Tampa Bay Bankruptcy Bar Association

The Cramdown

Newsletter for the Tampa Bay Bankruptcy Association

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Winter 2023-2024

PRESIDENT'S MESSAGE

by Megan Murray
Underwood Murray PA

The holidays have passed, the lights have gone up and down in my neighborhood and the humidity has dropped as we leave the holiday season behind us. We have a lot to be thankful for, including our families, friends and colleagues, and an uptick in bankruptcy cases. Upon us is the season for New Years' resolutions and giving back. If you haven't done so already, consider taking a pro bono case, or volunteering either at the district-wide virtual clinic or our in-person pro se clinic. Earl, the pro se clinic's Elf on the Shelf, is watching to see how many firms will have at least one pro bono volunteer by the TBBBA's year end in June.

The annual View from the Bench was the first of many events in November and December 2023, with the View from the Bench reception the official start of Bankruptcy Advent. This year was the first year we availed ourselves of many views from bankruptcy benches across the state without our flagship leader, Hon. Michael G. Williamson. In his memory, the View from the Bench was named the Hon. Michael G. Williamson View from the Bench. The steering committee, led by Hon. Judge Colton and Stephanie Lieb, masterfully took the reins and, by all accounts, it was a smashing success.

We started the festivities with a highly-anticipated reception at a new location, the Julian B. Lane Riverfront Park. Attorneys, CPAs, estate fiduciaries, and other members of local bars from Tallahassee to West Palm Beach convened on the West side of the Hillsborough River to chat with old friends, make new friends, and share a toast on the river's edge at sunset.

Fortunately, a lovely evening was ordered and delivered, right on time. It was Bankruptcy Thanksgiving without the turkey!

The following day, much life black Friday, we gathered early in the morning for incredible deals – invaluable insight from our wonderful judges. Hon. Roberta Colton (Tampa) and Liz Green (Orlando – Baker Hostetler), masters of this year's ceremony, again achieved the impossible - breaking down a year's worth of cases and practice pointers into easily digestible and entertaining bites, while carrying on the masterpiece theatre Judge Williamson conceived 39 years ago.

It is hard to believe next year will be the 40th View from the Bench in the Middle District of Florida. In December, we met for our yearly holiday party, sharing a special night with our bankruptcy family at Spain Restaurant. Believe it or not, the Florida Bar and the TBBBA are already planning for more special occasions and other fantastic opportunities to get together as a community in the coming months and year. I hope you enjoyed the holidays, and the lights, and egg nog that came with it. Happy New Year from the TBBBA.

Left to Right: Nicole Noel, TBBBA president-in-waiting; Megan Murray, current TBBBA president; Barbara Hart, most-recent TBBBA president

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The **TBBBA** is proud to offer multiple **CLE programs** throughout the year to its members!

Upcoming CLEs Programs

(topics and speakers subject to change)

January 9, 2024

Judge Tiffany Geyer is moderating a panel composed of Carol Fox, John Anthony, Liz Green, and Steve Berman regarding nursing home bankruptcies

February 13, 2024

Judge Wendy DePaul discusses Pro Bono Opportunities and Rewards

Chief Judge Carly Delano provides the State of the District

April 9, 2024

Eric Jacobs and Nathan Wheatley discuss eligibility issues

May 14, 2024

Mark Wolfson and Scott Underwood discuss post-confirmation jurisdiction issues

June 11, 2024

Professor Charles Nyce discusses Florida real estate insurance

Upcoming Consumer Lunch CLEs

(free to members, presented via Zoom)

January 23 • March 5 • April 2 • May 7

On **January 23**, Chief Judge Delano will discuss updates impacting Chapter 13 practice including changes to Miscellaneous Fee Schedule; Official Forms 410A and 417A; Federal Rules of Bankruptcy Procedure 3011, 8003, 9006, new Rule 9038, effective December 1, 2023. This program will also discuss Middle District of Florida updates on Local Rules, Negative Notice List and Administrative Orders as well as Model Chapter 13 Plan revisions and form orders confirming Chapter 13 Plan revisions. Go to TBBBA.com to register.

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Partial "Dirt-For-Debt" Plans in an Uncertain Real Estate Market

By Nicole Carnero
Associate at Law Offices of Robert M. Geller, P.A.

In the aftermath of the COVID-19 pandemic, the real estate industry is seeing property values significantly decrease. This is because of several economic factors, including rising inflation, rising cap rates, and restrictions on mortgage financing.[1] There are fears of ongoing inflation and an impending recession that make the real estate market increasingly uncertain. If this uncertainty persists and property values continue to decline, secured lenders with interests in real property collateral will be adversely affected. These lenders are less likely to receive the "indubitable equivalent" of their claims in Chapter 11 partial dirt-for-debt plans. While these plans have always been challenging to confirm, this process is more difficult in a depressed, uncertain real estate market.

I. DIRT-FOR-DEBT REQUIREMENTS

Dirt-for-debt plans are powerful tools in the Chapter 11 bankruptcy arena – particularly for debtors. Secured creditors are conveyed real property collateral, while debtors have an opportunity to emerge from bankruptcy free from a substantial debt. This may include a "full" dirt-for-debt plan where the debtor conveys *all* the real property in full satisfaction of the creditor's claim, or a "partial" dirt-for-debt plan where the debtor conveys only a *portion* of the real property in partial or full satisfaction of the claim.[2] The latter is clearly the most advantageous for debtors and the most precarious for secured creditors. For instance, a debtor borrows $5 million from a lender secured by an interest in five real property units. The debtor could potentially give the creditor two of those parcels to force satisfaction of its entire claim. But there is one caveat: the secured creditor *must* receive the "indubitable equivalent" of its claim in the real property collateral.

