Tampa Bay Bankruptcy Bar Association

The Cramdown

Newsletter for the Tampa Bay Bankruptcy Association

Editor-in-Chief, Angelina Lim
Johnson, Pope, Bokor, Ruppel & Burns, LLP

Spring 2023

PRESIDENT'S MESSAGE

by Barbara Hart
Stichter, Riedel, Blain & Postler, P.A.

Lame-duck (may be used as a noun or adjective): one whose position or term in office will soon end. See *Merriam-Webster.com*.

I have always loved the Tampa Bay Bankruptcy Bar Association and all its members, but never so much as now that my term as President of the TBBBA nears an end. Until you have had the opportunity to work closely with our all-volunteer, awe-inspiring TBBBA Board, it is hard to truly appreciate their diligence, intelligence, energy, creativity, and devotion to the TBBBA's success. There is a tremendous amount of work that goes into keeping TBBBA a vibrant organization providing a valuable service to its membership and community including planning a calendar of events for the year; managing our business accounts, website, social media, and news blasts; hosting events like the View from the Bench reception, Holiday Party, Clay Shoot, Golf Tournament, Clerk's Appreciation Luncheon, and the Annual Dinner; providing valuable CLE programing; publishing *The Cramdown*, planning Judicial Liaison meetings, helping our community through CARE programming and our Pro Se Assistance Clinic, and so much more. We enjoy this wonderful TBBBA community because of the attorneys who serve on the Board and provide countless hours of time and energy. I cannot say enough about these talented, type-A bankruptcy nerds, but I would like to brag about each of them at least a little.

Noel R. Boeke, Chair. Noel's ruthless efficiency, attention to the bottom line, good humor and charm will be missed as he soon rolls off the Board after nine years of consecutive service. Noel made leading the TBBBA look easy! Noel-we salute you and thank you!

Megan W. Murray, Vice-President. It is hard to imagine a better choice for the TBBBA's president-elect. I think Megan must be an old soul as her wisdom and grace belie her years. Megan has been my right-hand person. She cheerfully and skillfully lends competent support and excellent counsel whenever needed. Thank you, Megan, for taking all my calls! It is with great interest that I look forward to your presidency and future career.

Nicole Mariani Noel, Secretary. Efficient, detailed, accurate, and witty, Nicole has turned the Board's meeting minutes into an art form. She has been an active member of the Board for the past six years, providing thoughtful and valuable input on the direction of the TBBBA. Thank you, Nicole!

Ryan C. Reinert, Treasurer. No matter the organization, the job of treasurer is a tough one. It is especially true of the TBBBA. We have a significant number of members and events equaling a lot of transactions and accounting. Anyone who survives the position of TBBBA treasurer is deserving of our respect and gratitude. Thank you, Ryan!

Michael Barnett, Pro Bono/Community Service. Michael's long and award-winning history of pro-bono service is well known, so we invited him to join the Board and manage our Pro Se Assistance Clinic. Michael re-opened our in-person clinic, which had been operating virtually due to Covid. In addition, the Clinic continues to serve people virtually as well. Michael also joined Judge Brown's and Judge Burgess' committee that recently launched a district-wide virtual platform to

continued on p. 4

The Tampa Bay Bankruptcy Bar Association
2021-2022 Officers and Directors

President
Barbara Hart
Stichter Riedel Blain & Postler, P.A.
110 E. Madison Street, Ste. 200
Tampa, FL 33602

Vice President
Megan Murray
Underwood Murray PA
100 N Tampa Suite 2325
Tampa, FL 33602

Secretary
Nicole Noel
Kass Shuler, P.A.
1505 N. Florida Avenue
Tampa, FL 33602

Treasurer
Ryan Reinert
Shutts & Bowen LLP
4301 W. Boy Scout Blvd. Suite 300
Tampa FL 33607

Chair/Past-President
Noel R. Boeke
Holland & Knight LLP
P.O. Box 1288
Tampa, FL 33601

CLE Chair
Erik Johanson
Erik Johanson PLLC
3414 W Bay to Bay Blvd, Ste 300
Tampa, FL 33629

CLE Chair
John Landkammer
Anthony & Partners, LLC
208 N. Franklin St, Ste 2800
Tampa FL 33602

Consumer
Kristina Feher
Feher Law, P.L.L.C.
1275 66th Street N., #40042
St. Petersburg, FL 33743

Technology
Dan Fogarty
Stichter Riedel Blain & Postler, P.A.
124 E. Madison St, Ste. 200
Tampa FL 33602

Judicial Liaison
Nicole W. Peair
Office of the U.S. Trustee
501 E. Polk St., Ste 1200
Tampa, FL 33602

Cramdown
Angelina Lim
Johnson, Pope, Bokor, Ruppel & Burns, LLP
401 E. Jackson Street, Suite 3100
Tampa FL 33602

Community Service & Pro Bono
Michael Barnett
Michael Barnett, PA
506 N Armenia Ave
Tampa, FL 33609

Membership
Ryan Yant
Carlton Fields
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, Florida 33607

CARE Committee
Daniel Etlinger
Jennis Law Firm
606 East Madison Street
Tampa FL 33602

Social
Matt Hale
Stichter Riedel Blain & Postler, P.A.
110 E. Madison Street, Ste. 200
Tampa, FL 33602

In This Issue

Past Presidents

1988-1989 ..... Leonard Gilbert (chairperson)

1988-1989 ..... Don M. Stichter

1989-1990 ..... Douglas McClurg

1990-1991 ..... Richard C. Prosser

1991-1992 ..... Robert B. Glenn

1992-1993 ..... Thomas B. Mimms, Jr.

1993-1994 ..... Edward M. Waller, Jr.

1994-1995 ..... Harley E. Riedel

1995-1996 ..... Roberta A. Colton

1996-1997 ..... Jeffrey W. Warren

1997-1998 ..... Michael P. Horan

1998-1999 ..... Dennis J. LeVine

1999-2000 ..... Russell M. Blain

2000-2001 ..... John D. Emmanuel

2001-2002 ..... Zala L. Forizs

2002-2003 ..... Catherine Peek McEwen

2003-2004 ..... John Lamoureux

2004-2005 ..... Edwin Rice

2005-2006 ..... David Tong

2006-2007 ..... Herbert Donica

2007-2008 ..... Shirley Arcuri

2008-2009 ..... Donald R. Kirk

2009-2010 ..... Luis Martinez-Monfort

2010-2011 ..... Elena Paras Ketchum

2011-2012 ..... Lara Roeske Fernandez

2012-2013 ..... Keith T. Appleby

2013-2014 ..... Stephenie Biernacki Anthony

2014-2015 ..... Edward Peterson

2015-2016 ..... Adam Lawton Alpert

2016-2017 ..... Kelley Petry

2017-2018 ..... Scott Stichter

2018-2019 ..... Lori Vaughan

2019-2020 ..... Jake Blanchard

2020-2021 ..... Kathleen DiSanto

2021-2022 ..... Noel R. Boeke

President's Message

continued from p. 1

provide pro se bankruptcy assistance across the Middle District. Michael is rolling off the TBBBA Board to focus on professional endeavors but has agreed to continue service on the district-wide Pro Se Assistance Clinic Board. Thank you, Michael, for your dedication to the TBBBA and to pro bono service in the Middle District of Florida!

