated that the weight of such a factor could be determinative in borderline situations such as where the loan at inception was not usurious but later became so upon the occurrence of a future contingency, or where the actual interest rate charged is close to (although in excess of) the maximum legal rate. As the Court stated, such a rule "strikes a balance between the legislative policy of protecting borrowers from overreaching creditors and the need to preserve otherwise good faith, albeit complex, transactions which may inadvertently exact an unlawful interest rate."

Thus, while the Court has not completely stripped the traditional usury savings clause of all efficacy, lenders doing business in Florida should take care to recognize that there is now considerably less salvation available from such provisions.

--Edmund W. Whitson, III



UPDATE ON PIONEER IN THE MIDDLE DISTRICT

In a recent edition, we reviewed the early returns on the U.S. Supreme Court's standard for determining excusable neglect, at least in the context of late-filed Chapter 11 claims, in Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership, 113 S.Ct. 1489 (1993). Here is an update on those early returns.

The Tampa Division now has a holding from the District Court concerning excusable neglect and the application of Pioneer. In an unpublished opinion, Continental Graphics Corporation v. Kennedy, Case No. 93-696-CIV-T-21B, the Court applied Pioneer to affirm a finding of non-excusable neglect by Judge Baynes in a Chapter 7 case.

In the case below, February 8, 1993, was the last day for filing objections to the debtor's discharge. Due to an apparent mistake in calendaring, counsel for the creditor failed to file a motion for extension of time or to object timely to the discharge. On February 23, 1993, the bankruptcy court entered the debtor's discharge. On February 27, 1993, the creditor filed what the creditor characterized as an unopposed motion for extension of time to file a complaint to object to the discharge and to determine the dischargeability of certain debts. On March 4, 1993, the bankruptcy court denied the motion and the appeal followed.

The creditor claimed that the bankruptcy judge abused his discretion in denying the motion to extend time because, prior to February 8, 1993, the debtor's counsel had consented to an order extending the time to file the necessary motion. Furthermore, the creditor claimed to be the sole unsecured creditor, who was actively engaged in preventing the discharge on the grounds of the debtor's alleged fraudulent acts. In that regard, the creditor had obtained an order modifying the automatic stay so that it might pursue a state court action based on fraud. Moreover, the creditor had filed an objection to exemption as to the debtor's home.

The creditor relied heavily on Pioneer. The District Court noted that, in Pioneer, the Supreme Court took a liberal approach to defining "excusable neglect" to include "omissions caused by carelessness." Nevertheless, the District Court noted further that Pioneer dealt with a Chapter 11 case, and therefore, Pioneer must be distinguished from this Chapter 7 case because of the differing policies of the two bankruptcy Chapters. The District Court observed that Chapter 11 provides for reorganization and permits the invocation of equitable powers to achieve a fair and equitable result. On the other hand, Chapter 7 focuses on liquidation and the prompt closure of the bankruptcy estate. Furthermore, the Court found that Bankruptcy Rule 9006(b)(1), which was invoked in Pioneer, specifically does not apply to situations such as in this Chapter 7 case, which is governed by Bankruptcy Rule 3002(c). See Pioneer, supra, at 1495, n. 4.

In affirming the bankruptcy judge, the District Court rejected the creditor's attempt to use excusable neglect. The Court found that the cases make clear that the claim of excusable neglect recognized in Bankruptcy Rule 9006(b)(1) does not exist in a matter covered by Bankruptcy Rules 4004(a) and (b), and 4007(c). Moreover, the Court lacked discretion to extend the bar date. In re Alton, 837 F.2d 457 (11th Cir. 1988); In re Hill, 811 F.2d 484 (9th Cir. 1987); In re Cintron, 101 B.R. 785 (Bankr. M.D. Fla. 1989).

The District Court also relied on Bankruptcy Rule 4007(c), which provides specifically that after hearing on notice the bankruptcy court "may for cause" extend the time for filing the applicable complaint. The Rule further provides that the motion shall be made before the time has expired. Consequently, the Court ruled that it need not examine the factual dispute as to whether the debtor consented to an extension before the time expired. The Court found the creditor's reliance on any consent as misplaced because of Bankruptcy Rule 4007 and cited approvingly, In re Barley, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991), which stands for the proposition that the time bar to file a dischargeability/discharge complaint is jurisdictional, the lapse of which time extinguishes the cause of action.

On the other side of the excusable neglect issue, Judge Proctor applied a balancing of the equities from Pioneer and granted a claimant's motion to file a late claim in a Chapter 11 case. See In re American Gas Products, Inc., Case No. 93-1630-3P1. According to the Court, without Pioneer, the Court would not have allowed the claim to be timely filed in any fashion because the evidence offered would not have been excusable neglect under the Eleventh Circuit's standard.