Section 1129(b)(1) of the Bankruptcy Code states that a Chapter 11 reorganization plan can be confirmed even when all impaired classes have not voted to accept the plan, as long as the plan does not "discriminate unfairly, and is fair and equitable" with respect to these nonvoting classes.[3] One way to demonstrate a plan is fair and equitable is by proving that a secured creditor has received the "indubitable equivalent" of its secured claim through a dirt-for-debt plan. Whether a particular plan has passed the indubitable equivalent standard depends on the circumstances of the case and the provisions of the plan. There is no uniform interpretation of "indubitable equivalence" but the value of the property to be surrendered plays an important role, which makes dirt-for-debt plans the subject of substantial litigation in bankruptcy courts.

There is little question that plans proposing to surrender all of the real property collateral provide secured creditors with the indubitable equivalent of their claims. It is the partial dirt-for-debt plans that are much more difficult to get approved.[4] The debtor has the burden of proof to show that the indubitable equivalence standard is met by a preponderance of the evidence. In an uncertain real estate market plagued by fluctuating prices and financial cloudiness, this is easier said than done.

II. VALUING REAL PROPERTY COLLATERAL

Section 1129(b)(2)(A)'s "indubitable equivalence" originated in *In re Murel Holding Corp*, 75 F.2d 941 (2d Cir. 1935) wherein the Court concluded that there was no reason to deprive a creditor of property "unless by a substitute of the most indubitable equivalence."[6] In the dirt-for-debt context, indubitable equivalence depends on the appraised value of the real property collateral at the time of plan confirmation. Since *Murel*, courts have used different methods to appraise real property collateral

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1 Harold Bordwin, *Coping with Rising Interest Rates & Declining Property Values*, Sept. 2023, https://turnaround.org/jcr/2023/09.
2 Peter Janovsky, *'Dirt for Debt' In Bankruptcy Plans of Reorganization*, Nov. 1, 2019, https://zeklaw.com/news-and-insights/dirt-for-debt-in-bankruptcy-plans-of-reorganization.
3 11 U.S.C. § 1129.
4 *In re CRB Partners, LLC*, 11-11915-CAG, 2013 WL 796566 (Bankr. W.D. Tex. Mar. 4, 2013).
5 *CRB Partners, LLC*, 2013 WL 796566, at *4.
6 *Murel Holding Corp*, 75 F.2d at 942.

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for dirt-for-debt plans. Courts have also recognized how challenging this is to accurately assess in an uncertain real estate market.

For instance, the Fourth Circuit analyzed a partial dirt-for-debt plan in *In re Bate Land & Timber LLC*, 877 F.3d 188 (4th Cir. 2017). The debtor purchased 79 tracts of land through a secured lender and eventually filed for Chapter 11 bankruptcy.[7] In the debtor's reorganization plan, it proposed a partial dirt-for-debt plan to satisfy the secured creditor's claim of $14.6 million through a transfer of only two of the 79 tracts of land.[8] The Fourth Circuit interpreted indubitable equivalence to mean "that the treatment afforded the secured creditor must be adequate to both compensate the secured creditor for the value of its secured claim, and also ensure the integrity of the creditor's collateral position."[9] The Bankruptcy Court determined the value of the tracts of land by considering their "highest and best use."[10] The Fourth Circuit concluded that the appraisal was proper because it reflected the highest and best use of the land.[11] Since this did not cover the entire amount of the creditor's secured claim, the remaining portion was paid in cash.[12]

In contrast to the Fourth Circuit's approach, the District Court in *In re Clarendon Holdings, LLC*, 7:11-CV-247-H, 2013 WL 8635348 (E.D.N.C. Mar. 18, 2013), appraised real property collateral based on its fair market value. The Court explained how valuation must be approached conservatively in a depressed real estate market, as the potential for loss is greater than the potential for gain.[13] The valuation should also take into account the loss of income a creditor may encounter prior to the sale of the property.[14] Similarly, the Bankruptcy Court in *Matter of Martindale*, 125 B.R. 32 (Bankr. D. Idaho 1991), valued the debtor's real property collateral at fair market value, less 10% projected holding and resale expenses.[15] The court emphasized how, in an uncertain market, it is doubtful that a dirt-for-debt plan offers the creditor "indubitable equivalence," unless the appraised value of the property far exceeds the debt to be paid.[16]

In *In re B.W. Alpha Inc.*, 89 B.R. 592 (Bankr. N.D. Tex. 1988), a Chapter 11 debtor proposed turnover of real property in full satisfaction of a creditor's claim. Unlike other courts, however, the *B.W. Alpha, Inc.* Court refused to conclude that surrender of the collateral would provide the creditor with the indubitable equivalent of its claim.[17] The court reasoned that "in order to be the indubitable equivalent, the property must produce a cash flow or be capable of being sold within a reasonable time so that the creditor can realize cash."[18] It was insufficient for the debtor to surrender property roughly equal to the amount of the creditor's claim, given the uncertain real estate market conditions. In other words, because the property could not be sold within a reasonable time and the creditor could not realize cash, the partial dirt-for-debt plan was denied.

III. ESTABLISHING 'INDUBITABLE EQUIVALENCE'

Courts remain divided on how to appraise real property collateral in the dirt-for-debt context. In an uncertain real estate market, these appraised values are less likely to be an accurate reflection of the true worth of the real property collateral. Despite this, there are ways for courts to ensure secured creditors still receive the indubitable equivalent of their claims in uncertain times.

