The Cramdown

Tampa Bay Bankruptcy Bar Newsletter

Spring 2000

The President's Message

By Russ Blain

A New Day And A New Judge For The Tampa Bench

To Judge Michael G. Williamson, becoming a bankruptcy judge is the fulfillment of a lifelong dream and the outcome of a sequence of fortuitous events. To the Tampa bench and bar, he brings to the bench a star-studded career of bankruptcy experience and knowledge.

After a long and arduous appointment process, Judge Williamson was sworn in on March 1 as the Tampa Division's fifth, the Middle District's ninth, and Florida's fifteenth bankruptcy judge. That same afternoon, he was assigned his first case and went right to work in his newly occupied chambers on the 10th floor of the Sam M. Gibbons United States Courthouse. Judge Williamson has gone into the rotation for newly filed cases, and some existing cases will be reassigned to him.

It's hard to imagine anyone being more prepared for life as a bankruptcy judge than Judge Williamson. From his early days as a panel trustee, through 20 years of practicing almost exclusively in bankruptcy and insolvency, Judge Williamson has represented hundreds of debtors, creditors' committees, trustees, secured and unsecured creditors, and buyers. He counts as his most significant case the representation of the committee in the General Development Corporation case, one of the largest land-development cases filed. Judge Williamson also has served as a mediator, an arbitrator, and an examiner.

As an original appointee to the lawyers' advisory committee on local rules, Judge Williamson worked with Chief Bankruptcy Judge Emeritus Alexander L. Paskay to write the first set of local bankruptcy rules for the Middle District. An active leader in bar work, Judge Williamson has served as president of the Central Florida Bankruptcy Law Association. A member of its Executive Council since 1986, Judge Williamson has chaired the Bankruptcy/UCC Committee of the Business Law Section of The Florida Bar, numerous legislative committees, and

Inside This Issue

From The Chief Judge's Chamber

By The Honorable George L. Proctor,*
Steven R. Wirth[+] and Jodie L. Spencer[']

REPETITIVE BANKRUPTCY FILINGS: TO TOLL OR NOT TO TOLL THAT IS THE QUESTION

After the Supreme Court concluded that "Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously filed for Chapter 7 relief," the floodgate was opened for debtors and their creative counsel to seek afresh start discharge or reorganization through repeat bankruptcy filings.[1] More particularly, when a debtor files multiple bankruptcy petitions, the issue arises whether or not the three-year nondischargeability period for income taxes is suspended during the pendency of a prior bankruptcy case.

In *Morgan v. United States (In re Morgan)*, 182 F.3d 775 (11th Cir. 1999), the Eleventh Circuit was faced with this very narrow issue: Whether the three-year priority period of 11 U.S.C. § 507(a)(8)(A)(i)[2] is tolled during the pendency of a prior bankruptcy proceeding. In *Morgan*, the debtors owed taxes for the years 1987, 1988 and 1989. Their first Chapter 13 plan, which provided for full payment of the taxes, was confirmed in November 1990. The case was dismissed in October 1994 because the debtors failed to make the plan payments. The debtors filed a successive bankruptcy petition in January 1995. The Internal Revenue Service ("IRS") again filed a priority claim for the unpaid taxes pursuant to 11 U.S.C. § 507(a)(8)(A)(i). The debtors objected to the priority status of the IRS claim of unpaid income taxes on the basis that they "were over three years old"[3] and thus, should not be accorded priority status pursuant to § 507. The bankruptcy court denied the debtors' objection to the IRS claim. The bankruptcy judge followed the majority view and concluded that when 11 U.S.C. § 108(C)[4] is considered in conjunction with 26 U.S.C. § 6503(b)[5] of the Internal Revenue Code, the three-year priority period allowed for unpaid income taxes is tolled during the pendency of the debtors' first bankruptcy proceeding. The district court affirmed the bankruptcy court decision.[6]

In *Morgan*, the court pointed out that the majority of circuit courts that have addressed the issue have relied on § 108(c), read in conjunction with 26 U.S.C. § 6503, to extend the statute of limitations period for the IRS.[7] Disagreeing with the majority position, the Eleventh Circuit held that 11 U.S.C. § 108(c), the Bankruptcy Code tolling provision, does not toll the three-year priority period for unpaid income taxes during the pendency of a prior bankruptcy case. The *Morgan* Court did not mention its prior decision in *Burns v. United States (In re Burns)*, 887 F.2d 1541 (11th Cir. 1989) where it held that as long as a statutory scheme is coherent and consistent, there is no reason to look beyond the plain meaning of the statute. The court would have been hard pressed to base its decision to toll the priority period upon a plain reading of § 108 and 26 U.S.C. § 6503, or on an analysis of the legislative history, without contradicting itself in its prior decision in *Burns*.

Instead, the Eleventh Circuit followed the Tenth Circuit's lead[8] in relying upon 11 U.S.C. § 105[9] and its equitable label in order to legitimize this particular decision. Consequently, the *Morgan* Court held that the bankruptcy court's equitable power is sufficiently broad to toll the priority period, if the equities favor the IRS. The Eleventh Circuit noted that due to congressional intent, which favors allowing the government sufficient time to collect taxes, and the fear that taxpayers may abuse the bankruptcy process to avoid paying taxes, the equities will generally favor tolling the priority period.[10] The court did, however, qualify its stance by indicating that there may be factual scenarios in which the equities will favor the taxpayer.[11] Nonetheless, the Court specifically rejected the notion that a finding of dilatory conduct or bad faith is necessary to find the equities in favor of the IRS.[12] The Eleventh Circuit vacated the decision of the district court and remanded the case to the bankruptcy court to consider the issue of tolling under § 105(a).