Judge Proctor opined that the Supreme Court has directed that courts should not find inexcusable neglect simply because a lawyer did not do what should have been done; instead, courts must consider the rights of the parties. Put another way, courts must balance the equities and determine what should be appropriate under those circumstances. In granting the motion, the Court found that more harm would come to the claimant from denial, than would result to the creditors of the bankruptcy estate from allowing the late claim. The Court also allowed additional time for any party in interest to object to the underlying claim.

As you can see, Pioneer altered the excusable neglect playing field. The equitable nature of the inquiry has created varying results. Moreover, at least two courts have refused to apply Pioneer in the Chapter 7 context.

--Donald Alan Workman

BANKRUPTCY BAR EXPERIENCES IMPACT OF GOVERNMENT EFFORT TO TAKE CONTROL OF FEDERAL CITATIONS

Anne V. Ellis, Director of Library and Records Services
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.

The United States Department of Justice ("DOJ") has begun a full scale crusade to remove control of case law citation systems from private vendors (e.g., West Publishing, Lexis, et al.) and substitute its own database as the sole publisher of federal case law, including bankruptcy case law. As the director of a large law firm library, I was asked by West Publishing to observe the October 19, 1994 "Citations" meetings in Washington, D.C. My involvement has been informative, educational, and controversial. Heated discussion over the issues has taken place both in print and also on the Internet's Law Library forum. The implications could be significant for lawyers, their staff, and their clients.

The Issues

Vendor-Neutral Citations - The following two issues are being argued: First, does West Publishing own their internal pagination systems as they claim? Second, should each state and federal court issue its own citations? The DOJ objective is to allow any publisher to electronically produce its cases with vendor-neutral citations based upon information generated on the DOJ database. The public should surely have full access to the law. However, it is uncertain as to whether the DOJ can successfully "rewrite the book" on how to do legal research. And the legal community may find it very frustrating, costly, and time-consuming to deal with a multiplicity of state and federal citation systems. The current system has worked well for more than 120 years. The current issues all revolve around the question of whether a new system should be developed at this time.

Department of Justice Legal Database - The DOJ's proposal to become a legal publisher is fraught with three potential problems: cost, confusion, and bias. Estimates of the cost involved in putting together a federal data base range from $50 to $100 million dollars. The fact that West and Lexis both have such databases already in place makes the DOJ proposal appear to be a waste of taxpayers' money. At least one state, Louisiana, governmentalized the citation process with resultant confusion and delay. This phenomenon might be greatly magnified at the federal level. Another problem is presented by the need for safeguards against bias. Safeguards must be formulated to ensure that the DOJ publishes all appropriate opinions, including those that are unfavorable to the government.

Washington Meetings

Three meetings have recently taken place in Washington concerning "Vendor-Neutral Citations" and the DOJ proposal to create its own universal database. First, West Publishing hosted a press conference sponsored at the National Press Club. Speakers included Charles Rosenberg, a California litigator and trial lawyer, James R. Seidl, co-founder and President of Legal Research Center which provides legal and factual research and writing services to U.S. and Canadian attorneys, and Donald Dunn, Director of the New England College of Law Library. Each spoke of their concerns over rejecting West's much used and respected citation and legal research system.

The second meeting was held by TAP (Taxpayer Assets Project). TAP is a project set up by Ralph Nader to study the management of governmental property, which includes information resources. The meeting was chaired by Jamie Love, an economist, and included West, Lexis, Tax Analysts, Shepards, Hyperlaw, approximately two dozen small, legal publishers, and a handful of law librarians. The discussion centered on the adoption of a standard format for vendor-neutral citations. West Publishing's representatives argued against a change and questioned whether there were antitrust implications in publishers banding together to control citation reform. Other large publishers such as Matthew Bender, Lawyers Cooperative, and Commerce Clearing House refused comment on any of the proposed changes. The result of the three hour meeting was that the small, legal publishers, Lexis, and Tax Analysts agreed to use paragraph (versus page) citations if a new citation system is adopted. It might be noted that three states, Louisiana, Colorado, and Wisconsin are already in the process of using or adopting vendor-neutral citations. Unfortunately, each state has a different system.

The third meeting was essentially held for the benefit of the DOJ, and essentially re-emphasized remarks made at the TAP gathering. There was no discussion of the Department of Justice's proposal to produce its own legal database.

Position of American Association of Law Libraries

The AALL Executive Board adopted a resolution stating the need for the following criteria:

1. A system of citation that permits reference to legal or law-related information in any medium, print or electronic, without requiring reference to the proprietary products of any particular publisher.
2. Free or low cost public databases that provide access to public domain legal and law-related information.

