The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

SUMMER, 2003

Editor, Donald R. Kirk

STRAP IN FOR THE COMING WILD RIDE OF CHANGES

President's Message

By Catherine Peek McEwen

Don't fear change, embrace it. -Anthony J. D'Angelo, The College Blue Book

The art of progress is to preserve order amid change. -A. N. Whitehead

Change should be a friend. It should happen by plan, not by accident. -Philip Crosby, Reflections on Quality

This column started the bar year with a retrospective piece on the founders of the Tampa Bay Bankruptcy Bar Association, why we organized, and how we had successfully met the vision of our founding members over the past 14 years. Thanks to our many volunteers, we continued that success this year (more about them at the end of this piece). We end the bar year with a prospective look to anticipated changes next bar year that will affect all of our practices, will be stressful (change always begets stress), and may even be difficult. We offer some simple suggestions on how to adjust with minimum inconvenience.

CM/ECF – It's Really Here Now

The advent of the new case management and electronic case filing system (CM/ECF) is upon us. The association has attempted to help prepare us for CM/ECF by bringing us programs both last bar year and this bar year that have introduced us to the look and feel of the system – and the tools we need to access and manipulate it — so that it will not be totally foreign to us when reality hits.

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TRUSTEE'S REPORT

by Cynthia B. Burnette

United States Trustee's Efforts Lead to Guilty Plea for Bankruptcy Fraud

The United States Trustee reports that on March 19, 2003, Lori Ann Snyder, a resident of Sarasota, Florida, entered a plea of guilty to a one count Information charging her with committing bankruptcy fraud. Between December 1995 and January 2000, Ms. Snyder, formerly known as Lori Ann London, applied for credit cards issued by various financial institutions using false names and false social security numbers. The false names used by Ms. Snyder included the names of several of her pet dogs, Emily London, Tulip London, Daisy London. Ms. Snyder filed bankruptcy under Chapter 7 of the United States Code on March 18, 2002, and at the time of the filing, she listed 59 credit cards with debt in excess of $265,000. Approximately 23 of the credit cards were issued in the names of her pet dogs. The credit cards were used to

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Donald R. Kirk
Fowler White Boggs Banker
501 East Kennedy Boulevard
Suite 1700
Tampa, FL 33602
(813) 228-7411
(813) 229-8313 (Fax)

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THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION 2003-2004 OFFICERS AND DIRECTORS

Officers

Chair/Immediate Past President
Catherine Peek McEwen
Catherine Peek McEwen, P.A.
(813) 248-5852
Fax: (813) 248-3061
Email: Catmcewen@aol.com

President
John J. Lamoureux
Carlton Fields, P.A.
(813) 223-7000 Ext. 4224
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Vice President/President Elect
Edwin G. Rice
Glenn, Rasmussen, Fogarty & Hooker, P.A.
(813) 259-9900
Fax: (813) 259-9895
Email: Egr@grflaw.com

Secretary
David J. Tong
Salem Saxon, P.A.
(813) 224-9000 Ext. 3304
Fax: (813) 221-8811
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Treasurer
Herb Donica
Herbert R. Donica, P.A.
(813) 259-9900
Fax: (813) 259-9895
Email: donicapa@gte.net

Directors

Shirley C. Arcuri
Shirley C. Arcuri, P.A.
(813) 286-4081
Fax: (813) 286-4168
Email: scapa@ij.net

Caryl E. Delano
Addison & Delano, P.A.
(813) 223-2000
Fax: (813) 228-6000
Email: delano@mcaddison.com

Luis Martinez-Monfort
Mills Paskert Divers, P.A.
(813) 229-3500
Fax (813) 229-3502
lmmonfort@mpdlegal.com

Kelly Petry
Feinberg Isaak & Smith, P.A.
(813) 229-2221 Ext. 1214
Fax: (813) 225-1315

Scott A. Stichter
Stichter, Riedel, Blain & Prosser, P.A.
(813) 229-0144 Ext. 126
Fax: (813) 229-1811
Email: Ssticher@srbp.com

Donald R. Kirk
Fowler White Boggs Banker, P.A.
(813) 222-2022
Fax: (813) 229-8313
Email: dkirk@fowlerwhite.com

F. Lorraine Jahn
The Solomon Law Group, P.A.
(813) 225-1818 Ext. 258
Fax: (813) 225-1050
ljahn@solomonlaw.com

Pat Tinker
Office of the US Trustee
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DEAR MR. JUDGE

By Luis Martinez-Monfort

Judge C. Timothy Corcoran, III will leave the bench in August, 2003, but not without leaving behind a legacy. From an 11 year old Tennessee boy, to countless practitioners whose ages will remain confidential, Judge Corcoran has left an indelible mark on the bankruptcy community. However, those familiar with Judge Corcoran know that the past 14 years are only a short chapter in a life already rich with commitment and service to others.

Growing up in an Irish Catholic family, Judge Corcoran learned the value of faith, family and respect for the rule of reason. After graduating from the University of North Carolina in 1967, Judge Corcoran served in the United States Navy as a line officer until 1970. These years included 2 tours of duty in Vietnam, where he earned the Air Medal and Navy Commendation Medal with Combat Distinguishing Device. Judge Corcoran remained an officer in the U.S. Navy Reserve for over twenty years, finally retiring as a Lt. Commander in 1991.

Upon completion of his active tour with the Navy, Judge Corcoran attended law school at the University of Virginia School of Law, earning his Juris Doctor in 1973. After 2 years as a law clerk to the Hon. Wm. Terrell Hodges, Judge Corcoran joined the law firm of Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A. in 1975, becoming a shareholder in 1979. Over the course of the next 10 years, Judge Corcoran developed and honed his trial skills in state and federal courts as an AV rated attorney practicing in business and commercial litigation, bankruptcy, environmental litigation, administrative law and family law. In addition to balancing a full practice, Judge Corcoran assumed many of the internal duties for Carlton Fields including serving on the firm's board of directors and actively participating in the hiring and training of young lawyers. During his tenure at Carlton Fields, Judge Corcoran served as President of both the Hillsborough County Bar Association and Bay Area Legal Services, Chair of the Florida Bar Governance Committee 13-D, and as a member of the Board of Fellows and Board of Counselors of the University of Tampa.

By the late 1980s, Congress enacted legislation increasing the number of sitting bankruptcy judges in the Middle District of Florida. In August of 1989, Judge Corcoran donned the black robe and served as the sole bankruptcy judge in the Orlando district for the next 4 years. During that time, Judge Corcoran's Orlando docket was almost 4 times the national average for bankruptcy judges. In November of 1993, Judge Corcoran shifted his duty station to the Bankruptcy Court for the Middle District of Florida, Tampa Division.

Judge Corcoran has not only dedicated himself to the institution he represents, but also to the legal community of which he is a part. He is a constant fixture at all TBBBA and HCBA events, a regular guest lecturer at the TBBBA monthly luncheons and a prolific contributor to "The Cramdown" and Hillsborough County Bar Association's monthly periodical the "Lawyer." He serves as the Master of the Bench for the Ferguson-White American Inns of Court, a position he has held for the past 7 years. Recently, Judge Corcoran has conducted monthly luncheons for young practitioners, offering unfettered access and insight to the inner workings of the Court, as well as the practice of bankruptcy law.

Judge Corcoran's contributions, commitment and self-sacrifice to the local legal community have not gone unnoticed. In 1980, he received the Red McEwen Outstanding Lawyer Award from the Hillsborough County Bar Association and the following year, he was presented the Most Productive Young Lawyer Award from the Florida Bar. In the Spring of 2002, Judge Corcoran's reputation for sound judicial decisions and his record for integrity as a lawyer and a judge, coupled with his history of involvement in Bar-lead activities and his concern and willingness to assist young lawyers earned Judge Corcoran the Hillsborough County Bar Association's prestigious Robert W. Patton Outstanding Jurist Award.

As illustrious as Judge Corcoran's time on the bench was, he is not without his detractors. Even his most ardent critics, however, will universally agree Judge Corcoran's knowledge of the law and trial procedure is second to none. This is evident in the legal reasoning expressed in each of Judge Corcoran's 94 published opinions. From the smallest of disputes, to the 200 plus page decision in In re Toy King Distributors, Inc., Judge Corcoran's published opinions resonate with the sound of a complex legal mind conceived in reason and blanketed in equity.