Daniel E. Etlinger, CARE Program. If you have a challenging job that must be done well, call Dan Etlinger. When Dan undertook the CARE Program, we had not presented a single program in several years. The TBBBA needed to rebuild its local program and revitalize our volunteers. Dan managed to obtain a substantial grant to fund CARE programming and has made connections with the University of Tampa, the YMCA, and the Academy of Holy Names. The TBBBA's CARE Program is again thriving thanks entirely to Dan's efforts. Thank you, Dan!

Kristina Feher, Consumer CLE. This is Kristina's first year on the TBBBA Board. Kristina brought innovative ideas and new energy to our Consumer CLE meetings. Covering timely topics, she made sure that the TBBBA was able to present valuable CLE programs and provide practitioners with the ability to earn CLE credit. Kristina coordinated eight CLE programs, including those with

continued on p. 5

President's Message
continued from p. 4

our Judges. We thank you, Kristina, and are certain the more than 250 people who participated in these programs thank you as well! You are a terrific addition to our Board.

Daniel R. Fogarty, Technology. The TBBBA's Technology Committee manages far more than you might expect. The tech chair oversees our website, weekly news blasts, and social media presence. This year, in addition to all those regular duties, I asked Dan if he would also help me add a History Tab to our website, take our CLE luncheons to a hybrid format, find a shared drive to save TBBBA documents and records, and more. It was an excessively big ask indeed, but I knew that I could count on Dan. Thank you, Dan!

Matthew Hale, Social Events. As a first-year Board member, we tasked Matt with planning several of our larger events—the Holiday Party, the Clay Shoot, and the Annual Dinner. We set up the Holiday Party and the Clay Shoot as charitable events. Matt expertly managed these events with remarkable success. The Holiday Party raised $1,500 for Southwest Florida hurricane relief efforts and the Clay Shoot raised another $3,000 to support financial education programming in Tampa Bay. Thank you, Matt! We look forward to your help to put together the Annual Dinner and to your continuing contributions to the TBBBA Board for years to come.

Erik Johanson, CLE Luncheons. The job of managing the CLE luncheons is so important and significant to the work that the TBBBA does for our membership. Because of this, the assignment is a 2-year commitment and involves two Board members serving staggered terms. This year, Erik served as the senior member of the CLE team. Including an upcoming joint event with the Federal Bar Association, Erik has coordinated or helped to coordinate 10 CLE presentations this year. As with the role of CLE chair, Erik has easily managed all the tough Board assignments while managing a thriving law practice (he likes to call it "Viking Law") and welcoming a new baby to his family. He even lent TBBBA the support of his mom, Felicia, whom you may have seen at the sign-in desk at the luncheons. With Erik on the Board, the future of the TBBBA is in good hands. Thank you, Erik.

John W. Landkammer, CLE Luncheons. John joined the Board a few years ago and this year served as the junior member of our CLE luncheon team. John is thoughtful and precise, and together with Erik, ably managed the challenge of CLE coordinator. Chasing down current topics to keep our membership well-informed, finding the right presenters, and ensuring proper CLE credit is an exercise like that of herding cats. I am looking forward to the CLE programs John will plan for us next year. Thank you, John!

Angelina Lim, *The Cramdown*. Angelina broke an all-time TBBBA record by publishing five newsletters (to date) during this membership year. This included a Special Edition of *The Cramdown* dedicated to Judge Michael Williamson. As a former law clerk to Judge Williamson, Angelina gave the *MGW Memorial Edition* all the love and attention it deserved. Angelina also managed the process of taking *The Cramdown* to an all-electronic format, which has significantly improved the TBBBA's bottom line. Thank you, Angelina! And a special thank you to our behind-the-scenes *Cramdown* volunteers - Minerva Granger & Beth Ann Scharrer!

Nicole W. Peair, Judicial Liaison. Nicole jumped in and took over the role of Judicial Liaison after Judge Denise Barnett was appointed to the bench in the United States Bankruptcy Court for the Western District of Tennessee. The Judicial Liaison works with our Tampa judges in holding quarterly meetings to discuss procedural matters arising in bankruptcy cases, adversary proceedings, and contested matters. We have begun to solicit comments from membership for these judicial liaison meetings via the TBBBA's weekly news blast. Nicole is also working on

continued on p. 6

President's Message

continued from p. 5

the Clerk's Appreciation Luncheon scheduled for mid-May. Nicole is a powerful addition to the Board, and we are happy to have her. Thank you, Nicole!

J. Ryan Yant, Membership. While still fairly new to the Board, Ryan's contributions have been invaluable. As membership chair, Ryan's challenge was to encourage growth after several lean business years. Using a report of attorneys filing cases in the Tampa Bay area, Ryan reached out to those who were not already enjoying the benefits of membership. To be sure, Ryan is diligent, creative, and highly capable, but what I really appreciate is his unique ability to bring a sense of levity to discussions, which has a way of forming bonds and creating community within the Board and the membership. Thank you, Ryan!

It has been a great year for the TBBBA. I hope that you will join me in thanking the hardworking TBBBA Board and I thank you for the honor and privilege of serving with these wonderful people.

The 3 Presidents

Current, Past, and Future

Thanks to the current board members!

The Cramdown is published four times per year. Advertising rates are as follows:

Full Page 7.875w x 9.75h	$400/single issue • $1,200/4 issues
Half Page 7.875w x 4.75h	$200/single issue • $600/4 issues
Quarter Page 3.75w x 4.75h	$100/single issue • $300/4 issues
Business Card 3.75w x 2.375h	$50/single issue • $150/4 issues

The Tampa Bay Bankruptcy Bar Association reserves the sole and exclusive right to exclude any advertisement from being published in the Cramdown Newsletter.

Pricing is based on camera-ready computer generated art being supplied by advertiser.

Art Specifications: ALL ART MUST BE 300 dpi or higher. Preferred file format is PDF. High resolution jpg is acceptable.

For information regarding advertising in *The Cramdown*, contact:

Angelina Lim
angelinal@jpfirm.com

or visit our website
tbba.com/cramdown-advertising

Graphic Design Services by:

Eric West
graphic designer

"I make you look good"

813-389-3051
info@EricWestGraphics.com
www.EricWestGraphics.com

ROY KOBERT

CERTIFIED MEDIATOR

CELL: 321-945-2888 | DIRECT: 813-273-5262

ROY.KOBERT@GRAY-ROBINSON.COM

Board certified in Business Bankruptcy Law for nearly 20 years

Practical approach to mediation that draws on 30+ years of legal experience

Certified Federal Court Mediator, Middle District of Florida

Florida Supreme Court Certified Mediator

Diplomate, National Academy of Distinguished Neutrals

Complimentary use of my Tampa mediation conference center

For more details please visit:

gray-robinson.com/docs/roy-kobert-mediator-bio.pdf

GRAYROBINSON

The Securities Safe Harbor In Section 546(e) Of The Bankruptcy Code Is Alive And Well

By Michael C. Markham, Esq.