This Court has had previous occasion to visit this very issue. Initially, the Court addressed whether the three-year priority period is tolled during the pendency of a prior bankruptcy in *In re Harris*, 167 B.R. 680 (Bankr. M.D. Fla. 1994). Although the Court acknowledged that a literal application of §108(c) would not toll the priority period because it refers only to nonbankruptcy law, the Court looked to the intent of Congress in creating a limited priority period for taxes.[13] The Court stated that "a literal application of § 108 and § 507 frustrates the purpose in creating the priority period and applying limitation periods in bankruptcy."[14] Therefore, the Court held that § 108(c) tolled the priority period during the debtors' prior bankruptcy.

However, the Court revisited the issue in *In re Macko*, 193 B.R. 72 (Bankr. M.D. Fla. 1996). In Macko, the Court receded from its prior position and held that § 108(c) and 26 U.S.C. § 6503 do not suspend the limitation period in § 507 because those sections only apply to nonbankruptcy periods of limitation. The Court cited the Eleventh Circuit's opinion in Burns and discussed the importance of the plain meaning

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Message From The U.S. Trustee

by T. Patrick Tinker

PETITION PREPARERS SANCTIONED

Lensco Paralegal Services, Inc., Leonard Yanke and Stephanie Maxwell

On February 9, 2000, United States Bankruptcy Judge Paul Glenn entered judgments against Lensco Paralegal Services, Inc. ("Lensco"), Leonard Yanke and Stephanie Maxwell in the bankruptcy case of *In re Tammy Holland*, Case No. 99-6316-8G1. Mr. Yanke is the owner and principal of Lensco; Stephanie Maxwell was an employee.

Prior to filing for bankruptcy relief, Ms. Holland had received a tax refund and wanted to repay a friend some monies that she owed him. Stephanie Maxwell advised the debtor that the payment should not present a problem for her bankruptcy filing. Ms. Maxwell also advised the debtor regarding: the chapter of the Bankruptcy Code under which she should file; the effect of the bankruptcy filing on a creditor's attempt to repossess a vehicle; the dischargeability of a secured claim (stating that it would be discharged); and the applicable exemptions.

When the debtor's schedules were filed, the pre-petition loan repayment did not appear on them. At the Section 341 meeting, Chapter 7 Trustee Traci K. Strickland questioned the debtor about any pre-petition payments, and the debtor truthfully disclosed the repayment of her friend. The trustee thereupon informed the debtor that the monies paid to her friend had to be repaid to the estate as a voidable preference.

Following the Section 341 meeting, the debtor complained to the petition preparers about the advice they had given her. According to the debtor, Mr. Yanke specifically advised the debtor that the monies did not need to be repaid to the trustee, because the transfer occurred pre-petition. Mr. Yanke also advised the debtor "off the record" that she should not have told the trustee of the preferential payment.

The United States Trustee's adversary proceeding against these petition preparers was temporarily delayed as a result of another bankruptcy filing: Mr. Yanke filed a Chapter 11 bankruptcy petition on behalf of Lensco, Case No. 99-13095-8P1. Mr. Yanke, however, failed to obtain counsel for the corporate debtor, whereupon United States Bankruptcy Judge Alexander L. Paskay summarily dismissed the case.

Aside from the defendants' misbehavior in the *Holland* case, Judge Glenn also considered evidence of inappropriate behavior by the defendants in other bankruptcy cases that they had handled. One of those cases was *In re Ellis and Shirley Fishbeck*, Case No. 99-2449-8G7, which was referred to the United States Trustee by Thomas Chawk, Esquire, and Chapter 7 Trustee V. John Brook. In *Fishbeck*, Mr. Yanke sought compensation of $2,500, which he told the debtors would be charged to the debtors' credit cards so that the debtors would end up "paying nothing" for the petition preparers' services.

Judge Glenn's judgment in *Holland* permanently enjoins Mr. Yanke and Lensco from acting, either directly or indirectly, as bankruptcy petition preparers in any court of the United States. The Court also specifically enjoined Mr. Yanke from engaging in the unlicenced practice of law, and directed him to disgorge the sum of $175 that was received in the case. The Court also enjoined Ms. Maxwell from acting as a petition preparer in the State of Florida without prior motion and approval from the Court, and sanctioned her in the amount of $2,000 for violations of 11 U.S.C. § 110. The Court also permanently enjoined Ms. Maxwell from engaging in the unlicenced practice of law.