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7 *Bate Land & Timber LLC*, 877 F.3d at 192.
8 *Id.* at 195.
9 *Id.* at 193.
10 *Id.*
11 *Id.* at 199.
12 *Id.* at 193.
13 *Clarendon Holdings, LLC*, 2013 WL 8635348, at *2.
14 *Id.*
15 *Martindale*, 125 B.R. at 35.
16 *Id.* at 38.
17 *B.W. Alpha Inc.*, 89 B.R. at 597.
18 *Id.*

"Dirt-For-Debt"

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One option is for the secured creditor to retain a lien on the collateral. While this is not usually a requirement to meet indubitable equivalence, some bankruptcy courts have applied it. In *In re Walat Farms, Inc.*, 70 B.R. 330 (Bankr. E.D. Mich. 1987), lien retention was required where the real estate market was depressed and unstable. Debtor was a family farm corporation with over 1,800 acres of farmland, while the secured creditor held a mortgage interest in these acres.[19] The court reasoned that the real estate market at the time of plan confirmation was so unstable as to properly conclude the appraised value of the collateral was not the indubitable equivalent of the creditor's claim.[20] There was no guarantee that the eventual sale of the collateral would produce sufficient proceeds to satisfy the creditor's claims. Thus, the court denied plan confirmation where the plan did not also provide for the secured lender to retain a lien on the acres not to be conveyed.

Another option is providing oversecured creditors with an "equity cushion" to make up for any projected lost value on the collateral. In *Matter of Atlanta S. Bus. Park, Ltd.*, 173 B.R. 444 (Bankr. N.D. Ga. 1994), the debtor proposed satisfying the secured creditor's claim by delivering $144,860 in cash and conveying 30.24 acres of creditor's collateral to meet indubitable equivalence.[21] The Court confirmed this plan, holding that it was fair and equitable to the impaired creditor because it provided a means to recover any lost value in the creditor's claim.[22] This option protects the creditor's interest while considering external factors, like an unstable housing market.

IV. CONCLUSION

Real property values continue to decrease, and the nation's real estate market is increasingly uncertain. Secured lenders and Chapter 11 debtors must consider the consequences of this uncertainty in a partial dirt-for-debt plan context. While courts differ as to the meaning of indubitable equivalence and the best valuation methods for real property collateral, one aspect is undisputed: the proposed treatment must be *fair and equitable* to the impaired creditor. To do otherwise would prevent confirmation of the Chapter 11 reorganization plan. By considering different ways to protect secured creditors, partial dirt-for-debt plans still have a chance for success in an uncertain market.

19 *Walat Farms, Inc.*, 70 B.R. at 331.
20 *Id.* at 334.
21 *Matter of Atlanta S. Bus. Park, Ltd.*, 173 B.R. at 452.
22 *Id.* at 449.

Five Tips to a Successful Bankruptcy Sale from a Title Agent's Perspective

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Introduction

This article is borne, in large part, by an actual case. A chapter 11 debtor filed a highly contentious motion to immediately sell, which was met by objections. To the debtor's merit, it persevered, and the motion was granted. The hard part is over, right? Only after the sale order was entered did the debtor first pull its title report, which contained numerous chapter 7 requirements. Thus, there was a fundamental disconnect, that being this was a chapter 11 case whereas presumably an unfamiliar title agent pulled a title report incorrectly calling for chapter 7 requirements. The parties then spent several agonizing weeks connecting with the title agent, and its various underwriters and support staff, in order to eventually convince it to reissue the title report with chapter 11 conditions. The article helps bridge the gap between attorneys and title agents by providing five tips for bankruptcy practitioners from the vantage point of a title agent. Four of the five tips are applicable to any chapter, whether by motion or in that chapter's plan. The remaining tip – tax exemptions – is only applicable to a chapter 11 plan.

Tip No. 1: Order the Title Commitment Beforehand

If you leave this article with only one practice pointer, it is to order the title commitment before filing the operative sale documents. The title commitment is critical on several grounds, the first of which is proper service.

Service can implicate a number of noticing rules.[1] As stated in In re Karpe, "The purpose of the notice is to provide an opportunity for objections and [a] hearing before the court if there are objections."[2] Thus, "notice is sufficient if it includes the terms and conditions of the sale, if it states the time for filing objections, and, if the estate is selling real estate, it generally describes the property."[3]

These rules contemplate several parties receiving that notice including the debtor, trustee, U.S. Trustee, equity securityholders, creditors and indenture trustees, attorneys for the aforementioned, and all other interested parties. It is this last category – other interested parties – that may prove most problematic to accomplish without a title report.

Consider *Archer-Daniels-Midland Co. v. Country Visions Coop.*[4] Prior to the bankruptcy filing, an interested party obtained a right of first refusal in real property.[5] Once the bankruptcy was filed, the debtor did not list the party as a creditor or otherwise notify it of the pending case.[6] If the property was sold based solely on the schedules alone, it would have overlooked the interested party. In the instant case, the facts were even more egregious, as the court noted that "Country Visions filed a copy of the Right [of first refusal] in the local real estate records; even a cursory title search would have turned it up-indeed, did turn it up. [Archer-Daniels-Midland] had a copy of the title report and also knew that Country Visions was not a party to the bankruptcy."[7] Under those facts, the court determined that the buyer was not a good-faith purchaser entitled to protections under § 363(m) of the Code.[8]

How, then, is a practitioner to deduce all interested parties? From the title commitment, of course. A title commitment should "disclose the name of each person or entity in whom title is vested, and all additional parties identified in the records as having or claiming an interest in the property to be acquired. The latter may include tenants revealed by recorded leases, lienholders, beneficiaries of easements, taxing authorities, owners'