Section 546(e) of the Bankruptcy Code "shields certain transactions from a bankruptcy trustee's avoidance powers, including, inter alia, transfers by or to a financial institution in connection with a securities contract." I*n re Tribune Company Fraudulent Conveyance Litigation*, 946 F.3d 66, 71 (2nd Cir. 2019) ("customer" of "financial institution" deemed a covered entity protected by Section 546(e)). Section 546(e) provides one of the most important, but rarely contemplated or asserted, defenses to a fraudulent transfer. Whenever the underlying transaction implicates the securities world or money passing through a financial institution, the application of Section 546(e) should be closely studied.

Section 546(e) is set forth below:

> (e)Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

The language is tortured and contains numerous references to other Code sections and defined terms. At first blush, its application to a transaction is hardly obvious.

Many assumed that the defense provided by Section 546(e) had been essentially eliminated by the Supreme Court in *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 833 (2018). However, *Merit* "left open" whether the customer of a financial institution "acting as agent or custodian…in connection with a securities contract" can be a definitional financial institution. *Tribune Company* at 77-78. In *Merit*, the Supreme Court clearly noted that the parties in that case did "not contend that either the debtor or petitioner in this case qualified as a 'financial institution' by virtue of its status as a 'customer' under § 101(22)(A)." *Merit*, 138 S. Ct. at 890, n. 2.

The 546(e) defense focuses on an initial transfer from the debtor. However, in many instances, a trustee seeks to recover an alleged fraudulent transfer from a subsequent transferee. A subsequent transferee can only be liable under Section 550(a) "to the extent that [an underlying] transfer is avoided under" certain sections of the Bankruptcy Code, including Sections 544 and 548. Even if the trustee obtains a default judgment against the initial transferee, such default judgment is not binding on a subsequent transferee who may then raise any defense that could have been raised by the initial transferee, including Section 546(e). *SIPC v. Bernard M. Madoff Investment Securities LLC*, 501 B.R. 26, 35 (S.D.N.Y. 2013) (Madoff trustee conceded that a subsequent transferee may assert any defense available to the initial transferee); *Picard v. Bureau of Labor Insurance*, 480 B.R. 501, 522 (Bankr. S.D.N.Y. 2012) (subsequent transferee must be afforded its due process rights to contest the avoidability of the initial transfers), *cited with approval in In re Liquidation of Bernard L. Madoff Investment Securities, LLC*, 917 F.3d 85 (2nd Cir. 2019); *In re Flashcom, Inc.*, 361 B.R. 519, 525 (Bankr. C.D. Cal. 2007) (default judgment does not preclude subsequent transferee from disputing avoidability of underlying initial transfer); *In re AVI, Inc.*, 389 B.R. 721, 735 (9th Cir. BAP 2008) (automatic recovery

continued on p. 12

CLE Lunch
April 11, 2023
When is Enough Enough?!:
The Interplay Between Good Faith and Projected Disposable Income"
– Dave Jennis, Scott Underwood, Kathleen DiSanto and Dan Etinger

State of the District CLE – Chief Judge Delano
February 14, 2023

A Deep Dive into Metadata
Dwayne Denny of Data Specialist Group
March 14, 2023

Investitures:
Congratulations to the Honorable Tiffany Geyer on her investiture on March 17, 2023, in Orlando
and to the Honorable Jason Burgess in Jacksonville on February 2, 2022.

Securities Safe Harbor

continued from p. 10

from a subsequent transferee disallowed following the avoidance of an initial transfer through a stipulated judgment or default); *Thompson v. Jonovich*, 168 B.R. 408, 416 (Bankr. D. Ariz. 1994) (trustee who obtained a default judgment against the initial transferee was required to prove every element of fraudulent transfer against the subsequent transferee); *In re McMillin*, 448 B.R. 847, 851 (M.D. Fla. 2011), *rev'd in part on other grounds*, 482 Fed. App'x. 454 (11th Cir. 2012) (where underlying judgment against initial transferee is by default, subsequent transferee may attack the underlying transfer); *In re American Housing Foundation*, 2013 WL 2452692 (Bankr. N.D. Tex. 2013) (since underlying judgment was taken by default, subsequent transferee is not prevented from litigating underlying claim); *In re Jones Storage and Moving, Inc.*, 2005 WL 2590385 (Bankr. D. Kan. 2005) (court has no hesitation in holding that *res judicata* does not bind subsequent transferee). This rule is well established and comports with due process requirements.

The first question under Section 546(e) is whether there is a "covered entity" like a "financial institution." The term "financial institution" is defined in Section 101(22)(A) of the Bankruptcy Code to include a "customer" of a bank when a bank "is acting as agent or custodian for a customer (whether or not a 'customer,' as defined in section 741)." In many instances, funds are transferred through a custodial or other account at a recognized financial institution or bank. Accordingly, if the initial transferee of the alleged fraudulent transfer is a customer of a bank acting as its agent or custodian, the non-bank initial transferee is a covered entity under Section 546(e). *In Tribune Company*, the Court held that a financial institution was acting as the agent of its customer, and therefore the customer was a definitional financial institution and a covered entity. In a more recent case, the court concluded that a financial institution was acting as the custodian for its customer and therefore the customer was a covered entity. *Kelley v. Safe Harbor Managed Account 101, Ltd.*, 2020 WL 5913523 (D. Minn. 2020), aff'd, 31 F.4th 1058 (8th Cir. 2022).

The next question is whether the transfer was made "in connection with a securities contract." "Securities contract" is defined in Section 741(7)(A) of the Bankruptcy Code and includes "a contract for the purchase, sale or loan of a security." The term "security" is defined in Section 101(49) of the Bankruptcy Code to include a "note." "[T]he term 'securities contract' expansively includes contracts for the purchase or sale of securities, as well as any agreements that are similar or related to contracts for the purchase or sale of securities." *In re Madoff Inv. Sec., LLC*, 773 F.3d 411, 418 (2nd Cir. 2014); *see also In re MCK Millenium Centre Parking, LLC*, 532 B.R. 716, 730 (Bankr. N.D. Ill. 2015, *on reconsideration*, 2015 WL 13817636 (Bankr. N.D. Ill. 2015) (definition of "securities contract" was written expansively); *In re DSI Renal Holdings, LLC*, 2020 WL 1509447, n.38 (Bankr. D. Del. 2020 (same); *In re Quebecor World (USA) Inc.*, 453 B.R. 201, 212 n.7 (Bankr. S.D.N.Y. 2011) (Given the comprehensive language used to define "securities contract" in Section 741(7), a note purchase agreement is a "securities contract"); *In re Greektown Holdings,* LLC, 2015 WL 8229658 *16 (Bankr. E.D. Mich. 2015, *vacated on other grounds*, 765 Fed. App'x 132 (6th Cir. 2019) (the note purchase agreement is thus a "securities contract" because it is a contract for the purchase and sale of securities). The term "securities contract" as used in section 546(e) is very broad in its application and encompasses virtually any contract for the purchase and sale of securities and a wide array of related contracts, including security agreements. *In re Lehman Bros. Holdings, Inc.*, 469 B.R. 415, 438-439 (Bankr. S.D.N.Y. 2012) (security agreement that is "related to" another "securities contract" is a separate "securities contract"); *In re Bernard L. Madoff Inv. Securities, LLC*, 773 F.3d 411, 419 (2nd Cir. 2014) (the term "securities contract" includes, "quite expansively, any security agreement").