But if you want insight into Judge Corcoran the man, all you have to do is read an article by Mark Albright in the August 21, 2000 edition of the St. Pete Times. In that article, Mr. Albright retells the story of a letter Judge Corcoran received from 11 year old Clay Matlock, the recipient of a $10 gift certificate from Jumbo Sports, Inc. Clay was forced into Judge Corcoran's world by the Chapter 11 filing of Jumbo Sports and his failed attempt to use a $10 gift certificate at one of the local Tennessee store fronts. In a letter addressed "Dear Mr. Judge", young Clay asked Judge Corcoran's assistance in tracking down the people who "stole my money." Instead of tossing aside this hand written letter, Judge Corcoran broke from his extensive schedule and wrote a 3 page letter explaining the history and general working of bankruptcy, concluding his letter by explaining to Clay that "if a business fails because of honest mistakes like Jumbo Sports, no one goes to jail." As a postscript to his letter, Judge Corcoran attached a $10 money order, paid for out of his own pocket, compensating young Clay for his loss.

Whatever your encounters with Judge Corcoran were over the past 14 years, good or bad, one thing is for sure, no one can say that Judge Corcoran wasn't always fully engulfed in an unbridled commitment to the institution he represented and the community he served. Aside from all that, I, for one, will miss the ritual of entering my appearance on the record beginning from my left and ending on my right.

VIEW FROM THE BENCH

HISTORICAL BACKGROUND OF THE TREATMENT OF CONSUMER DEBTORS IN BANKRUPTCY

Hon. Alexander L. Paskay
Chief Bankruptcy Judge Emeritus
Middle District of Florida

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The claimed abuse by consumer debtors of the bankruptcy system, so loudly proclaimed and advertised by the credit card industry during the past seven years, is not a new phenomenon. This concern surfaced as early as in 1910. There were serious efforts to repeal the Bankruptcy Act of 1898 because, according to some, dishonest people made a practice of going into debt and then seeking the Bankruptcy Court to get relief from the payment of their debts.

To remedy this abusive practice, it has been suggested that the country should go back to the old fashioned primitive doctrine that required the payment of honest debts. See The Rise of Consumer Bankruptcy; Evolution, Revolution or Both?, David A. Moss & Gibbs A. Johnson, 73 Am. Bankr. L.J. 311 (1999). One must keep in mind that in 1916 the total filings were 24,838, and steadily decreased to 13,558 by 1920. Even at the end of the Great Depression there were only 57,081 cases filed and reached an all time low in 1945 of 12,862. Out of the 12,862 cases, 11,365 were under Chapter VII (straight or ordinary bankruptcies); 1,248 were under Chapter XIII (wage earners); 119 were under Section 75 (farmer debtors); 72 were under Chapter X (corporate reorganizations); 41 were under Chapter XI (arrangements); 8 were under Chapter 12; and 4 were under Section 77 (railroad reorganizations).

Of course, during this period, credit cards were unknown. There were no ATM machines and no large scale purchases on credit of big ticket consumer goods, with one exception. The only noticeable increase in filings had been attributable to the increase of consumer credit for appliances and automobiles in the 1920s. A report issued by the Department of Commerce described this deplorable state of affairs as an increased number of consumer debtors appearing in the Bankruptcy Courts seeking discharge of their debts as a creditable achievement. The ease with which this could be achieved through bankruptcy had an influence on the increase in the number of consumer bankruptcies.

Does not this sound like the war cry of the credit card industry since 1997 which almost produced the Bankruptcy Abuse Reform Act of 2002, which was designed to radically limit the rights of debtors to seek a discharge in Chapter 7?

At the end of the 1920s and the beginning of the 1930s, two general investigations spawned a renewed interest in amortization of debts of wage earners and an alternative to ordinary or straight bankruptcies for consumers. The first was the Donovan Investigation, which primarily dealt with certain abuses in the Southern District of New York. The investigation was conducted by William J. Donovan. He was a prominent New York attorney who later on became the head of the OSS, the predecessor of the CIA, the super spy organization during World War II. Mr. Donovan was the counsel for the Joint Committee of the New York Bar and operated under the guidance of U.S. District Judge Thomas D. Thatcher.

The Donovan Report issued in 1930 revealed widespread abuses of the bankruptcy system by corrupt debtors, and it recommended further investigation and an overall study of the Bankruptcy Act of 1898. The report concluded that the procedures in the Bankruptcy Court were too slow and that reliance on creditors to control and manage the proceeding was ineffective and misplaced. It recommended limiting creditors' control and the strict enforcement of criminal fraud penalties.

Judge Thatcher wanted a complete overhaul of the entire system. Specifically influenced by his observation of the British bankruptcy system, he suggested to place the emphasis on rehabilitation, rather than liquidation, and the use of compositions and extensions for repayment of debts under the supervision of the courts.

When Judge Thatcher resigned from the bench, President Hoover appointed him to serve as the Solicitor General in 1930. Judge Thatcher convinced President Hoover of the need for a nationwide study of the bankruptcy system. The Thatcher study concluded that the system completely failed in its mission of distributing the debtor's assets to creditors. The Study also concluded that many of the consumer debtors were anxious to pay their debts but were forced to file straight bankruptcy in order to protect their sole source of support, which was their wages, from garnishment. The study suggested several legislative changes. In response to the Thatcher Report, President Hoover called for new bankruptcy legislation in order to amend the Act of 1898.

The Hastings-Michener Bill introduced in Congress proposed to provide a simple method of corporate reorganization and also offered a relief to wage earners. A new section, Section 75, was to be added to the Bankruptcy Act which would provide that wage earners could pay their debts from future earnings over a two-year period and they would be protected from wage garnishments during the repayment period. The Bill failed and was not enacted in 1932.

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The onset of the Great Depression brought renewed pressure for an emergency measure to provide relief from growing burdens of debts and the inability due to loss of jobs to pay debts as they became due. To meet this challenge, in 1933 Congress enacted part of the Thatcher recommendations with many changes and additions, as well as some notable omissions. The new Section 75 dealt only with extensions and compositions by farmers. All recommendations concerning consumer debtors were omitted. Thus, wage earners who wanted to use bankruptcy to pay their debts out of their future earnings had to use the new Section 74.

SECTION 74 - HISTORICAL DEVELOPMENT

Section 74 is very long and complicated, and is comprised of 16 subsections. Technically, it is not a section designed to deal with wage earners. The only reference to wage earners is at the very end, which provides that involuntary proceedings under this section shall not be taken against a wage earner. This section was woefully inadequate to meet the needs of consumer debtors who wanted to repay all or some part of their debts out of their future earnings. The court was not granted jurisdiction over the future earnings of the debtor and did not provide for a discharge for debtors who successfully completed their plan of repayment.

THE ALABAMA EXPERIMENT

The U.S. District Judge of the Northern District of Alabama, W.I. Grubb, became concerned with the impact on the economy of the ever increasing filings by individuals. Judge Grubb, after having consulted with businessmen, attorneys, and representatives of large employers in the Birmingham area concluded that wage earners, who in 1931 represented 82 percent of all filings in the District, would pay their debts if given a chance. To provide this opportunity, Judge Grubb appointed Valentine Nesbit as Special Referee in Bankruptcy, one month after the President signed the emergency legislation which included Section 74.

Under his appointment, Mr. Nesbit was to be in charge of all cases filed under Section 74 of the emergency legislation. Referee Nesbit became interested in finding out how this section could be used to help wage earners who wanted to repay their debts if given a chance. As drafted, Section 74 did not give power to a referee to deal with the plight of wage earners at all, nor to grant debtors additional time to pay their debts out of their future wages. It was commonly understood that the section was designed to aid the business of small merchants, especially to deal with the secured debts of the merchants. The section granted jurisdiction and control to the court over the property of the debtor. Referee Nesbit realized that wage earners had no property over which the court could exercise jurisdiction and control. All they had were their future earnings and some meager personal effects.

Resorting to a very liberal interpretation of the section, and according to some by stretching or straining the law, Referee Nesbit started to apply Section 74 to wage earner debtors by developing a plan permitting an extension of time to pay their debts. More importantly, the court retained control over the wages of the debtors who filed under Section 74 in order to assure that payments were made to creditors. Under his procedure, when the petition was filed under Section 74, the court referred the case to Nesbit. Referee Nesbit promptly scheduled a meeting of creditors at which time the debtor was examined as to his earnings and expenses, debts, and his family situation. This was done in order to determine the amount needed by the debtor and his family to live on each month, as well as to determine how much would be available to pay to creditors under the plan.

Under the Nesbit procedure, the debtor could make a proposal to pay both the secured and the unsecured debts. The debtor's plan was scheduled for confirmation. If the proposal was approved by a majority in amount and number of creditors whose claims were filed and allowed, the proposal would be confirmed and was binding on both the debtors and the creditors. Confirmation hearings generally did not take more than four to seven minutes of court time per case.

If there was opposition and an objection to the debtor's plan, Referee Nesbit would dispense justice and equity as he saw fit. He would confirm the plan even over objections if he considered the plan to be fair and equitable for all concerned. Nesbit was not shy in applying strong arm tactics, especially when dealing with claims of loan sharks, whose claims he often reduced. Hardly anyone challenged Nesbit's rulings because they knew that Judge Grubb would not reverse him.