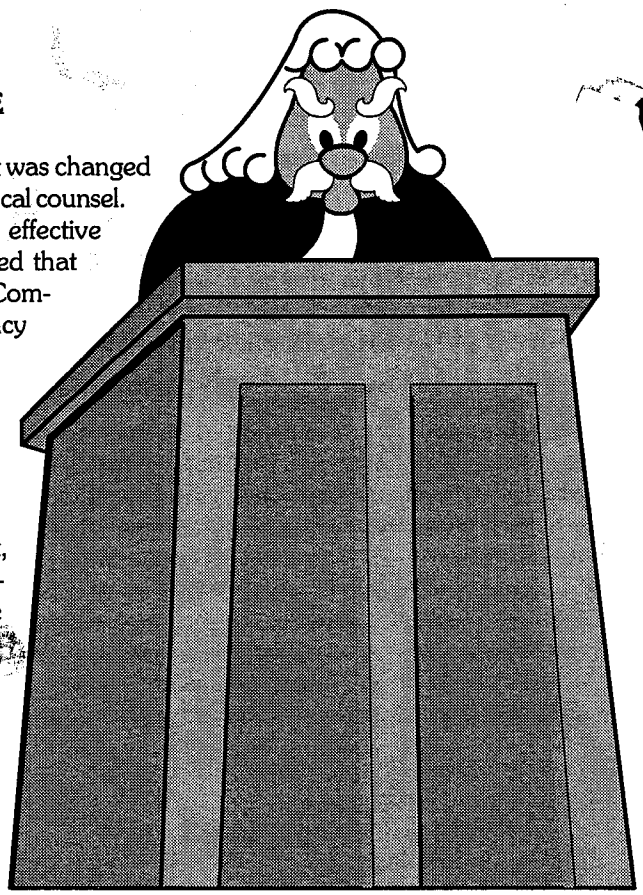
Resolution of the Executive Board of the American Association of Law Libraries. November 6, 1994.

AALL's position relies on their anticipation that the National Information Infrastructure will be the means of access for all legal information. Actually, in 1994, the public already has incredibly wide-ranging access to legal information through public libraries, law libraries, and the Internet. The government's entry into an already established and ever-expanding network seems like a very costly idea.

The issues recently presented are very important to the legal community since they affect the way the legal community performs, uses, and teaches legal research every day. To date, however, no one has polled either practicing attorneys or law librarians. We rely on the solid, methodical approach developed by West many years ago. We should all be cautious about jumping into costly, inefficient, and possibly chaotic legal research methods. As a private law firm librarian, I know that attorneys have quality, time, and billing constraints placed upon them as they do legal research. I question whether implementation of such diverse citation methods realistically will result in useful databases or efficient methods of legal research.

EDITORIAL NOTE: In addition to stating some of the relevant facts surrounding the current citation controversy, the preceding article reflects views that have not been adopted by the T.B.B.B.A. The T.B.B.B.A.'s Board of Directors has been asked to take a position with respect to the DOJ's pending government-controlled citation proposal; however, no position has been formulated as of the date of this issue of The Cram-Down. Contact any Board member if you wish to know more about the current database, or if you wish to express your opinion.

OTHER NEWS



BANKRUPTCY COURT AMENDS LOCAL RULE

Local Rule 1.07(c)(1) of the U.S. Bankruptcy Court's Middle District was changed effective July 1 to delete the residency requirement for lawyers serving as local counsel.

The requirement had been added by amendment, which became effective February 15. The Florida Bar News, Vol. 22, No. 14, Page 9, reported that Chief Judge Alexander Paskay noted the Local Rules Lawyers' Advisory Committee reexamined its original requirement and concluded that residency limitations "did more harm than good."

STAYING IN TOUCH WITH THE JACKSONVILLE BANKRUPTCY BAR ASSOCIATION, INC.

The Jacksonville Bankruptcy Bar Association, Inc. is an independent, non-affiliated, non-profit organization, organized as a Florida corporation. It has approximately 150 voting members, a historically active eleven-member board which meets monthly, and a number of committees open to all members. You are eligible to be a member if you are a member of The Florida Bar and admitted to practice in the U.S. District Court for the Middle District of Florida. Annual membership dues are $50. If you are not eligible, but wish to receive publications and attend functions, you may have these privileges by paying the annual membership dues. Please call David Otero (904) 354-1100 if you would like additional information regarding membership in the JBBA or attending the JBBA seminar.

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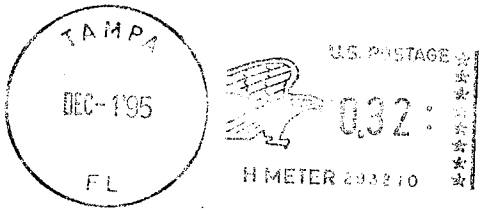

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