AAA Family Services, Inc., AAA Family Centers, Inc., and Deborah Dolen

United States Bankruptcy Judge Alexander L. Paskay has entered various orders in bankruptcy cases in the Tampa and Ft. Myers Division, requiring the disgorgement of fees and imposing sanctions for violations of 11 U.S.C. § 110. Many of the matters were brought to the Court's attention by Chapter 7 Trustee Diane L. Jensen in the Ft. Myers Division. The orders were entered against AAA Family Services, Inc. and AAA Family Centers, Inc. Deborah Dolen, a.k.a. Deborah Barwick and Deborah Harvey, has served as the principal and owner of both AAA Family Services,

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Clerk's Corner

By Charles G. Kilcoyne

IKON Document Services, 101 E. Kennedy Blvd., Suite 3425, Tampa, FL 33602 (813) 223-1313, has assumed, on a temporary basis, the vendor contract to provide photocopy services on behalf of the Clerk's office. Your office can open an account with them by filling out a new account information sheet, which can be obtained from their office or the Clerk's office. IKON will remain the vendor until such time as the bidding process for a contractor is concluded and the contract awarded.

On behalf of Ed Rice and the Tampa Bay Bar Association, I welcome you to use the new Attorney Resource Room located on the Northwest corner of the 10th Floor in the Sam M. Gibbons United States Courthouse. This room is available during regular business hours and contains a computer, printer, facsimile machine and telephone. The computer has direct access to the Clerk's office database and other features, such as Microsoft Word, Internet access and various other options. All I would ask is that no food or drink be taken into the room, and since it is directly attached to Courtroom 10B, that you use proper decorum. It took a while, but I hope you all will benefit from this resource.

CLE Committee Needs Volunteers to Plan Annual Dinner

This year's annual dinner is in the planning stage and dinner chair Julia Sullivan Waters could use a few good men and women to help her make it a well-attended success.

Anyone interested in assisting, please call Julia at (813) 224-3604.

Volunteers Needed!

The Second Annual TBBBA Golf Tournament is scheduled for May 12, 2000 at Westchase Golf Course. Tournament Chairman, Michael C. Markham, is seeking volunteers to assist him with the final preparations for the tournament.

Anyone interested in assisting Mike, please contact at (727) 461-1818 or email Mike at mikem@jbp.com

Additional Copies of the Bankruptcy Seminar For Paralegals and Legal Assistants Notebook can be purchased.

Cost: **Member: $25.00 plus $5.00 shipping and postage. Non-Member: $28.00 plus $5.00 shipping and postage.**

Contact: **Curran Porto**
Meininger, Fisher & Mangum, P.A.
711 N. Florida Ave., Suite 260
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View From The Bench

By The Honorable C. Timothy Corcoran, III

SECURITY UPDATE: CELLULAR TELEPHONES AND NOTEBOOK COMPUTERS

Since moving into the new Gibbons courthouse in downtown Tampa, bankruptcy lawyers have expressed to me and to my fellow judges their frustration with the high level of security present in the facility. Lawyers have frequently mentioned the burdens imposed upon them and their clients by being unable to bring cellular telephones and notebook computers into the building.

Regrettably, I am unable to report that those security restrictions have been relaxed. I can share here, however, the concerns and the interests that have caused the district court, after balancing all of the relevant factors, to come down on the side of security in this manner.

Background

Before moving into the Gibbons courthouse in the spring of 1998, the bankruptcy court in Tampa had occupied privately owned, leased space for many years, first on Twiggs Street and later on Memorial Highway. In Orlando, the bankruptcy court moved out of the George C. Young courthouse over 11 years ago and continues to occupy space in a downtown commercial office building. Before moving into the new federal courthouse in Fort Myers in 1998, the bankruptcy court also was housed for a number of years in leased commercial space.

When the bankruptcy court occupies space outside a federal courthouse, the United States Marshal provides security, but the level of security is substantially lower than that provided for a federal courthouse. This lower level of security results from both funding limitations and a perception that the bankruptcy court's needs for security are less than the district court's because we do not have criminal business and prisoners in custody.

While in our own space, the bankruptcy court traditionally had minimal screening at security checkpoints. We also allowed cellular telephones, notebook computers, and pagers, although sometimes the court security officers would hold cellular telephones at the security checkpoints. Our experience was that the only problem these devices presented was the minor disruption to a court proceeding that occurred occasionally when a cellular phone rang or a pager alerted. Although our local rule dealing with recording and photographic equipment contained no provision concerning cellular telephones, it did specifically permit notebook computers:

> (c) Nothing in this rule shall prohibit the use of dictation or computer equipment in conjunction with reviewing files in the Clerk's Office or, subject to Court control, the use of computer equipment in the courtroom.

Former L.B.R. 1.09, as amended effective Feb. 15, 1995.

The district court, on the other hand, has traditionally outlawed cellular telephones and notebook computers from its facilities. For many years, the district court's local rule has provided:

> Except that of Court personnel, cellular telephones and computer equipment are likewise prohibited . . . unless otherwise permitted by the judicial officer before whom the particular case or proceeding is pending. This rule does not prohibit the possession of telephonic pagers... provided that such pagers are either switched off or placed in a silent activation mode…

District Court L.R. 4.11.

Knowing that all bankruptcy court facilities in the district, except Orlando, would be located with those of the district court in federal courthouses, the bankruptcy court amended its local rules in 1998 to incorporate by reference the district court's local rule. L.B. R. 5073-1, as amended effective Oct. 15, 1998. Given the fact that the bankruptcy court is a unit of the district court, we could not continue to have a rule that squarely conflicted with the district court's rule on the same subject when we were physically located with the district court in can be used to transmit or broadcast court proceedings or other events, such as jury deliberations. These concerns intensify as the security risks and "high profile" the same buildings.