The phrase "in connection with" is similarly broad. It is well established that the phrase "in connection with" is to be "interpreted liberally." *MCK Millenium*, 532 B.R. at 731 (citing cases). In fact, the phrase "in connection with" suggests a broader meaning similar to the phrase "related to." *Id. See also Guardian Flight LLC v. Godfread*,

continued on p. 13

Securities Safe Harbor
continued from p. 12

2021 WL 983084 (8th Cir. 2021) (phrase "related to" has been defined broadly); *Bell v. Blizzard Entertainment, Inc.*, 2013 WL 12063912 *4 (C.D. Cal. 2013) (noting the liberal construction that courts have given to the phrase "related to" in a wide variety of contexts). On this issue, the Eighth Circuit recently stated:

> In In re Madoff, the Second Circuit noted that "[i]n the context of § 546(e), a transfer is 'in connection with' a securities contract if it is 'related to' or 'associated with' the securities contract." 773 F.3d at 421. There, the court rejected the "conten[tion] that in order for [certain] payments to have been made 'in connection with' a securities contract, there must necessarily have been some relation or connection between the payment and the contract," determining instead that "[§] 546(e) sets a low bar for the required relationship between the securities contract and the transfer sought to be avoided" and "Congress could have raised the bar by requiring that the transfer be made 'pursuant to,' or 'in accordance with the terms of,' or 'as required by,' the securities contract" but instead, "merely required that the transfer have a connection to the securities contract." *Id*. at 422.

Kelley, 31 F.4th at 1068.

The final question is whether the underlying transfers are avoidable under Section 548(a)(1)(A) of the Bankruptcy Code – the provision governing transfers based on actual fraud. If so, the immunity in Section 546(e) does not apply. Section 548(a)(1)(A) governs transfers made "within 2 years before the date of the filing of the petition" based on actual fraud. Accordingly, constructively fraudulent transfers made at any time or actually fraudulent transfers made more than 2 years before the petition date are eligible for protection under Section 546(e).

The recent case of *Kelley v. Safe Harbor Managed Account 101, Ltd.*, cited above, is instructive. In *Kelley*, the defendant was a subsequent transferee of an alleged fraudulent transfer arising out of the Petters' Ponzi scheme case. The defendant had innocently invested in the scheme's feeder fund. The trustee sued the feeder fund and obtained a large default judgment. The trustee then sued a subsequent transferee for alleged fraudulent transfers that occurred many years before the Petters' bankruptcy. The subsequent transferee defendant asserted that (a) the feeder fund was a covered entity under Section 546(e) because Wells Fargo acted as a custodian for the feeder fund, its customer; and (b) the transfers from Petters to the feeder fund were made in connection with a securities contract - a note purchase agreement. Initially, the district court granted summary judgment in favor of the defendant based on 546(e). *Kelley v. Safe Harbor Managed Account 101*, Ltd., 2020 WL 5913523 (D. Minn. 2020). On appeal, the Eighth Circuit affirmed on most points but remanded on the issue of whether the transfers had been made "in connection with" the note purchase agreement. *Kelley v. Safe Harbor Managed Account 101, Ltd.*, 31 F.4th 1058 (8th Cir. 2022). On remand, the district court found that the transfers were made in connection with the note purchase agreement and re-entered final summary judgment in favor of the defendant. Kelley v. Safe Harbor Managed Account 101, Ltd., 0:20-cv-000642-JRT (D. Minn. February 6, 2023).

It's worth considering if the Section 546(e) defense is available.

Like Moths to a Flame: The Irresistible Urge to Reject Burdensome Restrictive Covenants

By Erik Johanson, *Esq.*
Managing Attorney, Erik Johanson, PLLC

It is well established that restrictive covenants are not subject to rejection under Section 365 of the Bankruptcy Code.[1] In fact, few would seriously contend that Section 365 could be used to reject the deed restrictions and restrictive covenants typical of modern residential subdivision and condominium developments. However, on rare occasions, restrictive covenants can harm the overall character of a development. Where this occurs, the contract-rejecting powers of Section 365 emit an aura that allures bankruptcy lawyers like moths to flame. Judge Colton recently grappled with, but ultimately resisted, the siren song to reject a set of troubled restrictive covenants in *In re Wildwood Villages, LLC*.[2]

The *Wildwood Villages* case centered around a 55 Plus mobile home subdivision adjacent to The Villages in Central Florida. While the surrounding areas flourished, the Wildwood Villages subdivision foundered. The plight of the Wildwood Villages community traced its roots to the Deed Restricts recorded by the original subdivision developer. Under the Deed Restrictions, the developer was required to provide the lot owners with a host of amenities, including most notably, a recreational facility complex. In exchange, the developer was authorized to charge the lot owners a monthly fee, which right could be enforced by liening and foreclosing delinquent owners.

For decades, the centerpiece of the community was a 10,000 square foot recreational facility complex. However, after protracted class action litigation over the amount of the amenity fee, the developer filed a Chapter 11 petition. Shortly after the filing, the developer eliminated the existing recreational facility complex and proposed to relocate the amenities to a downsized facility located within the subdivision. Unfortunately for the debtor, the location it selected for the new facility was not zoned for commercial uses and the county refused to approve its re-zoning application. In the meantime, the debtor leased the old recreational facility to a third party, so there was nowhere else in the subdivision where it could build a replacement facility. As a result, the debtor found itself in default of the Deed Restrictions and was forced to liquidate. An ad hoc committee (hereinafter "the committee") of lot owners objected to the debtor's plan on the ground that it failed to assume and cure or to reject the Deed Restrictions. The committee also filed administrative expense priority claims for monetary damages caused by the elimination of the recreational facility.

In its briefing, the ad hoc committee argued that the Deed Restrictions contained two distinct categories of restrictive covenants: negative covenants and affirmative covenants. A negative covenant prohibits undesirable uses of property.[3] For instance, a covenant restricting the height of properties to two stories or prohibiting commercial uses is a negative covenant. An affirmative covenant, on the other hand, obligates the parties to perform affirmative acts.[4] A covenant requiring the developer to provide recreational facilities \is an affirmative covenant. The committee conceded that the debtor could not reject the negative covenants in the Deed Restrictions, i.e. the covenant that the subdivisions be restricted to 55+ residents and single family homes, but argued that the affirmative covenants pertaining the recreational facilities could be severed from the Deed Restrictions and rejected.