Initially, under the Nesbit procedure the payments were made by the debtors directly to the creditors holding allowed claims. Nesbit appointed young lawyers to supervise debtors and creditors in order to assure that the debtor made the required payments pursuant to the confirmed plan. Unfortunately, this did not work too well. So Nesbit created the position of supervisor, who was to collect and disburse all payments under the confirmed plan. Of course, there was nothing in Section 74 which even indirectly authorized the position of Special Referee, let alone for supervisors. This did not bother Judge Grubb or Nesbit.

The supervisor hired bookkeepers to keep formal records and to manage the collection and the disbursements of the payments made by the debtor. There were two ways the payments were made to the supervisor. Either the debtor paid the agreed amount, or the debtor's employer deducted

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the agreed amount from the debtor's paycheck and remitted that amount to the office of the supervisor. The supervisor, in turn, distributed the money to creditors holding allowed claims pursuant to the terms of the confirmed plan.

If the debtor failed to make the required payments, Nesbit would issue an order requiring the debtor's employer to either make monthly deductions from the debtor's paycheck or remit the entire pay to the court, referred to as the Debtor's Court, in order to make the appropriate payments to creditors. These procedures were used in all cases filed under Section 74 of the Act.

After Nesbit confirmed the plan, his role really ended as the collections and the distribution was made by the supervisor and his staff. After the debtor had paid in full all allowed claims approved in the plan, Nesbit closed the case recommending to the District Court that an order be entered dismissing the case. The order was placed on the court's record, reciting that all allowed claims had been paid in full. In this connection, it should be pointed out that the Nesbit procedure did not provide for a discharge because the plan called for a full payment of all allowed claims. It also should be noted that the involvement of Nesbit in the entire procedure was very limited. After his examination of the debtor at the initial meeting of creditors and conducting the confirmation hearing, the actual administration of the case was done by the supervisor and his staff. Of course, after completion of the payments, he did request dismissal of the case to the court.

WAS THE NESBIT PROCEDURE EFFECTIVE?

The Debtor's Court, a term unknown outside of the Northern District of Alabama, and certainly not a term used in Section 74, was a very busy court. Between 1933 when it was put in operation by Nesbit, up to the time the new Chapter XIII (the wage earner chapter) became law in 1938, there were 3,421 cases filed under Section 74. Out of the total, 2,300 were filed by employees of local industries.

Both debtors and creditors fared well in the Debtor's Court. In over 90 percent of the total filings, all allowed claims were paid in full. It was estimated in 1939 that 85 percent of the wage earners would have qualified to file for straight bankruptcy. It has been said that if the Nesbit concept were adopted nationwide, $20 million to $25 million a year could be salvaged from being lost in straight bankruptcy.

The cost for debtors to use the Debtor's Court was modest. Installment payments of the filing fee was available to eligible debtors. All administrative costs were deducted from each payment as a percentage and did not have to be paid in full when the plan was confirmed. It could be paid with the plan payments. The filing fee was $28.00. The supervisor's fee was 8 percent deducted from each payment to cover his fee and the cost of operating his office. Special Referee Nesbit received one-half of one percent of the amount paid by the debtor, which was deducted from each payment.

It should be evident from the foregoing that Mr. Nesbit operated under the Machiavellian principle of the end justifies the means. He stretched and strained the law more than the intent Congress had in enacting Section 74.

Some courts refused to approve the Nesbit procedures. They clearly held that the referee had very limited power to control future earnings of the debtor. See Oak Park Trust & Sav. Bank v. Van Doren, 79 F.2d 859 (7th Cir. 1935); McKeever v. Local Fin. Co., 80 F.2d 449 (5TH Cir. 1935). In McKeever, on appeal from the Debtor's Court in Birmingham, the court held that the debtor could not bind his future earnings by agreement. Nesbit routinely ignored this decision and continued to make agreements under which the debtors pledged their future earnings.

Section 74 required that the debtor deposit the costs of the proceedings in cash, which included the commissions of the referee and the trustee, based on the full amount of the debts extended and all the priorities. This requirement was also ignored by Nesbit because very few, if any, earners had sufficient cash to comply with this requirement of Section 74 when the petition was filed. It is evident that if the court insisted on full compliance with these requirements, Section 74 would be totally useless for wage earners.

Some districts sought an alternative to procedures for dealing with wage earner bankruptcies. Attempts had been made by lawyers, retail credit associations, loan companies and others to pool arrangements to collect the claims of creditors. Attempts were made to make arrangements with creditors to permit debtors to pay their claims over an extended period of time out of their future earnings. None of the attempts that were tried in Chicago, Atlanta and Minneapolis succeeded for the simple reason that one single creditor could veto the proposed arrangements.

WAS THERE LIFE FOR WAGE EARNERS AFTER NESBIT?

As the great depression deepened, it became painfully evident that Congress had to find a satisfactory relief for the ever increasing plight of wage earners. There was a dire need to supplement the emergency legislation of 1933. The National Bankruptcy Conference was formed and was composed of, among others, the American Bar Association, the National Association of Credit Men, the Commercial Law League and the National Association of Referees in Bankruptcy. It actively started to work toward a legislative solution to deal with the ever increasing critical status of the country's economy. The National Bankruptcy Conference, which had a great deal of influence in the group's deliberations focused on legislation dealing with business bankruptcies. It displayed its insensitivity and exhibited a benign neglect and indifference to the plight of the wage earners.

Fortunately, Congressman Walter Clift Chandler of Tennessee, who was very impressed with the Birmingham

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experiment, was put in charge to supervise all proposals dealing with bankruptcy by Hatton Sumners, the Chairman of the House Committee on the Judiciary. On August 10, 1937, the House passed H.R. 8046. After several hearings and amendments in the Senate, the Bankruptcy Act of 1938 – known as the Chandler Act – was passed by the Senate. It was signed into law on June 22, 1938, taking effect on September 22, 1938.

It is fair to conclude that the Chandler Act was built largely on the Birmingham experiment, as it was the direct result of the success of the procedures established by Nesbit in the Northern District of Alabama. Nesbit's successor Clarence Allgood, who was later appointed as District Court Judge, followed the general outline of the Nesbit Debtor's Court. The mechanics of the Chapter XIII payment procedure were the same. The trustee, the supervisor under the Nesbit procedure, collected and disbursed the payments received from the debtor. A percentage of the monies received was kept to pay the expenses. At times, the payments were made by the debtors directly to the court and at times by the employer of a particular debtor pursuant to an arrangement with the court.

WHAT HAPPENED TO WAGE EARNER BANKRUPTCIES UNDER THE REFORM ACT OF 1987?

The Chandler Act, commonly referred to as the Chapter XIII Wage Earner Plan, enabled an individual whose earnings were from wages, salaries or commissions, to propose a repayment plan. The plan could either be for repayment of all debts, priority, secured and unsecured, over a three or for cause, five-year period. The plan would be funded by the future earnings of the debtor. Also the plan could be either an extension plan – payment in full of all allowed claims – or a composition plan – paying only a percentage of the allowed claims.

DRAWBACKS OF THE CHANDLER ACT OF 1938

First, the wage earner plan was available only for employees whose principal income was from wages, salaries or commissions. Second, the debtor could not modify or alter secured debts through valuation of the collateral. Third, all creditors holding an allowable claim had the right to vote on the plan proposed by the debtor, and the plan could not be confirmed unless the debtor was able to secure the affirmative majority vote of creditors in each class.

Chapter XIII did not receive a universal acceptance. With the exception of the Northern Districts of Alabama, Georgia and Illinois, a significant number of courts had hardly any cases filed under this chapter. Even in districts where there were some filings, the numbers were negligible and, at most, were less than 100 filings per year. Of course, Birmingham was the exception, as they still tried to make the new statute work. This was largely due to the attitude of the majority of the referees and bankruptcy practitioners, primarily because of the amount of monetary reward for the work involved. While it is true that the work was largely non-legal and administrative, Chapter 13 trained paralegals were few and far between.

CHAPTER 13 UNDER THE CODE

Congress, having realized the shortcomings of Chapter XIII, extensively amended the chapter by adding some very important new provisions. First, the eligibility for relief was substantially enlarged. It is now available to any individual who has sufficiently regular income, regardless of the source. Thus, individuals whose income is derived from social security pensions, disability benefits, operation of a business as sole proprietorship, and the like, are eligible provided that the secured debts do not exceed $871,550.00 and the unsecured debts do not exceed $290,525.00 and are noncontingent and liquidated. These amounts are effective March 1, 2001, through March 1, 2004.