Persons coming to bankruptcy court in Tampa, Fort Myers, and Jacksonville are therefore required to play by the district court's rules. Because the bankruptcy court in Orlando continues to be in leased commercial space, the Orlando resident judges have, by standing order, authorized cellular telephones and notebook computers, and the situation in Orlando remains as it was in Tampa before we moved to the Gibbons building.

Why outlaw these devices?

The district court's restriction of the entry of these devices is based upon several concerns. First, the district court is concerned with security because the Marshal advises that these devices can contain explosives or be used to trigger an explosive device. Given current funding, the Marshal is limited in his ability to screen for explosives or triggering devices at existing security checkpoints.

Second, the district court is concerned that these devises nature of individual cases increase.

Third, the district court is concerned generally about these devices disrupting court proceedings, especially those involving juries.

Ironically, as these devices have become more common and generally accepted in our society, and as the bar and the public increasingly use and rely upon them, the increased sophistication and decreased size of these devices make them greater threats and even more the object of these kinds of concerns. Because the Marshal cannot control where these devices will end up once they are carried into the building and because the detonation of an explosive device anywhere in the building would threaten lives throughout the entire building, the district court has concluded that stopping them at the front door is necessary.

Lest one dismiss the district court's concerns as overly cautious, one need only remember that the Middle District of Florida has led the nation in the number of threats to judicial officers in past years. In addition, the district court has continued to have a large number of high threat criminal cases. Indeed, after the Oklahoma City bombing and recent terrorist threats, security has been substantially tightened at all federal courthouses around the nation. One can make a case, therefore, for the reasonableness of the tightened security measures in our district.

The Marshal recently conducted a survey of other districts to determine what those districts are doing as to cellular telephones, notebook computers, and pagers. With 68 of the 94 districts reporting, the Marshal determined that 72 percent do not allow cellular telephones in courthouses, 66 percent do not allow notebook computers, and 62 percent do not allow pagers. (Our district at least allows pagers.) It appears, therefore, that the security precautions in place in our district are not unusual.

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People On The Go

Jonathan J. Ellis has been named a partner at the Tampa offices of the Broad and Cassel law firm. Mr. Ellis practices bankruptcy and creditors rights.

Donald R. Kirk of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., in Tampa has been named chair of the Suncoast Children's Dream Fund Annual Celebrity and Sports Auction.

Dennis J. LeVine of Tampa presented "Personal Property Security Interests and Foreclosure in Florida" at a Florida Foreclosure and Repossession seminar.

Kathleen S. McLeroy has been appointed to the executive committee of the American Bar Association Law sections Pro Bono Committee. She is a shareholder with the Carlton Fields law firm in Tampa. Ms. McLeroy concentrates on creditor's rights, bankruptcy and commercial litigation.

Jeffrey W. Warren of Bush, Ross, Gardner, Warren & Rudy, P.A., in Tampa has become a fellow of the American College of Bankruptcy.

Edmund S. Whitson has been elected a shareholder in Carlton Fields' commercial litigation, bankruptcy and creditor's rights department. Mr. Whitson received his law degree from the University of Florida and graduated with Honors.

Donald A. Workman has been elected partner of the Tampa law firm of Foley & Lardner. He specializes in bankruptcy, creditor rights, debtor reorganizations, commercial litigation, mortgage foreclosures and real estate. He received his law degree from Stetson University College of Law.

Contact Donald R. Kirk at (813) 228-7411, 229-8313 (fax), or dkirk@fowlerwhite.com with contributions to this column; include moves, awards, or other happenings concerning / TBBBA members.

Calendar of Events

Date	Event	Time	Location
March 17, 2000	We're the Government and We're Here to Help You	12:00 a.m. —1:30 p.m.	Tampa-Downtown Hyatt
March 23-25, 2000	26th Annual Southeastern Bankruptcy Law Institute		Atlanta, Georgia
April 17, 2000	Bi-Annual Chapter 13 Seminar Luncheon Speaker: Judge Williamson	8:30 a.m.—1:30 p.m.	Tampa-Downtown Hyatt
May __, 2000	Case Law Update Speaker and Date: TBA	8:30 a.m.—1:30 p.m.	Tampa-Downtown Hyatt
May 12, 2000	TBBBA Second Annual Golf Tournament	1:00 p.m. Shotgun Start	Westchase Golf Course
June 2000	TBBBA Annual Dinner	TBA	TBA

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Bar, numerous legislative committees, and the section itself.

Becoming a bankruptcy judge has been in Judge Williamson's sights for quite some time. He delayed moving in the judicial direction while he managed the Maguire, Voorhis & Wells firm in Orlando and shepherded that firm's merger into Holland & Knight.

Judge Williamson attributes his knowledge of bankruptcy law and practice to the very judges with whom he will share the bankruptcy bench in Florida. "It's a great court," he says, and it he counts it a pleasure to have grown up with the court as it has evolved.

What will the practice be like before the bankruptcy lawyer-turned-judge? Judge Williamson doesn't plan to change his easygoing and conciliatory manner. But he does say that his courtroom will be more formal than people might expect. Judge Williamson gives high marks on courtroom decorum. For instance, he expects lawyers to address the court and not engage in "cross-talk."

Judge Williamson is also a strong advocate of professionalism and civility among lawyers. As a lawyer, I didn't let clients tell me how to practice law." The lawyer is to seek to achieve the client's objective, Judge Williamson says, but without sacrificing the lawyer's independent ethical obligations. Telling of his attitude is the fact that, during his career, he never filed a motion for sanctions against another lawyer and never had one filed against him.