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1 Fed. R. Bankr. P. 2002(a)(2), 2002(c)(1), 2002(g), 2002(i), 2002(k), 2002(l), 6004(a) and 9034(a). In addition, there may be applicable local rules. For instance, D. Colo. LBR 6004-1(c) requires a sale motion to specifically identify whether the buyer is an insider, the identity of the insider, the insider's relationship to the debtor and the measures advanced to ensure the fairness of the process and sales price.
2 84 B.R. 926, 930 (Bankr. M.D. Pa. 1988).
3 *Id.*
4 29 F.4th 956 (7th Cir. 2022).
5 *Id.* at 958.
6 *Id.*
7 *Id.* (emphasis in original)
8 *Id.* at 958, 960 (noting that the bankruptcy judge "was tempted to deem the failure of *anyone* to alert her to the Right a form of fraud on the court, but she did not set aside the sale to [Archer-Daniels-Midland].") (emphasis in original).

Five Tips
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associations, and heirs or devises of a deceased owner where these successors in interest can be identified from public records."[9]

Thus, when the court or trustee inevitably inquire about effective service, the practitioner can confidently state everyone who should have received notice did because the certificate of service matches the commitment.

Beyond service, ordering the title commitment in advance paves the way for the other to-be-discussed tips.

Tip No. 2: Err on the Side of Including the Legal Description in Early Filings

What constitutes a sufficient description for purposes of a conveyance has been the subject of numerous lawsuits. Anything less than an accurate and complete legal description is often rejected. For example, this has been applied to descriptions of "all my land" or "all my property",[10] by reference to a tax parcel identification number,[11] and by only indicating the street address[12] and an erroneous description.[13]

Once the full legal description has been ascertained, the immediate response may be to simply include the full description in the operative order(s). However, best practices are to include the legal description in the motion, notice of hearing and all other pertinent filings leading up to the sale.

First, this will assist in providing sufficient notice to interested parties. A "motion served on the secured creditor must be sufficient to place the creditor on notice that his lien is at issue."[14] The court considered this issue in *Holsinger v. Hanrahan (In re Miell)*, where a junior lienholder argued that its lien should not be extinguished from the sale due to deficient notice.[15] The lienholder conceded they received notice of the sale but were unaware of the ramifications, since its particular lien was not specifically named.[16] In denying this argument, in part, the court took note that the motion was identified by legal description and street address the real estate to be sold, thus the lienholder should have been aware its lien was at issue.[17]

Second, conservative title standards will require not only recording proof of authority from the bankruptcy court (again, the operative order) but also recording proof of sufficient notice to all creditors and interested parties.[18] Thus, to avoid any uncertainty and title issues, a more cautious approach is to include a valid legal description in all pertinent filings.

Tip No. 3: Clearly Demarcate if the Parties are Seeking Tax Exemptions (Chapter 11)

If the sale occurs in a chapter 11, then the parties should consider potential tax relief. Specifically, § 1146(a) provides that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 or 1191 of [this] title, may not be taxed under any law imposing a stamp tax or similar tax."[19]

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9 *Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions* (2016), U.S. Dept. of Justice Envtl. & Natural Resources Division Land Acquisition Section (2016).
10 *See, e.g., Davis v. Horne*, 45 So. 476 (Fla. 1907).
11 *See, e.g., Fla. Stat.* § 689.02(2).
12 Although such a description may be effective vis a vis the parties to the transaction, it is generally not insurable.
13 *See, e.g., Henderson v. Bank of Am., N.A. (In re Simmons)*, 510 B.R. 76, 105-06 (Bankr. S.D. Miss. 2014).
14 *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 531-32 (Bankr. E.D. Va. 2004) (also finding that "mailing of the notice of the hearing does not cure the defect in service of the motion itself.").
15 2010 WL 2743016, *1-2 (Bankr. N.D. Iowa 2010).
16 *Id.*
17 *Id.* at *3.
18 Even more conservative standards will still require proof that no objections to the proposed sale were made.
19 11 U.S.C. § 1146(a).

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Similar to the legal description, it is advisable to put in the initial filings that the parties intend to seek said tax exemption. This will help ensure the issue is considered and potentially lead to the broadest language possible, even beyond just real estate deals. For example, would recording fees and transfer taxes on trademarks be exempt pursuant to § 1146(a)? Clearly stating the intent in the opening documents, and providing notice to appropriate parties such that they have a meaningful opportunity to object (in this query, to the U.S. Patent and Trademark Office), will help maximize the chances that the moving party's relief will be granted. Failure to properly address this on the front end may necessitate an adversary proceeding, as opposed to contested matter, on the back end.[20]

Tip No. 4: Specifically Name the Liens That are Discharged in the Order

A standard title-commitment requirement may be to record satisfaction, release, proof of non-identify or other termination of a lien on the subject real property. The moving party will then dutifully forward the title agent a copy of the order stating that the sale is free and clear of all liens, claims, encumbrances and interests in the property. The moving party may be dismayed and shocked when the title agent's return prompt is this: How has it been determined that the specific lienholder received proper notice or was contemplated by the order?[21] Thus, the "talking past each other" cycle continues until the title agent is convinced or requires an additional mechanism, such as an affidavit, supplemental order or other indicia of proof.

To anticipate this quandary, it is best practices to include language to the effect of the sale being free and clear of all liens, including (but not limited) to those interests that the parties actually know of and can specifically identify. This is the best of both worlds. The parties subject to the transaction are still operating under a free-and-clear sale of all interests, and the title agent will have enumerated provisions in the record to tie into clearing specific exceptions.