Second, the debtor can alter or modify the rights of secured creditors through valuation of the collateral, pursuant to Section 506 of the Code. They cannot, however, alter or modify the rights of a mortgagee who holds a mortgage encumbering the debtor's residence, provided that the debt is secured solely by the principal residence of the debtor. This permits the debtor to bifurcate a secured claim into a secured part and an unsecured part. The secured part, representing the value of the collateral, must be paid in full. The unsecured portion generally receives only a small fraction of the among of the claim.

Next, regarding priority claims, they have to be paid in full but do not have to be paid in cash up front. They could be paid as part of the payments under the plan. In addition, the creditors have no right to vote. Thus, the veto power usually exercised by secured creditors, which killed a lot of Chapter XIII cases, is no longer possible.

Lastly, this new chapter has a very liberal discharge provision, usually referred to as a super discharge. There is also a provision for granting a discharge to debtors who, because of no fault of their own, did not complete the plan payments. This is called a compassionate or a hardship discharge.

Chapter 13 received a uniform large acceptance. The total annual filings skyrocketed in districts which had been hospitable to Chapter XIII cases. Even districts which had hardly any before, experienced a substantial increase in filings.

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SHOULD THE JUDICIARY BE INVOLVED IN CHAPTER 13 CASES?

The effectiveness and success of the Birmingham experience, as noted earlier, was attributable largely to the minimal involvement of Nesbit in the administration of the case. The Thatcher Report actually recommended that consumer cases should be handled by administrators, rather than by the judiciary. A study was conducted by the Brookings Institute in the 1960s, and in its 1971 report made a similar recommendation.

The National Bankruptcy Review Commission, was established by Congress by enacting the Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. It issued its report recommending the creation of the United States Bankruptcy Administration which would treat consumer bankruptcies as an administrative matter rather than as a matter for judges. See A REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137 (1973). According to one commentator, most consumer bankruptcy cases would become an administrative process like the social security or Veteran's Administration benefits programs.

It is not surprising that the bankruptcy bench, bankruptcy practitioners and, surprisingly, the consumer credit industry lined up to challenge any attempt to remove the judiciary from consumer bankruptcy cases. While the idea failed to reach legislative implementation, it did not really die. As recently as 1997, Professor Kenneth E. Klee made a similar proposal at the annual meeting of the bankruptcy judges. Professor Klee has extensive background in the legislative process, having worked on the Hill in the 1970s during the time Congress was deliberating the Reform Act of 1978 and the enactment of the Code. In an article published by the American Bankruptcy Law Journal, Professor Klee elaborated on the idea by suggesting that under a restructured system, the orders of confirmation would be entered by the clerks without any involvement of the judges. Further, unless the debtor's eligibility for relief or the dischargeability of debts were challenged, the judge's involvement in the process would be minimal, if not nil. See Kenneth E. Klee, Restructuring Individual Debts, 71 AM. BANKR. L.J. 431 (1997).

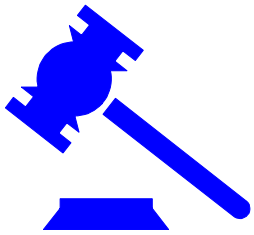
In response to his suggestions, Judge Robert D. Martin, the president of the National Bankruptcy Conference, published in the same journal, a rebuttal. While vigorously challenging the suggestions of Professor Klee, Judge Martin conceded that judges do not spend any time on consumer bankruptcy cases. Judge Martin also conceded that the true administration of consumer cases is undertaken by the Clerk of the Bankruptcy Court in each district and that this is generally done with remarkable efficiency. See Honorable Robert D. Martin, A Riposte to Klee, 71 AM. BANKR.L.J. 453,453 (1997).

There is no doubt that in most districts the administration of Chapter 13 cases is an assembly line process and run by the standing Chapter 13 Trustee. With some few exceptions, judicial involvement is negligible and mostly token. Notwithstanding this, it is unlikely that the several proposals outlined above will be actually implemented by legislation in the near future. This is so because of the strong opposition by the bench and bar.

There has been a concerted effort by the consumer credit card industry since 1997 to persuade Congress to severely restrict the right of consumer debtors to seek relief under Chapter 7. Several bills have been introduced in Congress since 1997, including H.R. 333 which was actually passed by both houses, albeit with some differences. One difference was an extensive provision under which debtors had to pass the so-called means test before being permitted to take the easy way and remain in Chapter 7. If they failed to pass the so-called means test, the case was to be dismissed unless they converted the case to a Chapter 13.

If legislation with a means test is ultimately enacted, it is anticipated that substantial litigation of the issue of eligibility and implementation of the means test will require a significant judicial participation in the administration of consumer bankruptcies.

Be that as it may, it is highly unlikely that the judiciary will be removed from consumer bankruptcy cases in the near future, even if the credit card industry – who spent about $50 million on the long sought after legislation – fails to persuade Congress to pass legislation requiring a means test.



CASE LAW UPDATES AVAILABLE FROM ABI

The American Bankruptcy Institute's 2002 Year in Review Consumer Bankruptcy Cases (122 pp) and 2002 Year in Review Business Bankruptcy Cases (65 pp) compilations are available on line to the public in pdf format at www.abiworld.org. The compilations may be printed or downloaded for free. The cases are arranged under general topical divisions and individual cases are summarized with the holdings and then digested.

CASE LAW UPDATE

Andrew T. Jenkins
Bush Ross Gardner Warren & Rudy, P.A.

Capital Factors, Inc. v. Kmart Corp. (In re Kmart Corp.),
291 B.R. 818 (N.D. Ill. 2003)

In a recent head-turning decision from the Kmart Corporation ("Kmart") chapter 11 case, the United States District Court for the Northern District of Illinois reversed the bankruptcy court's orders allowing the pre-plan payment of certain pre-petition claims as not authorized by the Bankruptcy Code.

In *Capital Factors*, the District Court addressed the appeal of four final orders of the bankruptcy court authorizing Kmart to make post-petition payments for pre-petition claims of certain "critical vendors" and "foreign vendors." The orders had been entered by the bankruptcy court in response to certain of Kmart's "first day motions." Relying on the "doctrine of necessity" and Section 105 of title 11 of the United States Code (the "Bankruptcy Code"), Kmart alleged in its motions that the payment of these pre-petition claims was necessary to maintain relationships that were vital to its operation and a successful reorganization. Kmart filed two motions seeking the authority for these post-petition payments that were heard on the same day that Kmart filed its chapter 11 petition. Kmart then filed two additional motions for the post-petition payment of pre-petition claims that were heard by the bankruptcy court approximately two weeks later. Capital Factors, Inc. ("Capital Factors"), a factoring agent for several of Kmart's suppliers, objected to each of these motions; however, the bankruptcy court entered written orders granting all of the motions. Capital Factors appealed each of the four orders, and the appeals were consolidated by the District Court.

Reviewing the bankruptcy court's decisions under a "clearly erroneous" standard, the District Court first turned to the language in Section 105(a) of the Bankruptcy Code for guidance This section states:

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

To aid in its interpretation of Section 105, the District Court next examined Seventh Circuit precedent in *In re Fesco Plastics Corp.*, 996 F.2d 152, 156 (7th Cir. 1993), and *Gouceia v. Tazbir*, 37 F.3d 295, 300 (7th Cir. 1994). These decisions stand for the proposition that Section 105 grants bankruptcy courts equitable powers "only as necessary to enforce the provisions of the [Bankruptcy] Code, and to add on to the [Bankruptcy] Code as they see fit." The District Court noted that the doctrine of necessity, though not specifically cited by the bankruptcy court in its orders, was relied on by Kmart in its motions. Delving into the doctrine's history, the District Court further observed that the doctrine of necessity was originally developed and applied in railroad reorganizations as the "necessity of payment rule" to justify the payment of the pre-petition arrearages of certain creditors, which were paid under pressure to secure essential supplies or services for the railroad's operation. The necessity of payment rule ultimately evolved into the doctrine of necessity and was applied by bankruptcy courts to non-railroad reorganizations. This doctrine has never been codified in the Bankruptcy Code.

Turning back to the provisions of the Bankruptcy Code, the District Court considered the general priority scheme set forth in Sections 503 and 507 of the Bankruptcy Code for the payment of claims. The Bankruptcy Code does not give a priority or administrative claim to an unsecured creditor for general pre-petition claims because the creditor may be critical or necessary to the debtor. Accordingly, the payment of pre-petition claims under the doctrine of necessity before the confirmation of a plan has the effect of raising certain unsecured creditors above other creditors who hold general unsecured claims and subordinating the claims of those unsecured creditors that are not "critical" to the debtor.