A high degree of formality and professionalism still leaves room for flexibility and innovation, in Judge Williamson's view. As a lawyer, he appreciated the openness and flexibility of sitting judges. He knows the ropes, and understands the degree to which negotiations and settlements are key to the bankruptcy process. As a judge, he does not want to be an obstruction to the process. He is a proponent of the use of technological innovation, and looks forward to presiding in the "'high-tech" environment of Courtroom 10-B.

When bench and bar activities make way for Sunday afternoon activities like watching football, Judge Williamson is just as likely to be lured away to ride his Harley-Davidson with his 14-year-old daughter, Michelle, and to stop at the diner for a bite to eat. An avid boater, he sees a boat in his future and looks forward to cruising the waters of the west coast. Judge Williamson also plans to keep working on his tennis game. He often plays tennis with his wife, Linda, an avid tennis player.

Judge Williamson is joined in Tampa by his Orlando secretary, Kathy Logan, Marti Malone of the clerk's office has been selected to serve as Judge Williamson's courtroom deputy and calendar clerk. Pat Howsmon of the clerk's office will serve as the leader of Judge Williamson's case management team. Judge Williamson recently hired as his law clerk Angelina Lim, who has experience from Dewey Ballentine and as clerk to Judge Cornelius Blackshear of the New York bankruptcy bench.

Judge Michael Williamson being sworn in as the Middle District's newest judge, while his wife Linda holds the Bible.

Eleventh Circuit Court of Appeals Judge Charles Wilson swears in Michael Williamson as the Middle District's newest bankruptcy judge.

The Tampa Bay Bankruptcy Bar Association Second Annual Holiday Party — Members Ring In The New Year With A "Chorus" Of Good Cheer

Judge "Kris Kringle" Corcoran, Judge Paul Glenn, Sara Kister, and Cindy Barnett celebrating the Holiday Season

Allyson Hughes, Zala Forizs, and Judge Mike Williamson

Santa Claus (Harvey Muslin) and his "Helpers" Lorraine Jahn, Ed Rice and John Lamoureux

Have they been naughty or nice this past year? Only their senior partners know for sure!

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rule and its preclusive effect of applying § 108(c) and § 6503 to extend the priority periods set forth in § 507. Moreover, the Court noted that Congress only granted the IRS a narrow opportunity to collect taxes in an extended priority period via its own tolling provision in § 507(a)(8)(A)(ii), for the duration a debtor has an outstanding offer in compromise plus 30 days.[15] Finally, the Court in *Macko* addressed § 105 and refused to extend the priority period on that basis because "any further extension of the priority period would be in contravention of congressional intent and [the Court] decline[s] to exercise its powers to toll, suspend or extend the priority collection period."[16]

In *Morgan*, the Eleventh Circuit failed to address the Supreme Court's recent decision in *United States v. Noland*, 517 U.S. 535 (1996), which determined that equitable considerations cannot be used to change the priority provisions of § 507 (a)(8). In *Noland*, the Court specifically held that bankruptcy courts could not invoke equity to subordinate tax penalties and thereby change the priority of debts fixed by Congress in the Bankruptcy Code.[17] In light of *Noland*, why should the IRS now be permitted to argue for the invocation of equity in its favor, as that demand seeks to alter the statutory priorities of § 507(a)(8)(A)(1) whenever there is a prior bankruptcy filing?

Sometimes the bankruptcy court's equitable powers justify deviation from accepted procedure. However, often times the phrase "equitable powers" is used as lubricating language to explain or justify a deviation from the express provisions of the Bankruptcy Code. In this context, the reference often acts as a poor cover. Therefore, rather than stretching the boundaries of § 105 to toll the income tax priority period beyond the plain language of § 507, courts should resist partaking in judicial activism in order to reach desired results. Nonetheless, in light of the conflict between the circuits, the scope of the tolling remedy and the application of the equitable jurisdiction of courts to grant relief will continue to be a source of inconsistent decisions absent resolution of the issue by the Supreme Court.

Footnotes:

* Chief United States Bankruptcy Judge for the Middle District of Florida, Jacksonville Division.

+ Law Clerk to the Honorable George L. Proctor, 1998-present.

• Law Clerk to the Honorable George L. Proctor, 1999-present.

[1] *Johnson v. Home State Bank*, 501 U.S. 78, 86 (1991).

[2] Section 507(a)(8)(A)(i) provides in pertinent part:

> (a) The following expenses and claims have priority in the following order:
> (8)Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for
> (A) a tax on or measured by income or gross receipts-
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

11 U.S.C. § 507(a)(8)(A)(i) (West 2000).

[3] Neither party disputed the fact that the tax liability in question was more than three years old and normally would have been dischargeable under 11 U.S.C.§ 1328(a)

[4] Section 108(c) provides in relevant part:

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order is entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
> (1) the end of such period, including any suspension of such period occurring on or after notice of the commencement of the case; or
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c) (West 2000).

[5] 26 U.S.C. § 6503(b) provides:

> (b) **Assets of taxpayer in control or custody of court.**--The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

26 U.S.C. § 6503(b) (West 2000) (emphasis in original).

[6] *Morgan*, 182 F.3d at 777.