The committee's argument found some support in Judge Paskay's *In re Camptown* decision.[5] The *Camptown* case involved an RV park that had entered into 99-year lot leases. Under the 99- year leases, the park manager was required to maintain the park in exchange for a $5.00 monthly fee collected from the residents. After several years, it became clear that the $5.00 fee was insufficient to fund the operation of the park. Unfortunately, the leases did not contain any provision enabling the park manager to raise the fee. After the park manager filed for bankruptcy, Judge Paskay ruled that the tenants'

continued on p. 15

1 *See, e.g., In re Alta Mesa Res., Inc.*, 613 B.R. 90, 95 (Bankr. S.D. Tx. 2019) (stating that "real property covenants are not executory and cannot be rejected under the Bankruptcy Code.").
2 *In re Wildwood Villages, LLC*, 2022 Bankr. LEXIS 1466 (M.D. Fla. Jan. 21, 2022) (Colton, J.).
3 *See* Weisler, Jay, *The Real Estate Covenant as Commons: Incomplete Contract Remedies Over Time*, 13 S. Cal. Interdis. L.J. 269, 325 (Spring 2004).
4 *Id.*
5 *In re Camptown, Ltd.*, 6 B.R. 352, 355-56 (Bankr. M.D. Fla. 1989).

Useful Advice

continued from p. 14

99-year leases were vested property rights that could not be rejected in bankruptcy. However, Judge Paskay ruled that the maintenance provisions of the leases were severable and could be rejected.[6]

In the *Wildwood Villages* case, Judge Colton concluded that *Camptown* did not involve recorded deed restrictions and, therefore, was distinguishable. Because the recorded Deed Restrictions ran with the land, Judge Colton ruled the recreational facility and maintenance fee obligations were "not part of an executory contract that [could] be assumed or rejected under § 365 of the Bankruptcy Code."[7] Simply put, "because a covenant [was] a property interest and not a contract, it [was] not capable or rejection."[8] Based on the Court's ruling that the recreational facility and maintenance fee provisions of the Deed Restrictions were not executory contracts, the debtor was able to confirm a liquidating plan.

At the subsequent trial on damages on the lot owners' administrative claim, the Court found that the committee failed to prove that the elimination of the recreational facilities resulted in diminution in property values. Ironically, had the debtor known that result in advance, it would have been incentivized to support the committee's argument that the affirmative covenants in the Deed Restrictions could be severed and rejected. In fact, the state of default under the Deed Restrictions caused by the elimination of the recreational facilities undoubtedly clouded the sale process under Section 363, as the law is equally clear that a trustee cannot sell free and clear of a valid restrictive covenant.[9]

6 *Id.* at 356.
7 *In re Wildwood Villages*, 2022 Bankr. LEXIS 1466, at *11.
8 *Id.*
9 *Gouveia v. Tazbir*, 37 F.3d 295, 298 (7th Cir. 1994)

The Subchapter V Trustee as Facilitator/Mediator

By Amy Denton Mayer, *Shareholder*
Stichter Riedel Blain & Postler, P.A.

Trustee as Facilitator

Of all the duties, the Subchapter V trustee's statutory duty to facilitate the development of a consensual plan of reorganization is perhaps the most important role and is unique to Subchapter V. 11 U.S.C. § 1183(b)(7). "The subchapter V trustee's special duty to 'facilitate the development of a consensual plan of reorganization' appears nowhere else in the Bankruptcy Code and is specific to subchapter V." *Id. See also, In re 218 Jackson LLC*, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021) ("The subchapter V trustee is the *only* trustee directed to 'facilitate the development of a consensual plan of reorganization'. This duty is assigned to no other trustee in bankruptcy. This distinction is significant.")

"The subchapter V trustee, tasked primarily with facilitating consensual plans, occupies a unique position as contrasted with its counterparts in traditional chapter 11 and other cases, who tend to be adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors." *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022). "Chapter 7 trustees take possession of the estate's property and dispose of or administer those assets in order to pay creditors." *218 Jackson LLC*, 631 B.R. at 947. "This role typically puts a trustee in conflict with the debtor and sometimes creditors." *Id.* "A chapter 11 trustee, if one is appointed, similarly takes possession of estate assets for the purpose of liquidation, sale, or less frequently, a reorganization." *Id.* "A chapter 13 trustee similarly is gathering assets, but in the form of plan payments in order to distribute to creditors." *Id.* "A chapter 12 trustee is perhaps the most similar here—not taking possession of estate property and occupying a similar oversight role." *Id. See also, Ozcelebi*, 639 B.R. at 381 ("Chapter 12 trustees are perhaps the closest to subchapter V trustees because they occupy a similar role as overseer without taking possession of estate property unless directed to do so in the administration of a confirmed chapter 12 plan of reorganization."). "But even a chapter 12 trustee is not charged with facilitation of a consensual plan." *218 Jackson*, 631 B.R. at 947.

The Subchapter V trustee's role was intentionally designed to be less adversarial. *Id.* Facilitation of a consensual plan requires the Subchapter V trustee to work with the parties—the creditors and debtor—to agree on a plan. *Id.* "The definition of facilitate is to 'make the occurrence of (something) easier; to render less difficult.'" *Id.* (*quoting Black's Law Dictionary* 734 (11th Ed. 2019). As a result, the Subchapter V trustee acts more like a mediator than an adversary. *Id.* (*quoting In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 n.81 (Bankr. S.D. Fla. 2020) ("A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a de facto mediator between the debtor and its creditors.").

A facilitator is someone that helps a group of people engage in discussions or work together; one who interacts with parties in negotiations, exchanging information and trying to further the process. FACILITATOR, *Black's Law Dictionary* (11th Ed. 2019). "The term 'facilitator' is often used interchangeably with the term 'mediator. . .'" *Id.* (*quoting* U.S. Office of Personnel Management, Alternative Dispute Resolution: A Resource Guide 8–9 (2001)).

The role of facilitating plan confirmation or other case issues can look like conducting a mediation. Indeed, the trustee's facilitator role has been analogized to that of a mediator. See Christopher G. Bradley, *The New Small Business Bankruptcy Game: Strategies for Creditors Under the Small Business Reorganization Act*, 28 Amer. Bankr. Inst. L. Rev. 251, 261 (2020) ("Trustees seem likely to play the role of mediator."); 22 Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38 AMER. BANKR. INST. J. (Nov. 2019) at 8 (the statutory goal of a consensual plan suggests that the trustee also fill a mediation role).

Bankruptcy courts have also described the Subchapter V trustee as a de facto mediator or mediator like. In *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 346 (Bankr. S.D. Fla. 2020), Judge Grossman described the role as follows:

> A Subchapter V trustee is specifically charged with the duty to "facilitate the development of a consensual plan of reorganization." 11 U.S.C. § 1183(b)(7). This role should include working

continued on p. 18

Trustee as Facilitator

continued from p. 17

> not only with the debtor, but with creditors as well, to facilitate negotiation of a consensual plan. A substantial part of the Subchapter V trustee's pre-confirmation role, therefore, should be to serve as a *de facto* mediator between the debtor and its creditors.

In *In re 218* Jackson *LLC*, 631 B.R. 937, 947 (Bankr. M.D. Fla. 2021), Judge Vaughan described the role as follows:

> "Facilitation of a consensual plan requires the subchapter V trustee to work with the parties—the creditors and debtor—to agree on a plan. The definition of facilitate is to "make the occurrence of (something) easier; to render less difficult." Black's Law Dictionary 734 (11th Ed. 2019). As a result, the subchapter V trustee acts more like a mediator than an adversary.