Examining additional case law regarding a bankruptcy court's power to authorize pre-confirmation payment of pre-petition unsecured claims under Section 105, the District Court noted the clear split in the circuit courts on this issue. The District Court did acknowledge that the application of the doctrine may be "well intended" and have "some beneficial results." However, relying on the language from the Seventh Circuit regarding the limits of a bankruptcy court's equitable power in *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.3d 524, 528 (7th Cir. 1986), the District Court held that the bankruptcy court "did not have the statutory or equitable power to authorize the pre-plan payment of pre[-]petition unsecured claims."

(cont. on Page 10)

Case Law Update *(cont. from Page 9)*

In opposition to this result, Kmart argued that the appeals instituted by Capital were "equitably moot" because the pre-petition claims had already been substantially paid and effective relief had become "imprudent and inequitable" as the parties had acted in reliance on the orders from the bankruptcy court. The basic question that must be considered in addressing the doctrine of equitable mootness is whether it is "prudent and fair to undo what the bankruptcy court did." However, the District Court noted that the cases cited by Kmart involving the doctrine of equitable mootness all addressed appeals from orders confirming bankruptcy plans of reorganization. In the instant case, the orders appealed by Capital were not confirming a plan. As such, the District Court determined that it was not too late to order the funds received by the "critical" vendors be returned despite Kmart's protest that such a task would be a "Herculean" effort because of the scope of these payments and would require a substantial sum of money to effectuate.

Given the split in the circuits on this issue, the *Capital Factors* decision in the Kmart chapter 11 case, which has been appealed to the Seventh Circuit, represents another problematic decision regarding payments to critical vendors for the bankruptcy courts and bankruptcy attorneys to interpret.

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President's Message *(cont. from Page 1)*

Reality is here. Training, which is being conducted by the Clerk's office, has begun and is an absolute prerequisite to use of the system. Without the training *and passing a test on the system*, a lawyer will not be given the key to the system: a log-in password that is his or her electronic "signature." So far, most who have taken the test have passed the first time.

Training opportunities are limited to certain days of the week and numbers of trainees, including trainees per firm per session. There are hundreds and hundreds of attorneys and staff members who will need to know CM/ECF, including creditor-only attorneys whose bankruptcy practice is limited to filing proofs of claim. A training session is thus going to be a hot ticket. The training priorities are now being set by the Clerk's office, but, importantly, with input from our association, primarily through its new consumer lawyers committee.

Too, our local rules necessarily need revamping to take into account practice under CM/ECF. The Clerk's office has requested that the association provide comment on the Clerk's suggested changes to the rules.

Although we cannot expect that all of our members will get an early priority for training or that our association's reaction to rule amendments will be adopted across the board, the association's role as a vehicle for helping to manage the transition to practice under CM/ECF cannot be overlooked. Members who want to weigh in on the issues have the opportunity to take a front seat in the process.

New technology is stressful enough, let alone the test part, new rules, and getting used to a new style of written advocacy – paperless — for our clients. Old dogs and even some younger pups who have relied on staff to master technological advances in the delivery of legal services will find these new tricks challenging. The stress can be minimized by arming oneself with information, including accessing the timely information, meetings, and programs provided by this association, and, most importantly, patience, patience, and more patience. Law school was not over in a week, and the adjustment to an entirely new way of practicing law, at least the written part, will not come in a week's time, either.

The perennial threat of a new Code

If the seemingly perpetually threatened proposed legislation gets out of Congress – and some day it has to, we will have about six months before its effective date to learn a vastly different new Bankruptcy Code.

Most of the proposed changes affect consumer cases, meaning they will affect many, many Tampa Bay practitioners' practices, based on the historical customer base of our court.

(cont. on Page 12)

THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION
2003-2004
Committee Chairs

The Association is looking for volunteers to assist us this coming 2003-2004 year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairpersons listed below.

COMMITTEE	CHAIR(S)	TELEPHONE	FACSIMILE
CLE Programs	Caryl E. Delano Scott A. Stichter	(813) 223-2000 (813) 229-0144	(813) 228-6000 (813) 229-1811
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Membership and Elections	Shirley C. Arcuri	(813) 286-4081	(813) 286-4168
Publications and Newsletter	Donald R. Kirk	(813) 228-7411	(813) 229-8313
Technology	Luis Martinez-Monfort	(813) 229-3500	(813) 229-3502
*Consumer Lawyers	David E. Hicks Randall Hiepe	(813) 253-0777 (727) 898-2700	(813) 253-0975 (727) 898-2726

*Ad-hoc, non-voting board members

Trustee's Report *(cont. from Page 1)*

pay for various goods and services, including several vacations, and to the pay off balances due on other credit cards. While Ms. Snyder listed her pet dogs as co-debtors on some of the credit card obligations, she failed to identify the names as aliases used by her and failed to disclose that she had used social security numbers other than her own. The Tampa Office of the United States Trustee uncovered the scheme upon examination of the debtor at the meeting of creditors and referred the case to the United States Attorney for criminal prosecution.

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President's Message *(cont. from Page 10)*

The consumer bankruptcy business here is booming while business bankruptcy cases are barely there. Last year our divisions (Tampa/Fort Myers) saw a mere 153 Chapter 11 cases compared to 17,692 Chapter 7 cases and 7,967 Chapter 13 cases. This means that in calendar year 2002, less than 6/10ths of one percent were Chapter 11 cases, while the remaining 99.94 percent were consumer cases. Last year's statistics are just the latest year's worth of a longstanding trend. Consequently, with most of our work being consumer-oriented and with most of the proposed legislation directed toward curbing consumer abuse (whether perceived or real), the legislation will present a tremendous inconvenience and challenge to most of our members.

Several years ago, when the threat of new legislation appeared imminent, we presented a primer on the key elements of the pending bills. Included in that presentation was an easy translation of the so-called "means" test, a formula that is not so easily fathomable given the legislation's language itself. The association intends to keep its members atop the learning curve by continuing to closely monitor Congressional developments and be ready to again provide — either alone or in collaboration with the Florida Bar's Business Law Section UCC/Bankruptcy Committee — a practical seminar on the legislative changes and how to incorporate them into our practices.

Learning the new law alone will be difficult; applying it before different judges will be more difficult. Just as many did when the Bankruptcy Act became the Bankruptcy Code 25 years ago, we will have to get ourselves informed and be patient with ourselves, our colleagues, and our judges as we work through how it will be applied in practice.

Welcoming a new judge

Bankruptcy practitioners in the Tampa and Fort Myers divisions have a relatively comfortable working relationship with our judges. That is primarily due to the fact they are known quantities — all five of our judges are known to us and we to them. After Judge C. Timothy Corcoran retires from the bench and his successor is appointed by the Eleventh Circuit in a few months, we will welcome a new judge.

A new appointee represents both a challenge and an opportunity to us. So how do we handle those twin prongs of change? The same way as the changes mentioned above: We arm ourselves with information, and we have patience. (Hopefully the new judge will have patience with us, too!)

While we now come into court many times without the need for significant preparation because we know what to expect, this will not necessarily be the case upon Judge Corcoran's retirement, at least not in the short term. We will attempt to elicit and pass on through these pages (which are posted on the court's website for the benefit of members, nonmembers, and *pro se* litigants alike) as much information from the new judge as the new judge would like us to have about him or her and the judge's preferences about how matters are handled. Over time, the new judge will get to know us, too. That knowledge is something we cannot expedite. We can make the process go smoothly in the meantime by being patient and prepared.

Thank you

It is customary for this space to be utilized as a means to thank the volunteers active in the association's programs and member services. That is one change this writer does not intend to make. The association's services are only as good as its volunteers' energy. We do not have a paid executive director to cover administrative tasks and execute programs we plan. We are 100 percent dependent on the members for this.

The board members and officers are at the front of ensuring that their particular function is successful. In addition to their own particular responsibility, many volunteered to assist with each other's committees, a sign of an excellent working board. This year's board and officers who helped this writer so diligently were *John Lamoureux* (v.p./president elect), *Ed Rice* (secretary), *Julia Sullivan Waters* (treasurer), *David Tong* (membership committee), *Herb Donica* and *Lorraine Jahn* (CLE/programs), *Donald Kirk* (newsletter committee), *Keith Fendrick* (technology committee), *Bill Zewadski* and *Cindy Burnette* (court liaison committee and View from the Bench reception), *Scott Stichter* (community service), and *Zala Forizs* (chair and wisdom dispenser). In addition, this past bar year we created an *ad hoc* consumer lawyers committee whose chairs were *David Hicks* and *Harvey Muslin*.