[7] *See Waugh v. IRS (In re Waugh)*, 109 F.3d 489 (8th Cir), *cert. denied*, 118 S. Ct. 80 (1997); *In re Taylor*, 811 F.3d 20, 23 (3d Cir. 1996); *Montoya v. United States (In re Montoya)*, 965 F.2d 554, 556 (7th Cir. 1992); *see also West v. United States (In re West)*, 5 F.3d 423 (9th Cir. 1993) (tolling § 507(a)(7)(A)(ii)'s 240-day priority period). *But see Quenzer v. United States (In re Quenzer), 19 F.3d 163 (5th Cir. 1993) (finding no tolling of* § 507 under § 108©; but not considering § 105); *see also Offshore Diving & Salvaging, Inc.*, 1999 WL 9617643, * 3-4 (E.D. La. Oct. 20, 1999) (interpreting Quenzer to permit equitable tolling under § 105(a)).

[8] *See Richards v. United States (In re Richards)*, 994 F.2d 763 (10th Cir. 1993) (concluding IRS should not lose taxes that it had no reasonable time to collect or that law restrained it from collecting); *see also Gurney v. Arizona Dept of Revenue (In re Gurney)*, 192 B.R. 529, 536 (B.A.P. 9th Cir. 1996) (concluding three-year period for discharge of excise taxes per § 507(a)(8)(E) is tolled during prior Chapter 13 cases).

[9] Section 105(a) provides:

> (a) The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court order or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (West 2000).

[10] *See Morgan*, 182 F.3d at 780.

[11] *See id.*

[12] *See id.* at 780 n. 8 (rejecting bad faith proposition espoused in *In re Gore*, 182 B.R. 293, 316 (Bankr. S.D. Ala. 1995)).

[13] *See Harris*, 167 B.R. at 683.

[14] *id.*

[15] *See Macko*, 193 B.R. at 75.

[16] *Id.* at 76.

[17] 517 U.S. at 539-40.

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Inc., and AAA Family Centers, Inc. She generally maintains, however, that she is not involved in the actual preparation of bankruptcy cases, and has consequently asserted that she is not a bankruptcy petition preparer.

The United States Trustee currently has pending an adversary proceeding against Ms. Dolen and AAA Family Centers, Inc. in the bankruptcy case of *Dan and Crystal Whitley*, Case No. 99-741-9P7. The United States Trustee alleges that the defendants prepared the debtors' bankruptcy documents but hid their involvement in the case in two ways: first, they failed to make the required disclosures of their services and compensation as required under 11 U.S.C. § 110 and, second, they concealed their involvement by hand writing on the documents a purported statement by the debtors that they had personally prepared the documents. The defendants retained counsel, Thomas E. Pryor, Jr. of Orlando to represent them in this matter, and filed an answer denying the allegations. The United States Trustee is seeking a nationwide injunction against the defendants acting as petition preparers.

As in the above-described matter involving Lensco, the United States Trustee's adversary proceeding was temporarily delayed by a bankruptcy filing of one of the defendants: Ms. Dolen filed for Chapter 13 relief on her own behalf in a case before the Honorable C. Timothy Corcoran, III. Her schedules, incidentally, reflected her stock ownership of AAA Family Centers, Inc. and described the stock as having a value of *negative* $70,000. At the same time, she scheduled regular monthly income of $5,000 from that company. Judge Corcoran entered an order holding that the automatic stay did not apply to the United States Trustee's efforts under 11 U.S.C. § 110, and he ultimately dismissed the case on the motion of Chapter 13 Trustee Terry Smith due to the debtor's failure to make required Chapter 13 plan payments.

While her Chapter 13 case was pending, Judge Corcoran also heard several motions of the United States Trustee regarding actions taken by Deborah Dolen and/or her companies in other cases pending before him. Although evidence was presented that the AAA entities subcontracted out some of the document preparation services, the Court nonetheless concluded that the corporate entities and Ms. Dolen were all bankruptcy petition preparers within the meaning of 11 U.S.C. § 110. Judge Corcoran considered the violations of disclosure requirements in the cases before him, as well as the history of sanctions orders entered by Judge Paskay. The Court also considered information from a website created by Ms. Dolen under the name of "Para-Link," in which Ms. Dolen gives a biographical account of her services as a petition preparer, including her activities with entities such as AAA. At http://www.para-link.com/LAWFIRM/law/street.htm, the website states that in bankruptcy cases there "is no law saying that you have to recall who helped you." Moreover, it states that petition preparers who do not list their identity and who have customers "with bad memories . . . fare the best." In the cases before him, Judge Corcoran directed the disgorgement of $525 in fees and sanctions totaling $14,000. The Court also specifically concluded that Ms. Dolen operated and controlled the business activities of the two corporate entities, that she and the corporations were engaging in continuing, willful non-compliance with the requirements of Section 110, and that Ms. Dolen therefore should be held jointly and severally liable with the corporate entities for the sanctions.

Ms. Dolen and the AAA entities are also the subject of judicial proceedings in other parts of the State and around the country. United States Bankruptcy Judge Lewis M. Killian, Jr. has imposed monetary sanctions in the Northern District of Florida. In the Southern District of Florida, United States Bankruptcy Judge Steven H. Friedman has issued sanctions of $10,000 against Ms. Dolen and AAA Family Centers, Inc. and enjoined both of them from acting as petition preparers in that district. Proceedings are also pending in the United States Bankruptcy Courts for the District of Wyoming and the Northern District of California.