As a practical matter, the trustee's facilitator role naturally matches a mediator's role. "The mediator's role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order." M.D. Fla. L.B.R. 9019-2. The trustee's role as facilitator is identical. In some instances, the trustee fulfills his or her facilitator role by engaging in "shuttle diplomacy" with respect to contested issues by transmitting settlement offers between counsel via telephone or email communications. In other cases, it is critical for the parties and their counsel to participate in face-to-face (Zoom or in-person) discussions/negotiations with the trustee with break-out sessions to facilitate the open flow of communication. During these negotiations, the trustee is not simply a message carrier. The trustee is actively analyzing issues, questioning perceptions, conducting private caucuses, stimulating negotiations between opposing sides, suggesting alternatives, and keeping order among the parties and counsel.

continued on p. 19

Trustee as Facilitator

continued from p. 18

The author serves as a Subchapter V trustee in the Middle District of Florida for cases filed in the Tampa and Fort Myers divisions, and has been appointed in approximately sixty-five cases. In some cases, the court has ordered the parties and their counsel to participate in "meet and confer" or "mediation" sessions with the author, in her capacity as a Subchapter V trustee. *See e.g., In re Joseph Robert Verna and Karen Elizabeth Verna*, Case No. 2:22-bk-00021-FMD (M.D. Fla. 4/27/22) (Doc. No. 87) directing the parties to participate in zoom mediation with the Subchapter V trustee. In other cases, no formal order has been entered, but the court has orally directed the parties to participate in "meet and confer" sessions with the trustee.

Not a Mediator

But the Subchapter V trustee cannot, in the traditional sense, be a mediator. Mediators, by longstanding practice and by codification in almost all jurisdictions, are not involved in the underlying case. Mediators typically sign, and require the parties to sign, confidentiality agreements. Mediators are also subject to strict limitations on disclosures pursuant to professional and ethical standards. Thus, they are required to maintain the parties' confidences. Once the mediation is concluded, mediators do not touch the case again; they do not show up in court at a subsequent hearing following an unsuccessful mediation and participate as a party in interest.

Mediation is "a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." MEDIATION, *Black's Law Dictionary* (11th ed. 2019). It is an opportunity for the parties to negotiate a mutually acceptable, but equally painful settlement consistent with the mediation policy of self-determination. "Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action." *Id. See also*, *Florida Rules for Certified & Court Appointed Mediators* ("Florida Mediation Rules"), Rule 10.210 (August 2021) ("Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.")

A mediator is "a neutral person who tries to help disputing parties reach an agreement. MEDIATOR, *Black's Law Dictionary* (11th ed. 2019). "The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute." *Florida Mediation Rules*, Rule 10.220. *See also*, M.D. Fla. L.B.R. 9019-2 ("The mediator's role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order."). "The mediator should not opine or rule upon questions of fact or law, or render any final decision in the case." *Id.* Indeed, the ultimate decision-making authority rests with the parties. *Florida Mediation Rules*, Rule 10.220. At the conclusion of mediation, the mediator is required to report to the court (1) the identity of the parties in attendance at the mediation, and (2) that parties either reached an agreement in whole or in part or that the mediation was terminated without the parties' coming to an agreement. M.D. Fla. L.B.R. 9019-2(a).

In most jurisdictions, mediators are governed by standards of professional conduct. *See e.g., Florida Mediation Rules*, Part II. *See also*, M.D. Fla. L.B.R. 9019-2(d) ("All mediators who mediate in cases pending in this District, whether or not certified under the rules adopted by the Supreme Court of Florida, shall be governed by standards of professional conduct and ethical rules adopted by the Supreme Court of Florida for circuit court mediators."). Typically, this prevents the mediator from disclosing, outside the context of mediation, any oral or written communications made during mediation or in furtherance of mediation. *See e.g.*, M.D. Fla. L.B.R. 9019-2(g)(2) ("Except as provided in this section (g), all Mediation Communications are confidential, and the mediator and the Mediation Participants shall not disclose outside of the mediation any Mediation Communication, and no person may introduce in any Subsequent Proceeding evidence pertaining to any aspect of the mediation effort."). In addition, communications made during mediation are generally privileged and not admissible in evidence in a subsequent proceeding. *See e.g.*, M.D. Fla. L.B.R. 9019-2(g)(3) ("Without limiting subsection (2), Rule 408 of the Federal Rules of Evidence

continued on p. 20

Trustee as Facilitator

continued from p. 19

and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions or mediations apply.).

While the trustee is not able to rule or render decisions in the context of mediation, the trustee is an estate fiduciary and a party in interest in the case. The trustee can be called upon by the court to express a position on sales of assets, confirmation of a plan, or other matters that come before the court. In such a case, the trustee may be required to make disclosure with respect to matters learned during the course of "mediation" even if the parties requested or directed the trustee to maintain confidentiality. This would undoubtedly place the trustee into a conflict position. That begs the question—can the parties waive the conflict?

Rule 10.340(a) of the Florida Mediation Rules provides that "[a] mediator shall not mediate a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality." *Florida Mediation Rules*, Rule 10.340(a). A mediator may serve following appropriate disclosure of a conflict so long as: (1) all parties agree, and (2) the conflict does not clearly impair the mediator's impartiality. *Florida Mediation Rules*, Rule 10.340(c). If the conflict clearly impairs the mediator's impartiality, the mediator is required to withdraw. *Id.* The result under the local bankruptcy rules in the Middle District of Florida is the same. *See* M.D. Fla. L.R. 9019-2(c)(2) ("The parties may waive a mediator's actual or potential conflict of interest, provided that the mediator concludes in good faith that the mediator's impartiality will not be compromised. The unique nature of bankruptcy cases favors the parties' ability to waive conflicts and supersedes the concept of nonwaivable conflicts.").

continued on p. 21

Trustee as Facilitator

continued from p. 20

There will always be potential for conflict between the trustee's "mediator" role and its party in interest status. This is likely a conflict that clearly impairs the trustee's impartiality preventing the trustee from serving as a true mediator.

Encouraging Candid Communications with the Trustee

There are two concerns expressed by practitioners with respect to communications with the trustee: (1) confidentiality (i.e., protection from disclosure in almost all circumstances), and (2) admissibility into evidence under Rule 408 of the Federal Rules of Evidence. The disclosure issue was discussed above. Unfortunately, not every disclosure made to the trustee is protected. Astute bankruptcy practitioners are keenly aware of this fact. Some are refusing to engage in candid communications with the trustee or refusing to utilize the trustee's facilitation services for fear of subsequent disclosure compromising their case. There are certainly instances where the parties need a third-party mediator. But the key is recognizing those instances and separating the issues for mediation from the issues which can be addressed efficiently and economically by the Subchapter V trustee without compromising the case.