Our strongholds have continued to be delivery of information through our monthly luncheon programs and newsletter and the many opportunities for fellowship and networking. Accordingly, we also thank the following CLE/program committee volunteers: *Russ Blain* (annual dinner chair) and *Julia Sullivan Waters*, *Lorraine Jahn*, and *John J. Lamoureux*

(cont. on Page 13)

President's Message *(cont. from Page 12)*

(annual dinner); *Brian K. Oblow* and *Lori V. Vaughan* (bankruptcy sales program co-chairs); *John J. Lamoureux* and *Amy Hill Martinez-Monfort* (electronic discovery program); *Harvey Paul Muslin* and *David E. Hicks* (Chapter 7 panel program co-chairs), *Kelley Petry* and *Barbara Hart* (holiday party co-chairs); *Cheryl Thompson* and *Edmund S. Whitson, III* (appellate program co-chairs); *Michael P. Brundage* and *Caryl E. Delano* (mediation program co-chairs); *Randall C. Hiepe* and *Robert M. Quinn* (dischargeability program co-chairs); *Lorraine Jahn* and *Herb Donica* (client psychology and document management programs co-chairs); and speakers *Judge C. Timothy Corcoran*, *Judge Michael G. Williamson*, and *Judge Paul M. Glenn*. We also thank the newsletter committee's volunteers, who planned the *Cramdown* editions, wrote articles, or snagged advertising sponsors: *Cheryl Thompson*, *Judge C. Timothy Corcoran, III*, *Judge Michael G. Williamson*, *Judge Alexander L. Paskay*, *Lori V. Vaughan*, *Stephanie M. Biernacki*, *Elena Ketchum, Luis Martinez-Monfort*, *Amy Hill Martinez-Monfort*, *Adam Lawton Alpert*, *Terry Miller*, *J. Ryan Chandler*, *Carrie Beth Baris*, *Dennis J. Levine*, *Edmund S. Whitson, III*, *Cassandra Culley*, *Andrew T. Jenkins*, and *Charles G. Kilcoyne*. The consumer lawyers committee is off to a great start thanks to the attendance of numerous members at the periodic lunch meetings, the work of members *Kelley Petry* (social) and *Don Golden* (scribe) in ensuring the momentum keeps going, and court liaison updates from *Charles G. Kilcoyne*. On the social/athletic front, we thank the organizers of our enjoyable tennis and golf tournaments, *Rob Soriano* and *Bob Wahl* (tennis) and *Mike Markham*, *Kim Johnson*, and *Paula Luce* (golf). Finally, we thank nominating committee volunteers *Mike Horan*, *Roberta Colton*, *Zala Forizs*, *John J. Lamoureux*, and *David Tong*.

Perhaps you noticed how many people are responsible for what goes on in a bar year. We have a constant need for volunteers. If you are not currently involved in the association, why not make a change yourself and participate next year?

CYBERGENICS REVERSED

By Catherine Peek McEwen

Official Committee of Unsecured Creditors of Cybergenics Corp., v. Chinery 3rd. Cir.

The United States Supreme Court in Hartford Underwriters Ins. Co. v. union Planters Bank, 530 U.S. 1 (2000) does not operate to prevent the Bankruptcy Court from authorizing a creditors' committee to pursue the estate's causes of action for the benefit of the estate, under appropriate circumstances.

Clerk Oliveria Receives Highest Court System Award

David K. Oliveria, the Clerk of the U.S. Bankruptcy Court for the Middle District of Florida, is the recipient of a special Director's Award for Excellence in Court Operations Court Administration from the Administrative Office of the Courts. The award is the federal court system's highest honor for its employees. Mr. Oliveria was recognized for his uncompromising commitment to excellence in every facet of the clerk's office and court operations, particularly his stewardship of court resources.

"From establishing sound fiscal management and reducing expenses, improving personnel performance, enhancing employee work environment, and addressing national audiences, in a very short period of time he has led us a very long way," said then Chief Judge Thomas E. Baynes, Jr. "We are fortunate to have him. The U.S. courts are fortunate to have him." Among the many programs and procedures Mr. Oliveria has instituted here are a revamped personnel evaluation system, a new employee recognition program, revised budget and procurement processes and inventory system, an improved website, expanded videoconferencing capabilities, and facilitation of the CM/ECF system.

"Mr. Oliveria's accomplishments are not restricted to one area and are not limited to personnel, or technology, or fiscal management," wrote current Chief Judge Paul M. Glenn in nominating Mr. Oliveria for the award. "He has inspired the personnel of this court to embrace a new management philosophy dedicated to becoming the standard by which others area measured."

Interested in Public Speaking?

A joint effort by the Hillsborough County Bar Association and Chief Judge Manuel Menendez of the Thirteenth Judicial Circuit of the State of Florida has produced the Speaker's Bureau. The Speakers Bureau provides speakers to schools and civic organizations on law-related topics. If you would like to volunteer to speak on bankruptcy law issues, please call the HCBA's Melissa Fincher at 221-7777.

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CALENDAR OF EVENTS

EVENT	DATE	LOCATION
Florida Bar Annual Meeting	June 25-28, 2003	Orlando World Center Marriott
SW Florida Bankruptcy Professional Association Reception	July 17, 2003	Ft. Myers Federal Courthouse
ABI Southeastern Bankruptcy Workshop	July 30-August 2, 2003	Amelia Island, Florida
Florida Bar Business Law Section Retreat	August 22-24, 2003	Ritz Carlton, West Palm
Florida Bar General Meeting	September 3-6, 2003	Tampa Airport Marriot
View From the Bench Reception	November 5, 2003	TBA
View from the Bench Program	November 6, 2003	TBA
Stetson University College of Law's Seminar on Bankruptcy Law and Practice	December 12-13, 2003	Sheraton Sand Key Resort, Clearwater Beach

STETSON UNIVERSITY COLLEGE OF LAW TO HOST ITS 28TH ANNUAL SEMINAR ON BANKRUPTCY LAW AND PRACTICE

Stetson University College of Law is proud to announce its Twenty-Eighth Annual Bankruptcy Seminar, to be held at the Sheraton Sand Key Resort, Clearwater Beach, Florida, December 12-13, 2003. The seminar is designed for all practitioners who desire to maintain bankruptcy as their field of expertise as well as general practitioners who encounter bankruptcy issues in their practice.

The seminar faculty includes nationally known experts in the field of bankruptcy and is chaired by The Honorable Alexander L. Paskay, Chief Bankruptcy Judge Emeritus, Middle District of Florida. This year's conference will feature the following topics: Recent Developments in Chapter 13; Civil Enforcement of Section 707(b); Dischargeability Issues; Recent Developments of Fraudulent Transfers; Ethics; Eligibility for Relief, Co-Debtor Stay, Plan Preparation; Financial Duties Representing Chapter 11 Debtors; Cash Collateral, Stay Litigation in Chapter 11; Multiple Jurisdictional Practice; Chapter 13 Confirmation, Best Interest Test, Good Faith Issues, Confirmation Problems, Lien Stripping; Special Role of the U.S. Trustee in Chapter 11 Cases; and more.

As a pre-cursor to the bankruptcy seminar, Stetson will also host its annual Primer on Bankruptcy on the law campus, Saturday, November 8, 2003, from 9:00 a.m. until 1:00 p.m. This basic level workshop is a "must attend" for attorneys, paralegals, and legal assistants who would like to become familiar with the operation of the bankruptcy court.

A brochure with additional information and a registration form will be available soon. For current information about the Primer or the Annual Conference, please call the Office for Continuing Legal Education at (727) 562-7830 or visit the CLE Web-site at: http://www.law.stetson.edu/cle.

Thank you

The Cramdown is the result of the hard work and dedication of many people. If you get a chance, please thank the following people for their contributions to this past year's editions of the Cramdown.

Judge Corcoran
Judge Williamson
Judge Paskay
Cheryl Thompson
Adam Alpert
Carrie Barris
Stephanie Biernacki
Cynthia B. Burnette
Ryan Chandler
Cassandra Culley
Drew Jenkins
Elena Ketchum
Cathy McEwen
Terry Miller
Chuck Kilcoyne
Luis Martinez-Monfort
Amy Hill Martinez-Monfort
Dennis LeVine
Lori Vaughan
Ed Whitson

The Cramdown also thanks Trudy McKean and Perfect Impressions for the great job they have done in publishing this newsletter.

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CLERK's CORNER

By Chuck Kilcoyne

CM/ECF UPDATE

Our previous CM/ECF Project Manager, Terry Miller, has left the Court to take on new duties as the Clerk of Court for the Bankruptcy Court in Arizona. Ms. Lee Ann Bennett, Deputy-in-Charge of our Orlando Division, has assumed the duties and responsibilities of CM/ECF Project Manager until a new Chief Deputy joins the Court. You may reach Lee Ann by phone at (407) 648-6365, extension 6855, or by e-mail at LeeAnn_Bennett@flmb.uscourts.gov. The training of our customer users has begun with Chapter 7 panel trustees and the U.S. Trustee office staff. Their training commenced May 26, 2003, and we hope to have the training complete by early July 2003. Our trainers will then travel to the Ft. Myers division in July to train the Chapter 7 panel trustees assigned to that division during the month of July. Also during the month of July, we plan to train the Standing Chapter 13 Trustee and his staff.