Tip No. 5: Ponder What Else Can Be Done

Finally, coming full circle, ordering the title commitment before filing the sale documents enables you to evaluate what else your client may want – or, in some circumstances, what your client may need – to accomplish through the sale process.

For example, the title commitment may reveal an incorrect legal description that may be reformed as part of the sale process. After all, bankruptcy courts may be considered courts of equity, and courts of equity "have [the] jurisdiction to reform written agreements that fail to reflect the intentions of the parties due to a mutual mistake of fact."[22] Simply put, bankruptcy courts "may reform the deed in question."[23]

Another example is that the title commitment may unearth an easement that could be extinguished as part of the sale process. An easement is a "property right or an interest in rem" and thus "subject to § 363(f)."[24] "Several cases support the proposition that property may be sold free and clear of an easement, like any other in interest in property, under all the prongs of § 363(f)". However, must like the right of first refusal previously discussed, this extinguishable interest might not be readily apparent from the face of the schedules.[25] This proposition extends beyond merely an easement to include other interests in the property above and beyond an actual lien, which may be extinguished through the sale process.

One last illustration is that the sale process may be utilized to revitalize lapsed condominium documents. Through this process, a court reinstates expired declarations if certain conditions are met, such as any necessary provisions and if a certain number of owners support the measure. The bankruptcy process will often provide superior disclosures and processes than the impacted parties are afforded out of court. Thus, the mechanism as a whole might be a win-win for everyone involved

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20 *See* Fed. R. Bankr. P. 7001(7), which defines an adversary proceeding to include an action to "obtain an injunction or other equitable relief," which would encompass certain declaratory, equitable and injunctive relief to later seek a tax exemption determination; *Baltimore Cnty. v. HIS Liquidating LLC (In re Integrated Health Servs.)*, 2006 U.S. Dist. LEXIS 8403, *9-10 (D. De. 2006) (holding that adversary proceeding was necessary and rejecting argument that the motion was "merely a request for the court to interpret the terms of the Plan and enter an order confirming that that's what it says.") (internal quotations omitted).
21 *See, e.g., In re Dulgerian*, 2008 Bankr. LEXIS 248, *5 (Bankr. E.D. Pa. 2008) ("The title company working to close the sale has refused to remove the Easement from the title absent either consent from the Easement holder or a specific court order.").
22 *Branch Banking & Trust Co. v. Jessee (In re Creger)*, 403 B.R. 381, 386 (Bankr. W.D. Va. 2009).
23 *Id.*
24 *In re Metroplex on the Atl.*, LLC, 545 B.R. 786, 792-93 (Bankr. E.D. N.Y. 2016).
25 *Id.* at 795.

Conclusions

In *Hill v. Portillo (In re Kenneth C. Casey, Inc.)*, the court began its analysis by stating that the "common saying 'he's not buying what you're selling' is a good summary of what happened in this confusing dispute."[26] In that case, the trustee filed a sale motion and obtained a final sale order.[27] Unfortunately, the auctioneer only sold a portion of what was authorized to be sold and, further compounding the matter, sold additional land that had not been authorized to be sold by the court.[28] It is uncertain from the record whether any of the parties had obtained a title commitment or policy, but this is exactly the type of good, bad or ugly transaction that title insurance is intended to address.

Once a title agent is cognizant that the transaction involves a bankruptcy (through a suggestion of bankruptcy, disclosure by the parties, appearance on a public site investigated through the due diligence or otherwise), they will immediately begin asking targeted questions regarding the proceeding.[29]

Beginning the dialogue between bankruptcy practitioner and closing and title agents earlier in the process will help ensure that the closing is handled smoothly. Keeping these tips in mind will help ensure that the attorneys and their clients maximize the utility of the sale process.

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26 2022 WL 272630, *1 (Bankr. D. Colo. 2022).
27 *Id.* at *1-2.
28 *Id.* at *2-3.
29 Some examples of typical questions include the following: Is the sale before or after acquired property, pre- or post- confirmation, abandoned or surrendered by the parties, free and clear or subject to liens, and ordinary or not in the ordinary course, all depending on the bankruptcy chapter and particulars of that matter?

With Rule 41(a), It's All Or Nothing!

By Hayley McAleese
Hayley McAleese is a rising 2L at the University of Florida Levin College of Law, where she is an editor for Florida Law Review and president of the Law Association for Women. She expects to graduate in May 2025 and hopes to work as a litigator afterward. She was a judicial intern for the United States District Court for the Middle District of Florida, Tampa Division, this past summer, where she interned for U.S. District Judge Thomas Barber, U.S. Magistrate Judge Amanda Arnold Sansone, and U.S. Bankruptcy Judge Catherine Peek McEwen. She can be reached at hayleym@ufl.edu.

You file a complaint against another party on behalf of your client asserting three separate counts. Both parties file motions for summary judgment. While the motions are pending, you and the defendant's attorney settle the third count and move the court to approve the settlement. The judge approves the settlement and directs you to file a joint stipulation of dismissal of the settled count that will be self-executing upon its filing. The judge then grants summary judgment for the defendant on the remaining two counts. You can appeal the summary judgment because it is a final judgment, right? According to a recent decision by the Eleventh Circuit Court of Appeals concerning voluntary dismissals, wrong.[1]

Rule 41(a) of the Federal Rules of Civil Procedure governs voluntary dismissals and applies in the bankruptcy context to both adversary proceedings and contested matters.[2] This rule states in relevant part:

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(2) *By Court Order; Effect*. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.[3]

The Eleventh Circuit previously held that under Rule 41(a)(1), a plaintiff may, without a court order, voluntarily dismiss an entire action but not individual claims.[4] In *Perry*, the court stated that the plain language of Rule 41(a)(1) provides that plaintiffs can voluntarily dismiss "only an action in its entirety."[5] The court reaffirmed that ruling in *In re Esteva*, stating that "Rule 41(a) 'does not permit plaintiffs to pick and choose, dismissing only particular claims within an action.'"[6] Therefore, Rule 41(a)(1), which governs voluntary dismissals without a court order, does not allow for voluntary dismissal by the plaintiff of an individual claim or a subset of claims.