Take this case for example. A creditor files an objection to the debtor's eligibility to proceed in Subchapter V. The debtor really wants to be in Subchapter V, but knows its eligibility case is weak and does not want to spend the time or money litigating the eligibility issue. Debtor's counsel wants to try and negotiate a quick plan to avoid having to litigate the eligibility issue. In order to express the exigency in getting a deal done, debtor's counsel wants the third-party neutral to know just how weak his case is. Obviously, debtor's counsel does not want the third-party neutral to communicate that to creditor's counsel. If the trustee serves as the third-party neutral with respect to the eligibility issue and learns of weaknesses in the debtor's case, the trustee may be obligated to make subsequent disclosure to the court if the eligibility issue goes to trial and the court prompts the trustee for his or her position. In this case, the parties would be best served by a third-party mediator.

In most cases, however, the trustee is best suited to serve as de facto mediator with respect to contested matters and adversary proceedings. Why? The trustee is already up to speed. The trustee knows the parties, their counsel, the case, the financial issues, and the legal issues. In addition, many trustees bill at an hourly rate that is a significant discount off of their market rates. Therefore, utilizing the Subchapter V trustee should save the parties and their counsel substantial time and money.

So, how do you encourage parties to have candid communications with the trustee? Rule 408 of the Federal Rules of Evidence provides that "evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

> **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
>
> **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority."

Fed.R.Evid. 408.

The trustee along with the parties and their counsel could agree that all oral and written communications about a particular matter are intended to be confidential settlement communications subject to Rule 408. Specifically, the trustee could have each party and their counsel sign an agreement which provides that statements made and materials used during the course of the settlement negotiations shall not be subject to disclosure in discovery (except for statements and materials otherwise subject to discovery, which were not prepared specifically for use in the settlement negotiations) or admissible in any judicial or administrative proceeding.

By Christie Arkovich
info@christiearkovich.com

I'm writing this as the U.S. Supreme Court is hearing oral arguments as to whether the Biden administration's student loan forgiveness program is overturned. Student loan payments are now set to resume 60 days after the debt cancellation program is implemented, 60 days after the lawsuits are resolved, or 60 days after June 30, if litigation fails.

The vast majority of the 25 million applications filed to date are for loan balances between $20,000 and $39,999. The second largest category is for those with loan balances of $40,000 – $59,999. What this tells us is that even if the 10k forgiveness, or 20k for a Pell Grant recipient, is upheld, most borrowers will continue to have a balance remaining.

Does Your Client Still Have Exorbitant Student Loan Debt? Not Any More if One or More of the New Programs Fit.

Other programs now exist or have been modified over the past couple of years to drastically reduce student loan debt. Let's go over some of the most significant recent updates:

New DOJ guidance for federal student loan discharge: allows for an attestation process to accompany an adversary proceeding wherein the Department will recommend a partial or full discharge of federal student loan debt in a manner designed to reduce litigation time and expense. You still need to file an adversary complaint but the intent is to allow for a much quicker discharge with less litigation. Send the attestation form to your local AUSA ASAP after filing the complaint and move to stay the litigation while that is being reviewed. The ABI has a webinar recorded on February 28 with forms available for the complaint, attestation, motion to stay and order approving settlement.

The IDR Waiver program: There is a May 1, 2023 deadline to consolidate any older FFEL Loan(s) to the newer Direct Loans. This will then allow an automatic one-time account adjustment to give IDR forgiveness credit for all forms of payment and even extended forbearances. Repayment histories (including extended forbearances) will allow for forgiveness to occur immediately for undergrad loans after 20 years of payments (or graduate school loans after 25 years of payments).

Repaye revisions: This is in a comment period right now, but the final rule is expected to lower IDR payments by more than half when the payment pause ends. The new calculations will allow for an IDR payment of 5% of discretionary income for undergrad loans and 10% for grad loans. A higher percentage of 225% of the poverty level will be used to calculate expenses. Finally, the pending new rule will allow a spouse to file a separate tax return to avoid having to count a high wage earner non-borrower spouse. This was NOT a term of Repaye earlier and was a very sticky problem that may now have a solution for married borrowers.

Joint Spousal Loans: The Act allowing for these loans to be split has passed in October 2022. The rollout has been delayed because the application is not expected to come out until late March 2023. But this split will mean the world for borrowers who are divorced and still bound together by federal student loans.

TPD income monitoring waived: Starting in July 2023, there will be no post-discharge income monitoring. Since the pause is in effect until at least August, no one will be required to certify or update their income going forward.

BDTR stay lifted: The Court denied the motion to stay in the **Sweet v. Cardona** case in late February, so approvals of Borrower Defense applications filed before June 22, 2022 involving over 100 schools are granting forgiveness now. We've already seen the first forgiveness letter for one of our clients! It's unknown how long the refunds will take. Creditors are also required to take steps to delete the credit report tradeline associated with the discharged loans.

The information provided in this Sidebar does not, and is not intended to, constitute legal advice. For a 1-on-1 consultation, please email info@christiearkovich.com.

Member News & Announcements

Email Angelina Lim to be included in the next issue!
angelinal@jpfirm.com

Erik Johanson became a dad on January 5, missing the tax deduction for last year by five days. Congrats to Bailey and Erik! Frederick Lee is thriving.

Matt Hale also became a dad. His daughter, Claire Michelle was born on March 20, 2023. Michelle is doing well. Congrats to Matt and Katy.

Edward J. Peterson, III, joined Johnson Pope Bokor Ruppel and Burns. LLP in February, after a long and distinguished career at Stichter, Riedel Blain & Postler, PA. He is an asset to Johnson Pope's bankruptcy department, joining Michael C. Markham, Al Gomez, and Angelina Lim. He continues to actively practice in Alabama and Florida.

Share your news and accomplishments!

Email
Angelina Lim • angelinal@jpfirm.com

Edmond Whitson joined McGlinchey Stafford PLLC in February 2023.

Keith Appleby launched Westshore Mediation & Arbitration in February 2023. The alternative dispute resolution firm aims to provide comprehensive and innovative solutions to clients' legal needs, with a focus on personalized and efficient approaches to each case. Westshore Mediation's approach emphasizes effective communication and collaboration, working closely with clients to understand their goals and develop tailored strategies for resolving disputes.

"I am excited to bring my experience and commitment to client service to the legal community through Westshore Mediation," said Keith Appleby. "My goal is to become a go-to resource for mediation services in bankruptcy cases by providing parties the highest levels of excellence and professionalism."

On April 3rd, 2023, the TBBBA, FBA Tampa Bay Chapter assisted with the Roadways to the Bench event. Roadways to the Bench is the national diversity event of the Judicial Conference Committees on the Administration of the Bankruptcy System and Magistrate Judges System and featured a national live-streamed panel discussion from Washington, D.C. and an in-person roundtable discussion with local federal judges.

By Nicole Peair
Tampa Office of the U.S. Trustee

Debtors Audits To Resume March 13, 2023

The United States Trustee Program (USTP) will resume audits of individual chapter 7 and chapter 13 bankruptcy cases under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on March 13 ,2023. The USTP contracts with independent firms, utilizing certified public accountants and independent licensed public accounts, to perform audits of individual chapter 7 and chapter 13 cases randomly selected by the USTP. The purpose of the audit is to determine the accuracy, veracity, and completeness of petitions, schedules, and other information required to be provided by the debtor under sections 521 and 1322 of title 11. The audits are designed to provide baseline data to gauge the magnitude of fraud, abuse, and error in the bankruptcy system; to assist the USTP in identifying cases of fraud, abuse, and error; and to enhance deterrence.