By the end of July 2003, all documents being filed in CM/ECF cases by these groups of customers will be filed electronically. The staff of the Clerk's office is very much looking forward to the receipt of electronically filed documents.

Training for our debtor attorney users will commence in August, with creditor attorney user training to follow.

As we look to bring more external users on the system, you may wish to again take some time to ensure you are adequately prepared. Attached is a memo outlining the hardware and software requirements to participate in CM/ECF. In order to receive your CM/ECF login, you will need to complete the training and then certify that your office has the appropriate hardware and software to utilize the system.

Please monitor our web site (www.flmb.uscourts.gov) for information concerning CM/ECF training and registration information.

Hardware and Software Requirements to Participate in CM/ECF

Personal computer (Pentium class recommended) running a standard platform such as Windows 95, 98, Me, 2000, XP with at least 128 MB of RAM. Macintosh equivalents are also acceptable.

Internet access via Cable modem, DSL (Digital Subscriber Line), ISDN (Integrated Services Digital network) or T1 line. Standard Dial-up modem access (56 K speed) is not recommended because its connection speed from the Internet to the CM/ECF will be very slow when downloading/uploading files from the server.

An Internet Service Provider using point-to-point protocol (PPP). America On Line is not endorsed for use with ECF.

Internet Explorer (IE) 5.5 or newer (6.0) or Netscape Navigator version 4.6X or 4.7X.

Software to convert documents from a word processor format to portable document format (PDF). Adobe Acrobat PDF Writer, as well as certain word processing programs can perform this function. Acrobat Writer Version 5.0 and earlier versions, 3.X, 4.X meet the CM/ECF filing requirements. Adobe can be contacted at 1-888-724-4508. For viewing documents, not authoring them, only Adobe Acrobat Reader is needed.

A PDF-compatible word processing program, such as WordPerfect or Microsoft Word. (Macintosh word processing software allowing PDF file conversion is also acceptable.)

A scanner to transmit documents that are not in your word processing system. A scanner equipped with an automatic document feeder is recommended for faster scanning of multiple page documents.

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5th Annual TBBBA Golf Tournament

The Fifth Annual TBBBA Golf tournament was a great success. 130 golfers participated at the 5th Annual TBBBA Golf Tournament on Friday, April 18, 2003, at Bay Palms Golf Course on MacDill Air Force Base. Winners are shown below:

First Place
Beth Daniels
Walter Poff
Ian Williamson
Dennis Fieber

Second Place
Judge Paul Glenn
Larry Foyle
Dan Rock
Judge James Whittemore

Third Place
Bob White
Ron Maller
Witt Wilkerson
Dave Wilbanks

Judge's Division
Judge Paul Glenn

Longest Drive – Women's
Beth Daniels

Closest to Pin – Women's
Kim Johnson

Longest Drive – Men's
Witt Wilkerson

Closest to Pin – Men's
Greg Brown

Judges' division winner Judge Paul M. Glenn,

Judge C. Timothy Corcoran and Steve Oscher

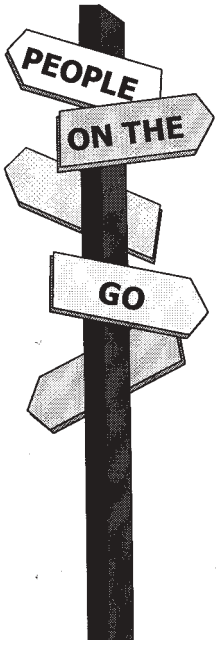
Tournament director Mike Markham and Judge Michael G. Williamson, a runner-up in the judges' division

Cathy McEwen and Cole Jeffries

Don Stichter, Dennis LeVine, Greg Golson, Scott Stichter

Chuck Kilcoyne

Bob Olsen, Donald Kirk, Chip Morse, Darren Farfante



Luis Martinez-Monfort has joined Mills Paskert Divers P.A. with offices at 100 North Tampa Street, Suite 2010, Tampa, Florida 33602. Mr. Martinez-Monfort will head the Creditor's Rights and Bankruptcy department for the firm.

The Hillsborough County Bar Association recently recognized **Catherine Peek McEwen** and **Roy Cohn** for their outstanding pro bono services. Both Ms. McEwen and Mr. Cohn were recognized for their long participation in the Volunteers Lawyers Program.

Ray Zacek is now the IRS Bankruptcy Specialist assigned to the Middle District of Florida, Tampa Division. His duties include resolution of technical issues in both personal and business bankruptcies, and he can be reached at (813) 315-2219, fax (813) 315-2484, or email w.ray.zacek@irs.gov.

David Schrader has joined the Verona Law Group, P.A. Mr. Schrader will concentrate on creditor's rights and bankruptcy.

Is Your Membership Information Up To Date?

Are you receiving all of your email and fax notices to the correct address? Is the mailing label on your Newsletter correct? Was your information printed correctly in the Annual Directory? If not, please send change of email and/or address notification to: pitrudy@verizon.net.

Reception Honoring Judge Paskay

On July 17, 2003, beginning at 4:30 p.m., the Southwest Florida Bankruptcy Professional Association will host a ceremony followed by a reception in honor of Judge Alexander L. Paskay's 40th year of service on the bench. The ceremony will be held in the Fort Myers federal courthouse, bankruptcy courtroom, with a reception to follow at SoCo, a restaurant within two blocks from the courthouse. Cost is $15 for non-members of the association ($10 for the members, who will get a mailed invitation; there are a couple of Tampa members). Checks should be payable to the Southwest Florida Bankruptcy Professional Association and sent to Diane Jensen at P.O. Drawer 1507, Fort Myers, Florida 33902.

The TBBBA will not be arranging for mass transportation for the event. However, Michelle Jeffries, the wife of one of our members (Cole Jeffries), runs Carey Transportation locally and has given us a quote for a mini-bus holding 25 people and costing $45 per hour. Assuming an eight-hour outing (2.5 hours each way, time for bathroom stops, and 2.5 hours of event time), the cost would run $360, or less than $15 per head, plus the driver's tip. Anyone who is interested in going by group bus can contact Cathy McEwen at catmcewen@aol.com.

Highlights from the April Membership Luncheon

Highlights from the May Membership Luncheon

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In re Charles Sings Trustee the Blues As Close Is Still Good Enough for Horseshoes and Certificates of Title

Written by:
Edmund S. Whitson, III, Carlton Fields, P.A., ewhitson@carltonfields.com

Last month, the U.S. Court of Appeals for the Tenth Circuit decided *In re Charles*, holding that a secured creditor's notation of itself as "owner" (rather than lienholder) of a vehicle is sufficient to perfect any lien interest that creditor may have in the vehicle, regardless of any statutory requirement that the lien appear on the face of the certificate. *In re Charles,* _____ F.3d ____, 2003 WL 1384031 (10th Cir. March 20, 2003). In so doing, the Tenth Circuit followed the majority view that the "substantial compliance" doctrine of the Uniform Commercial Code applies to state law certificate of title statutes. While the case is not of any landmark or unique precedent, it once again highlights a significant issue of statutory interpretation under state law and the UCC, and it raises certain implications regarding federalism and the purview of bankruptcy "common law."

The facts of *Charles* are fairly straightforward. The debtor entered into a master lease agreement (the "MLA") with a putative lessor, which purported to grant the debtor a leasehold interest in four trucks. The lessor was listed as the "owner" of the trucks on the Kansas certificates of title. Three years later, the debtor commenced a chapter 7 bankruptcy case and the trustee brought an adversary proceeding under 11 U.S.C. §544 to recharacterize the MLA as a disguised security agreement and to avoid the lessor/secured creditor's allegedly unperfected security interest in the four trucks. Without reaching the issue as to whether the MLA was a "true" lease, the bankruptcy court granted the lessor summary judgment based on the legal issue that, even if the lease were recharacterized, the lessor "substantially complied" with Kansas law governing perfection of security interests in motor vehicles. *Id.* at 1.