Perry, In re Esteva, and similar decisions implied that Rule 41(a)(2), which governs voluntary dismissals by court order, has the same "entire action" requirement.[7] However, the Eleventh Circuit only recently made that implication explicit in its *Rosell* decision.[8] The facts set forth in the first paragraph of this article are identical to those in *Rosell*.[9] The parties in that case did not specify in their stipulation which subsection of Rule 41(a) authorized the dismissal of the third count, but the court determined that it did not matter whether dismissal was under subsection (a)(1) or (a)(2) because it was improper under either.[10] The court explained that the reasoning in *Perry* applies to Rule 41(a)

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1. *Rosell v. VMSB, LLC*, 67 F.4th 1141, 1143 (11th Cir. 2023).
2. Fed. R. Bankr. P. 7041 and Fed. R. Bankr. P. 9014(c) (respectively).
3. Fed. R. Civ. P. 41(a).
4. *Perry v. Schumacher Grp. of La.*, 891 F.3d 954, 958 (11th Cir. 2018).
5. *Id.* (quotations omitted).
6. *In re Esteva*, 60 F.4th 664, 677 (11th Cir. 2023) (quoting Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1106 (11th Cir. 2004)).
7. *Rosell*, 67 F.4th at 1143.
8. *Id.*
9. *Id.*
10. *Id.*
11 *Id.* at 1144.
12. *Id.*
13. *Id.*

Rule 41

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(2) because "the word 'action' is used identically in both Rules 41(a)(1) and 41(a)(2)."[11] Furthermore, *In re Esteva* applies because, even though its holding concerned Rule 41(a)(1) specifically, it "discussed Rule 41(a) in general, not just Rule 41(a)(1)."[12] Thus, Rule 41(a) provides for voluntary dismissal only of an entire action, and voluntarily dismissing anything less than an entire action, with or without a court order, is invalid.[13] Consequently, any individual claims purportedly dismissed under Rule 41(a) remain pending before the court, and a judgment on the remaining claims is, therefore, not final.[14]

In the facts set forth in the opening paragraph, the third count purport- edly dismissed, in fact, remained pending.[15] Because there was still more for the court to dispose of, the judgment on the other two counts was not final, so the judgment was not appealable.[16] In other words, when it comes to Rule 41(a), it is all or nothing.

This does not mean the parties are stuck with a decision that is not reviewable or with claims they no longer want; it simply means that Rule 41(a) is not the proper avenue to rid their lawsuit of those claims.[17] Instead, parties have two other options: Rules 15 and 54(b) of the Federal Rules of Civil Proce- dure.[18] Rule 15 applies to adversary proceedings, but not contested mat- ters in bankruptcy, and it allows a party to amend its complaint by receiving permission from the other party or leave of the court.[19] Under Rule 54(b), which applies to both adversary proceedings and contest- ed matters,[20] a party can seek final judgment on fewer than all claims, which judgment the court may enter "only if the court expressly determines that there is no just reason for delay."[21]

Parties have options to eliminate individual claims. However, Rule 41(a) is not one of them.

This Article was previously published in the Florida Bar out-of-State Division's Summer 223 edition of State-to-State and is republished with permission.

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Fed. R. Bankr. P. 7015 and Fed. R. Civ. P. 15(respectively).
20. Fed. R. Bankr. P. 7054(b) and Fed. R. Bankr. P. 9014 (respectively).
21. Fed. R. Civ. P. 54(b).

Member News & Announcements

Email all of your news to Ryan Yant to be included in the next issue!
RYant@carltonfields.com

• Underwood Murray is pleased to welcome **Daniel Etlinger** as a partner. Daniel focuses primarily on commercial bankruptcy, litigation, and transactional matters. He also just published an article, Five Tips for a Successful Bankruptcy Sale from a Title Agent's Perspective, in the October issue of the ABI Journal.

• **Nicole Carnero** has joined The Law Offices of Robert M. Geller, specializing in consumer bankruptcy law.

• **Luigi Orengo** (Carlton Fields) welcomed baby Armand Orengo on June 2, 2023. (Armand is dressed as Sully from Monster's Inc. for Halloween).

• On September 21, 2023, **Matthew Hale, Kathleen DiSanto, and Luis Rivera** presented a program titled Know When to Hold' Em, Know When to Fold 'Em – Loans vs. Merchant Cash Advances for the Southwest Florida Bankruptcy Professionals Association, offering critical insights into the complexities of merchant cash advances and related bankruptcy issues, while providing practical strategies for navigating the legal intricacies surrounding MCA funding in a chapter 11 case.

• **Megan Murray** (Underwood Murray) presented at a CLE event regarding Subchapter V for the bankruptcy section of the Columbus, Ohio bar. Megan also presented the basics of nondischargeability at a CLE event for the Small/Solo section of the Business Law Section of the Florida Bar.

• **Donald Kirk** (Carlton Fields) spoke at the Central Florida Bankruptcy Bar Association's annual meeting about recent developments as to Subchapter V cases and third-party non-consensual releases. He also presented at the ABA's Business Law Section's annual meeting on a panel that included SDNY Bankruptcy Judge Lisa Beckerman discussing "The Governance of a Distressed Business – Independent Directors for Hire".