Comments on Court's Copy Service Requested

The Clerk's office will soon be rebidding the court's contract for the provision of copy services. One of the benefits of your membership is the association's role as liaison between the judge's and clerk's staffs and our members. As consumers of the copy service provided by the Clerk's office, your (or, better yet, your staff's!) input on the quality and responsiveness of the service is valuable. If you wish to provide comment to the Clerk's office, whether anonymously or not, now is your chance. Direct your comments to Rod Anderson or John Olson, who head up the association's court liaison committee.

(Continued from page 5)

Acting through its Court Security Committee, the district court regularly reviews the need for these security measures. As the bankruptcy judge member of the Executive Committee of the Court Security Committee, I can assure you that the district court is aware of the burdens these security measures place on lawyers and litigants and that both sides of the issue have been fully aired. Given current conditions, however, the district court has continued to conclude that, after balancing all of the burdens and benefits, the scales tip in favor of maintaining these security measures in place. Although I believe that the district court continues to be committed to regularly reviewing the matter, it looks as if the tight security measures in place now will continue until funding and technology developments allow otherwise.

Exceptions to the rule

In these circumstances, the tip for practitioners is to use the present rules to your advantage. Remember that the existing rule, L.B. R. 5073-1, which incorporates the district court's L.R. 4.11, allows cellular telephones and notebook computers *when authorized by the presiding judge*. When you have the need, therefore, ask for that authorization. The policy adopted by the district court for the granting of such authorization for the Gibbons courthouse provides:

> Local Rule 4.11 addresses the issue of whom and under what circumstances notebook computers, cellular telephones, and similar portable electronic devices may be brought into and used in court facilities. In general, that local rule provides that such equipment may be brought in and used only with the express authorization of the presiding judge.
>
> When a presiding judge chooses to grant such an authorization, the judge should do so by written order . . . . The attorney or other person authorized by the order shall then present a copy of the order to the court security officer at the security checkpoint at the entrance to the building. Court security officers will not be expected to telephone a judge's chambers for verbal authorization or to confirm a person's report of a prior written order authorizing he equipment.
>
> The order shall be case, trial, or hearing specific. Except in the cases of contract court reporters who regularly report the proceedings before a judge, judges should not grant blanket authorization to person for all purposes. Contract court reporters, however, will nevertheless be required to show identification, and they and their equipment will be subject to security screening as any member of the general public.

Memorandum from Judge Anne C. Conway, chairperson, Court Security Committee, dated Apr. 30, 1998, regarding adoption by Board of Judges of security policies pertaining to new Tampa courthouse.

When you have a specific need for a cellular telephone or notebook computer in connection with a case, trial, or hearing, make the request for an order of authorization to the judge before whom you will be appearing. Raise the issue with the judge at the preliminary hearing or pretrial conference. I will also consider your requests made orally through my courtroom deputy clerk, Melissa McClure, or through other chambers staff. The other judges will also consider your requests through their staffs. Just remember to make the request in plenty of time so that the necessary order of authorization can be issued and mailed to you for presentment at the security checkpoint when you bring the device into the building.

The bankruptcy judges are also pleased that the attorney resource room that is about to open on the 10th floor -- made possible through the efforts of the Tampa Bay Bankruptcy Bar Association and the Business Law Section of The Florida Bar -- will alleviate some of the burden the security restrictions place on your practices.

Hopefully, I will be able to report to you in the future that the current restrictions on the entry into the courthouse of cellular telephones and notebook computers have been relaxed. Until that day, however, I hope you will understand the necessity of the current policies and do your best to live with them.

Monthly CLE Meetings Promise More Interesting Speakers and Topics

After rousing lectures from Professors Mark Yochum and Jeff Davis in January and February, you might wonder what we could possibly do for an encore.

How about this for March (March 7, 2000): "We're the Government and We're Here to Help You." Seriously. Program co-chairs Adelaide Few and Lorien Smith Johnson have assembled a panel of government honchos who will answer your most pressing questions concerning set-offs, compromises, claims, the new administrative procedure and other issues unique to the federal government. Get it straight from the horse's mouth. The program will be held at noon at the Hyatt Regency Downtown.

In April (April 17, 2000), Terry Smith will offer his every-other-year half-day seminar on Chapter 13 Practice and Procedure. If Congress acts in the meantime, this seminar will become even more of a "must." Following the seminar, the April program's lunch speaker will be Judge Michael Williamson who will talk about, well, anything he pleases. Therefore, both consumer and business bankruptcy lawyers should plan to attend. The program will be held at the Hyatt Regency Downtown, beginning at 9:00 a.m. The lunch segment, priced separately, will begin at noon.

In May (date and time TBA), co-chairs Al Gomez and Greg Golson are planning a half-day seminar on any new bankruptcy legislation and a case law update. The speaker will be a nationally known practitioner or judge. He or she will also be the luncheon speaker.

If you have any questions, ideas, or time to help out with any of these programs, please call Allyson Hughes at (727) 842-8227 or Cathy McEwen at (813) 209-5017.

Recent Supreme Court and Eleventh Circuit Decisions Involving Bankruptcy Law

By Donald R. Kirk

Supreme Court To Decide Whether Non-Trustees Can Surcharge Collateral Under 11 U.S.C. §506(c).