The Tenth Circuit affirmed, agreeing with the lower courts' analysis that the lessor's notation as "owner" on the certificate of title, although failing the plainly-stated requirements of the Kansas statute, satisfied the substantial compliance standard because the omission of any mention of a lien on the certificates of title constituted "minor errors" which were not "seriously misleading." *Id.* at 3; *see generally,* U.C.C § 9 – 402(8). In reaching that result, the Tenth Circuit rejected the trustee's reliance on two Kansas appellate court decisions which held that notation of a lien on the certificate of title is the exclusive method of perfecting a lien on motor vehicles and other titled vehicles. *See Mid American Credit Union v. Bd. of Cnty Comm'rs of Sedgwick Cnty*, 806 P.2d 479, 484 (Kan. Ct. App. 1991); *See also Beneficial Finance Co. of Kansas, Inc. v. Schroeder*, 737 P.2d 52, 55 (Kan. Ct. App. 1987) (involving a priority dispute as to a mobile home and holding that the Kansas certificate of title statute contained the exclusive method for perfecting a security interest therein). The *Charles* court distinguished these cases factually without addressing the very literal, plain-meaning interpretations of the Kansas statutes applied in both cases.

Specifically, in deciding a negligence case against government officials for failure to list a lien on a motor vehicle, the *Mid American* court addressed the history of the Kansas certificate of title statute. The court emphasized the literal, plain-meaning interpretation given the lien notation requirement by the Kansas courts, while commenting that federal courts had interpreted the statute "differently." *Mid American,* 806 P.2d at 484 (*citing In re Littlejohn*, 519 F.2d 356 (10th Cir. 1975) (holding that listing the lien on the title was not necessary for perfection)). The *Mid American* court noted that, in response to *In re Littlejohn*, the Kansas legislature amended the relevant statutes to, in its view, tacitly reemphasize the lien-listing requirement. *Id.* To relax such a requirement, cautioned the *Mid American* court, would "endanger the reliability of sales of vehicles by assignment of title and diminish the reliability of a certificate of title." *Id.* Accordingly, the *Mid American* court reversed summary judgment for the defendants and remanded for a determination of plaintiff's damages. Thus, notwithstanding some factual distinctions, both *Mid American* and *Schroeder* demonstrate that it is strict statutory adherence – and not substantial compliance – which is mandated under state law.

Nevertheless, in addition to rejecting the literal, plain-meaning statutory interpretation urged by the trustee and supported by Kansas law, the *Charles* court also dismissed the trustee's policy argument that adopting the substantial compliance standard in Kansas would result in harm to innocent creditors. *Id.* at 4. Rather, the *Charles* court again emphasized the virtual wealth of federal bankruptcy case law applying the substantial compliance standard regardless of the plain meaning of the state certificate of title statute. [1] Significantly, these cases were largely influenced by an authoritative treatise suggesting that grafting the substantial compliance standard to such cases is appropriate to "soften the literal requirements of state certificate of title legislation" and "modernizing" the certificate of title statutes to comply with the policies of Article 9. *Id.* at 2 (citing 1 Barkley Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶ 12.03 [1] at 12 –14 (1993)). Further, the *Charles* court opined that, in general, courts should apply the substantial compliance standard "regardless of any express statutory requirements." *Id.* at 2.[2]

The rationale of these cases is that a diligent creditor would not be prejudiced by the failure of the secured party to have its lien noted on the certificate of title. *See, e.g.*, *In re Circus Time, Inc.*, 641 F.2d 39, 42-43 (1st Cir. 1981). They reason that a creditor would begin its search under the name of the debtor (the ostensible owner of the vehicle) and, failing

(Cont. on Page 23)

to locate the collateral under that index, would then turn to the vehicle identification number or other search criteria. *Id.* Under that search, the creditor would ultimately discover the alleged ownership interest of the lessor/secured creditor and, thus, be put to notice of that interest and further investigation thereof. *Id.* Hence, the notation on the certificate serves its "notice" function and that is all that is required under the U.C.C. regardless of any statutory requirement that a lien be listed on such certificate. *Id.* at 43. Again, these cases characterize the state certificate of title statutes in an almost patronizing way, criticizing a plain meaning application thereof as "formalistic," "technical" and not comporting with the "real world." *Id.* (citing 1C P.Coogan, W. Hogan & D Vagts, *Secured Transactions Under the Uniform Commercial Code*, § 29A.04(6), at 2931 (1980).

The *Charles* court did acknowledge contrary authority addressing similar facts, where a bankruptcy court rejected the majority view and enforced the lien-listing requirement mandated by state law. *In re Charles*, 2003 WL 1384031 at 5, n.3 (citing *Wheels, Inc. v. Otasco, Inc. (In re Otasco Inc.)*, 111 B.R. 976 (Bankr. N.D. Okla. 1990), *rev'd on other grounds*, 196 B.R. 554 (N.D. Okla. 1991)(reversing based on finding that lease was a true lease). The *Otasco* court focused its analysis on Oklahoma state law in assessing the creditor's argument, in accordance with the majority view, that the absolute filing requirements of the certificate of title statute must be tempered within the more lenient standard prescribed under U.C.C. § 9-402(8). *Otasco,* 111 B.R. at *990.* The court concluded, based on its review of the case law and official comments, that the law was somewhat ambiguous. The court then tested the facts of the case to the requirements of Section 9-402(8) and found that U.C.C. provision applicable only to "trivial inaccuracies," inadvertent misstatements or those determined errors on a case-specific basis. *Id.* at 991. The court, however, did not find Section 9-402(8) to have any bearing on what it termed "deliberate and intentional" misstatements and omissions "in furtherance of a scheme to misrepresent the true nature of the transaction." Because, in the court's view, these omissions of the lien-listing requirement were not "errors," Section 9-402 was inapposite.[3] *Id.* at 992-993. Moreover, the *Otasco* court warned that the adoption of such a standard would "demolish the UCC's policy of encouraging compliance with clear, simple, statutorily-prescribed methods of achieving perfection." *Id.*

However compelling (or not), the *Otasco* analysis might be from a policy and well-reasoned analysis of the relevant authority, it is not the prevailing view and of doubtful precedential value in the wake of *In re Charles*. Yet, pyrrhicly, *Otasco* (although somewhat vitriolic) effectively takes the majority view to task for what seems an almost paternalistic bias of the federal courts to impose a more liberal standard on statutes which have a clear, unambiguous mandate, all for the sake of "modernizing and softening" these statutes. The inescapable irony is that it is the federal courts who so often espouse and apply the virtues of the "plain meaning" rule as a constraint to judicial activism and encroachment upon the province of the legislature.[4] While *Circus Time* and its progeny apply the "substantial compliance" standard as an interpretation of state law, the familiar string cite in these opinions contains almost exclusively decisions by federal courts in bankruptcy cases.

There is no question that the practical realities of modern economic transactions demonstrate ample support for the result reached by *In re Charles* and the majority. It is the means, however, and not the end that begs more than simply practical, "real world" justification. In a legislative environment that is now acutely attuned to the need to update potentially antiquated legislation, the issue is whether this "modernization" should be left to the state legislatures rather than a somewhat strained application of U.C.C. § 9 – 402(8) or Revised U.C.C. § 9 – 506. It would seem that, in a forum that cites so often to *Butner*[5] and is so wed to the plain meaning rule, the latter would appear preferable to perpetuating the evolution of what is now known as the "bankruptcy common law."

(Footnotes)

[1] *See Load-It, Inc. v. VTCC, Inc. (In re Load-It, Inc.),* 774 F.2d 1077, 1078-79 (11th Cir. 1985) (holding a security interest in motor vehicle perfected under Georgia law where secured creditor identified as owner on certificate of title); *In re Circus Time, Inc.*, 641 F.2d 39, 42-44 (1st Cir. 1981) (same, applying Maine and New Hampshire law); *In re Nat'l Welding of Mich., Inc.*, 61 B.R. 314, 317 (W.D. Mich. 1986) (same applying Michigan law); *In re Microband Cos., Inc.*, 135 B.R. 2, 4-6 (Bankr. S.D.N.Y. 1991) (same applying New York, New Jersey, Maryland, and Michigan law); *Yeager Trucking v. Circle Leasing of Colo. Corp. (In re Yeager Trucking)*, 29 B.R. 131, 134-35 (Bankr. D. Colo. 1983) (same applying Colorado law); *Coble Sysl, Inc. v. Coors of the Cumberland, Inc. (In re Coors of the Cumberland, Inc.*, 19 B.R. 313, 320-21 (Bankr. M.D. Tenn. 1982) (same applying Tennessee law).

[2] The *Charles* court, despite *Mid American* and *Schroeder*, predicted that the Kansas Supreme Court would adopt the substantial compliance standard.

[3] Black's Law Dictionary defines "error" as a mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law. 282 (5th ed. 1983).

[4] *See also In re Manufacturers Credit Corp.*, 441 F.2d 1313, 1319 (3rd Cir. 1971) (holding that application of the UCC's "substantial compliance" standard to the New Jersey certificate of title statute would effectively rewrite the statute and constitute prohibited judicial legislation.)

[5] *Butner v. U.S.*, 99 S.Ct. 914 (1979) (holding that barring some federal interest, interests in property must be determined in bankruptcy pursuant to state law).

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