Share your news and accomplishments!

Email
Ryan Yant • RYant@carltonfields.com

• On September 5, Amy Mayer and Andrea Bone presented a TBBBA CLE lunch program titled Bankruptcy Reporting: Necessary Evil or Strategic Planning Tool for Confirmation. Filing a Chapter 11 case imposes additional reporting requirements on the debtor, including cash collateral budgets, budget to actual reports, monthly operating reports, plan projections, and the like. Many small business and Subchapter V debtors do not have the in-house expertise to prepare these reports or the funds to retain outside professionals. This often translates to a lack of reporting, delayed reporting, and/or inaccurate reporting. Like traditional financial reporting, bankruptcy reporting is an important tool to help management make informed business decisions. If utilized properly, bankruptcy reporting is a strategic planning tool that can be utilized to prepare and confirm a Chapter 11 plan. This program discussed the key financial reports in a Chapter 11 case and how to effectively use them as a planning tool for confirmation, as well as the consequences for failing to timely file certain bankruptcy reports.

• In early 2020, the world was shut down by the Covid-19 Pandemic. As months progressed, new laws and policies, including large stimulus bills and moratoriums, were implemented to address the financial repercussions of the Pandemic. In February 2021, a creditor's rights panel of attorneys, Nicole Mariani Noel, Peter Kelly, Keri Ebeck, and Gavin Stewart, provided a virtual CLE program titled The Calm Before the Storm: What to Expect and How to Deal with the End of Moratoriums, in which the panel discussed, inter alia, projected effects of foreclosure moratoriums, loan forbearance, the CARES Act, court backlog, PPP loans, bankruptcy filings, bankruptcy code and rule changes, and the impact of the stimulus bills. Then, on October 10, 2023, in the wake of the Pandemic, three members of the panel (Nicole Mariani Noel, Keri Ebeck, and Gavin Stewart) reassembled for an in-person CLE presentation titled Has the Storm Hit Us?: The Financial Aftermath of Covid-19 and Projections Forward to discuss what the bankruptcy practice has learned from the Pandemic and post-Pandemic loss mitigation solutions to take care of forbearance arrears (e.g., deferment, loan modification HUD partial claim). In addition, debtors and servicers need to be aware of restrictions on plan modifications after the sunset of CARES. The panelists also discussed whether the 2021 predictions were correct, whether there were meaningful cases regarding PPP, post-CRES 84-month plans, whether the moratoriums are done, and what to expect moving forward.

• **Guy A. Van Baalen**, Assistant United States Trustee, Department of Justice, Office of U.S. Trustee, and Nathan Wheatley, Trial Attorney, Department of Justice, Office of U.S. Trustee, presented a TBBBA Consumer CLE titled Best Practices for Virtual 341 Meetings.

• **Christie Arkovich** presented a TBBBA Consumer CLE program titled Get Ready for the Student Loan Pause to End: the recent Supreme Court Decisions and Next Steps for Borrower. She discussed the fact that the U.S. Supreme Court has ruled on President Biden's forgiveness plan and that payments are scheduled to restart on federal student loans after the pause ends on September 1, 2023. Many changes have occurred over the past three years during Covid-19 which can greatly benefit student loan borrowers, such as the IDR Waiver and One Time Account Adjustment, SAVE, PSLF modifications, Total and Permanent Disability Discharge income waiver, and new Department of Justice rules finally allowing for discharge in bankruptcy and well as new IDR rules for bankruptcy debtors.

• The **U.S. Trustee Program** implemented virtual meetings of creditors (via Zoom) in chapter 7, 12, and 13 cases in the Middle District of Florida for § 341 meetings in cases filed on or after September 1, 2023. The purpose for this policy decision is to promote access to justice by facilitating greater access to meetings by all parties in interest while promoting efficiency reducing travel costs and time commitments for participants, and enhancing fact-finding over telephonic meetings. The program was designed to familiarize the bar and other parties in interest with the best practices for preparing for and attending Zoom 341 meetings. The main topics covered included Essential Requirements & Advance Preparation; Meeting Logistics; Meeting Expectations; Best Practices; and Using Zoom.

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- Board Certified in Business Bankruptcy Law by the American Board of Certification
- Florida Supreme Court Certified Circuit Mediator
  - Business Bankruptcy Cases
  - Consumer Bankruptcy Cases
  - Adversary Proceedings
    - Preferential and Fraudulent Transfer Actions
    - Discharge/ability Actions
  - Real Estate and Landlord/Tenant Litigation
  - Business Litigation

TRENAM LAW

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View from the Bench
November 2, 2023

View from the Bench Reception

November 1, 2023

View from the Bench Reception, cont.

November 1, 2023

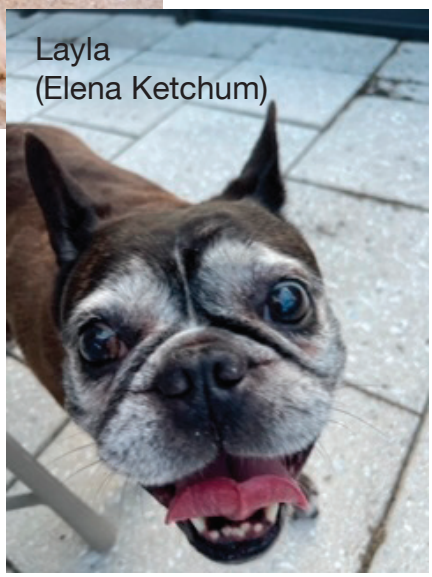
Please send your pet pictures to ryant@carltonfields.com for inclusion in our next edition