The United States Supreme Court granted certiorari in a case styled Hartford Underwriters Insurance Company v. Magna Bank, N.A. Magna Bank raises the issue of whether unpaid administrative expense claimants may surcharge collateral under 11 U.S.C. §506(c). A three judge panel of the Eighth Circuit originally held that an entity owed unpaid worker's compensation premiums for a post-petition period has standing to surcharge a secured creditor's collateral under 11 U.S.C. §506(c). On rehearing, the Eighth Circuit reversed, finding that the plain language of §506(c) allows only trustees to surcharge collateral. Both the Eighth and Fourth Circuits have adopted such a restrictive reading of §506(c). Other Circuits, however, permit non-trustees to assert §506 (c) surcharge claims.

Supreme Court Finds That Tax Lien Attaches To Disclaimed Inheritance.

In Dyre v. United States, 120 S.Ct. 476, 1999 WL1100445 (1997), the Supreme Court held that a tax payer's disclaimer of its right to an inheritance does not prevent a federal tax lien from attaching to the inheritance. State law determines the nature of a tax payer's rights to property; however, federal law determines whether such state rights constitute "property" or "rights to property" within the meaning of the federal tax lien statute. Thus, even under a state law which follows the "acceptance-rejection" theory, where no property rights arise until a beneficiary accepts its inheritance, a beneficiary's right either to inherit or channel the inheritance to another was a right that constituted "property" subject to a tax lien. The Court reasoned that the federal tax lien statute is broad and is intended to reach every property interest that a taxpayer might have. The decision does not deal with bankruptcy law. However, the Bankruptcy Code's definition of estate property is similarly broad to the tax lien act's definition. Thus, several recent opinions interpreting "property of the estate" adopted an approach similar to the Dyre approach, namely that state law determines the nature of a debtor's interest, but bankruptcy law determines whether that interest is property of the estate.

A Debtor May Not Use Florida's Homestead Exemption Laws To Circumvent Zoning Laws.

In Kellogg v. Schreiber, 1999 U.S. App. LEXIS 32217 (11th Cir. December 10, 1999), the Eleventh Circuit held that a debtor could not select a one-half acre portion of his property to be exempt homestead when the local zoning laws prohibited him from subdividing his property. The debtor filed a voluntary Chapter 7 bankruptcy and claimed a Florida homestead exemption on his residential property consisting of 1.3 "indivisible acres." The bankruptcy trustee objected to the exemption because it exceeded Florida's one-half acre limit on exempt property within a municipality. The zoning laws of the county in which the homestead property was located prohibited a subdivision of the 1.3 acre parcel. As a result, the Bankruptcy Court ruled that the debtor's property must be sold and that the proceeds apportioned between the debtor and his estate. Affirming the lower court's decision, the Eleventh Circuit held that homestead laws should not "become instruments of fraud, an imposition on creditors, or a means to escape honest debts." The Court reasoned that the non-exempt portion of the debtor's property would have no legal or practical use to the bankruptcy trustee because its conveyance would violate local zoning laws. The Eleventh Circuit concluded that if the debtor could not lawfully divide his homestead property into two parcels before declaring bankruptcy, then he should not be allowed to use his homestead exemption to circumvent zoning laws after filing bankruptcy.

Attorney Resource Room

By Ed Rice

At long last, the Attorney Resource Room is up and running. Although some minor improvements will be made over the next several months, it is operational and ready for use by our members. The Attorney Resource Room is located on the 10th floor of the Sam M. Gibbons U.S. Courthouse and is accessed from the northerly-most hallway on the 10th floor.

Available for your use is a telephone (free of charge), a copier ($.20 per page), a fax machine, and a computer for last minute word processing chores. Charges for copies are on the honor system, and a sign up sheet is available for users to log their copies. Users of the copy machine will be billed periodically by our association.

Special thanks to Zala Forizs and James, Hoyer, Newcomer, Forizs & Smiljanich, P.A. for donating the furniture for the room, the Business Law Section of The Florida Bar for underwriting the equipment purchase, and the Clerk's office for their assistance in setting up our new room.

The Attorney Resource Room promises to be of great benefit to our members, and I welcome any questions or comments regarding this new facility.

The Tampa Bay Bankruptcy Bar Association would like to thank the following entities who have donated door prizes to the Association's monthly CLE lunches for the months of January and February. All members are encouraged to support and patronize the entities and our advertisers who support the Association.

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Committee Chairs 1999-2000

The Association is looking for volunteers to assist us this coming year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairperson(s) listed below.

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The Association's Officers And Directors Wish Its Members A Safe And Festive St. Patrick's Day

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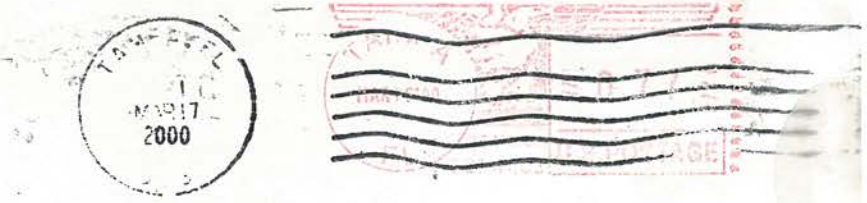

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