The USTP randomly designates for audit 1 out of every 250 consumer bankruptcy cases per federal judicial district and cases for exception audit in which the income or expenditures of a debtor deviate from the statistical norm of the district where the case was filed. An audit consists of a comparison between selected items on a debtor's originally filed bankruptcy papers and documents produced by the debtor at the request of the audit firm. The audit firms also conduct public record searches to look for unreported assets and to verify the market value of assets.

After reviewing information provided by the debtor, the audit firm contacts the debtor, through counsel if represented, to provide the debtor an opportunity to offer an explanation or supply additional information that may negate any negative findings. A material misstatement indicates the audit produced information that challenged the accuracy, veracity, or completeness of a debtor's petition, schedules, or other filed bankruptcy documentation. After an audit has been completed, the audit firm files a Report of Audit with the court and transmits a copy to the United States Trustee. If the audit firm cannot complete the audit because the debtor did not produce documents requested in connection with the audit, the audit firm files a Report of No Audit.

If a material misstatement is identified in a Report of Audit, the bankruptcy court gives notice to all creditors in the case. Additionally, the United States Trustee determines what action is appropriate based on the material misstatement(s) or Report of No Audit, if the debtor fails to satisfactorily explain the failure to make available the documentation requested for the audit, and may pursue a variety of actions depending on the circumstances of the case.

Condolences

Steve Cozzi

The TBBBA and bankruptcy community are deeply saddened and devastated by the news of Steve Cozzi, a valuable member of Jake Blanchard's law firm and a former intern at Judge Williamson's chambers. Steve was an active member of the St. Petersburg bar and was the diversity committee chair and member of that bar's Paraclete Magazine Committee. The St. Petersburg bar held an event honoring him on March 29. A GoFundMe account has been set up for Steve here.

Our thoughts and prayers go out to Jake Blanchard, Steve Cozzi and their families.

Glenn Johnson

Kim Johnson's husband, Randolph "Glenn" Johnson passed away on March 16. Glenn served in the Air Force and had a long career with the Federal Government that spanned 36 years. Kim has always been such a friend and fixture in the bankruptcy community and an avid supporter of the Paul M. Glenn Memorial Golf Tournament from its inception. His celebration of life was held on March 31, 2023. Our sincerest condolences to Kim.

Honorable Cynthia C. Jackson

Honorable Cynthia C. Jackson (ret.) passed away on April 21, 2023. Judge Jackson was appointed as a bankruptcy judge by the Eleventh Circuit Court of Appeals on March 5, 2013. She presided in the Orlando Division until February 2020, when she transferred to the Jacksonville Division. Due to health reasons, Judge Jackson retired in August 2021.

TBBBA Sporting Clay Tournament

February 24, 2023

Special Thanks! to our Pro Bono Volunteers

We'd like to give a shout out to the following participants who provided pro bono services to people in need

February 2023 Volunteers:

In person:
Laura Gallo
Kemi Ogentebi
Kelley Petry
M Barnett
Mark Robens
Scott Stichter
Maria Boudreaux
Peter Zooberg
Local virtual
Samantha Dammer
Megan Murray
Jake Blanchard

MD Virtual Pro Se project appts held: (district wide)

Kathleen DiSanto
Kristina Feher
Nina LaFleur
Alex Solomita
Traci Stevenson
Jonathan Tolentino

March 2023 Volunteers:

Robert Geller
Laura Gallo
Scott Stichter
Peter Zooberg
Mark Robens
Rebecca Strunk
Michael Barnett
Elyssa Tenanblatt
Kelley Petry
Luis Rivera
Kristina Feher
Megan Klotz
David Steen
Angelina Lim
Mike Dal Lago

Special Thanks! to our Pro Bono Volunteers

C.A.R.E. – A Year in Review

By Daniel Etlinger, Jennis Morse Etlinger

The Summer 2022 edition of The Cramdown featured an article "Why You Should Care about C.A.R.E." The hope was to help reignite the program post COVID's in-person restrictions. The result was an overwhelming success and merits a look at the year in review for the Tampa chapter of Credit Abuse Resistance Education (C.A.R.E.).

The lifeblood of the program is its volunteers and we had 28 people sign up. Of those, four are judges: Judge Delano, Judge McEwen, Judge Hooi and Judge Colton. In addition, we had 15 attorneys, one banker, two certified public accountants, four financial advisors/coaches, and two trustees. The full roster includes:

Andrea Bauman
Beth Ann Scharrer
Brad deBeaubien
Christine Peters
David Jennis
Harrison Standley
Jake Blanchard
Jason Alpert
Jeff Warren
Jessica Majeski
Jodi Zellner
John Lamoureux
Judge Caryl Delano
Judge Catherine P. McEwen
Judge Michael Hooi
Judge Roberta Colton
Kathleen DiSanto
Katie Brinson Hinton
Kelly Roberts
Kristina Feher
Larry Hyman
Luis Rivera
Nicole Peair
Noel Boeke
Richard Dauval
Roy Kobert
Rudi Mueller
Scott Webb

These volunteers collectively put on nine presentations to date which reached approximately 520 students. And, at the time of this article, there are another three presentations scheduled for April bringing the total for the year up to 12. Of those, four were on budgets, two on credit/credit scores, four on general financial best practices, and two on student loans. In addition, C.A.R.E. offers seminars on Bankruptcy 101 and Identity Theft.

The venues have included the Academy of the Holy Names high school, Growth Juvenile Detention Center, University of Tampa's business and veterans' programs, and the YMCA. C.A.R.E. can be tailored to schools including middle, high school, college or trade schools; and, youth organizations such as scouts, church or synagogue, mentoring programs, sports leagues, and more.

The program also successfully raised over $11,000. Of this, $7,500 came from a grant by the Bankruptcy Law Educational Series Foundation, Inc. (BLES) and another $3,500 came from a fundraising event hosted by our own Tampa Bay Bankruptcy Bar Association (TBBBA). The money was put to good use for things like purchasing giveaways to accompany the presentations, marketing materials, an appreciation lunch for the volunteers, and advertising. The last category included introductory letters to local organizations, journal advertisements in four local bar associations, social media campaigns, Tampa Bay Business Journal BizSpotlight, CLEs, blogs and newsletters, and more.

Again, C.A.R.E. would love an introduction to any organization you believe we could make a difference at. Or, if you are interested in being one of our presenters we are happy to discuss the details. Anyone who has a passion for helping others is welcomed. It has been a fantastic year for C.A.R.E. and we're excited for what the future holds in store.

CARE Volunteer Thank You Lunch

Save the Date

May 5
Judge Glenn Golf Tournament
at Bay Palms Golf Course, MacDill Airforce Base

June 6
TBBBA Annual Dinner
Palma Ceia Country Club

May 25 • 3:30 pm – 5:00 pm
CLE Program
"Honoring the Legacy of Bankruptcy Judge Michael G. Williamson: A Retrospective of His Most Influential Decisions";

Reception to follow
5:30 pm to 7:30 pm
Le Meridien, Tampa.