Haleakala
(Kelly Roberts)


Bianca
(Dan Fogarty)


Truffles
(Erik Johanson)


Foxy
(Elenda Ketchum)

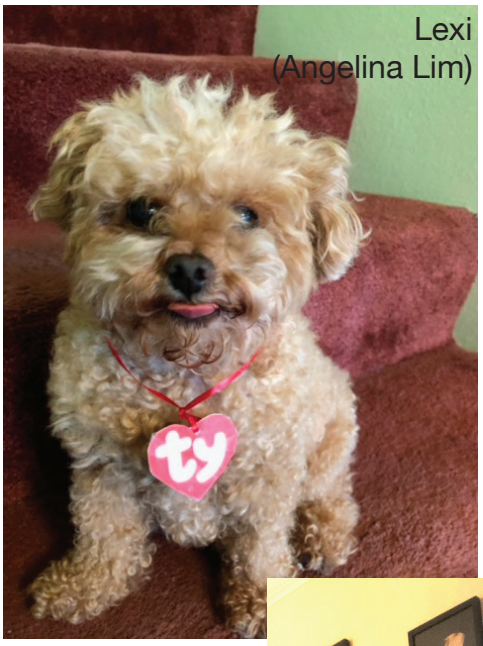

Layla
(Elena Ketchum)


Hazel
(Russ Blain)

Regan and Isabella
(Ryan Yant)

Shaggy
(Barbara Hart)

Welsh and Latte
(Roy Kobert)



Lexi
(Angelina Lim)

Penny (Megan Murray)

Fluffernutter and
Scammpers
(Dan Etlinger)

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.

The TBBBA would like to thank the following CARE program volunteers:

Adam Alpert • Rudy Mueller • Melissa Sydow

Angelina Lim • Jason Alpert • Nicole Noel

Scott Underwood

The TBBBA would like to thank those who recently volunteered at the in-person Pro Se Assistance Clinic. The Clinic provides no-appointment assistance every Wednesday between 2:00 – 4:00 p.m. at the Tampa courthouse. To volunteer, email dfogarty@srbp.com.

August

Amy Mayer
Scott Stichter
Peter Zooberg (x2)
Dan Fogarty
Dan Etlinger

September

Angelina Lim
Michael Barnett
Laura Gallo
Katelyn Vinson
Matt Hale
Megan Klotz
Kelley Petry
Daniel Fogarty

October

Michael Barnett (x2)
Samantha Dammer (x2)
Dan Fogarty
Laura Gallo
Mark Robens
Katelyn Vinson

The Middle District of Florida Virtual Pro Se Assistance Clinic, Inc., is seeking volunteers. The Clinic schedules 30-minute telephone consultations with individuals seeking assistance with bankruptcy, usually debtors. Attorneys can choose the days and times they are available. Please sign up to help at http://www.bankruptcyproseclinic.com, or fill out the following form on the next page and send to flmb_probono@flmb.uscourts.gov. Thank you for your help.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

Request to Attorneys to Volunteer for the Court's Legal Assistance Program

The Court has established a legal assistance program to enable low-income debtors (and in some instances their spouses and former spouses) to receive free legal services in the following types of cases:

- Adversary proceedings relating to the debtor's entitlement to a discharge and/or the non-dischargeabilty of a debt.
- Contested matters concerning the debtor's claim to a homestead exemption and subsections 522(o)-(q) of the Bankruptcy Code.
- Representation of spouses and former spouses of debtors in connection with the dischargeability of obligations under marital settlement agreements or judgments for the dissolution of marriage.

The Court requests that members of the bar volunteer for assignment under this program. The Court's goal is for a sufficient number of attorneys to volunteer so that each attorney is assigned to a case every three or four years.

The following procedures apply:

1. Applicants for legal assistance submit an application, including financial information, on a form available on the Court's website and at the Clerk's Office.

2. The application, and the applicant's bankruptcy schedules and statement of financial affairs, will be reviewed by the judge assigned to the adversary proceeding or contested matter.

3. Generally, the Court will grant an application if: (a) the applicant's current income does not exceed 200% of the current year's U.S. Department of Health and Human Services Poverty Guidelines for the applicant's family size, and (b) the applicant does not have sufficient assets to pay for the needed representation.

4. If the application is granted, the Court will enter an order appointing an attorney from the list of attorneys who have volunteered to provide representation in this program. Assignments will be made based upon Division in which the case is pending and the location of the attorney. If requested, the Court will provide the assigned attorney with pertinent papers and pleadings and the debtor's bankruptcy petition, schedules, statement of financial affairs.

5. If an attorney case wishes to decline the appointment to a case, the attorney, within seven days from the date of the appointment, may file and serve on the proposed client a motion for relief from the appointment order. If a motion is granted, the Court will enter another order of appointment.

6. Separate lists of volunteer attorneys will be maintained for each Division of the Middle District. A volunteer attorney seeking to discontinue participation in the program should send a letter to the Clerk of Court.

The Court urges you to volunteer for this important program. To volunteer, please complete the form below and return it to the Court. Thank you for your help.

Caryl E. Delano
Chief United States Bankruptcy Judge

Revised 10/1/2019

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

I wish to volunteer for the Court's Legal Assistance Program.

Name: _____
[Please print or type]

Address: _____

_____

Telephone: _____
[Please include area code]

Division(s) in which I am willing to accept assignments (check all that apply): **__FM, __JAX, __ORL, __TPA.**

Please return this form by email to: flmb_probono@flmb.uscourts.gov

Revised 10/1/2019