The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Luis Martinez-Monfort, Esq., Mills Paskert Divers P.A.

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SUMMER 2005

PRESIDENT'S MESSAGE

by Edwin G. Rice, Esq.
Glenn, Rasmussen, Fogarty & Hooker, P.A.

I want to thank our Association for the opportunity to serve as President over the last year. It has been a very rewarding experience. I also want to thank the people who truly make our organization outstanding.

John Lamoureux, our outgoing chairperson, and David Tong, our incoming President, have provided valuable guidance and support throughout the year. Thank you gentlemen.

Our Secretary, Shirley Arcuri, and our Treasurer, Herb Donica, did a great job. Herb and Shirley will remain as officers of our organization for the upcoming year. Herb will be our new Vice-President, and Shirley will remain in her post as Secretary.

Caryl Delano and Donald Kirk did a super job as co-chairs of the CLE Committee. The chairs of the CLE Committee have one of the hardest and most time-consuming jobs in our organization. The number and quality of our CLE programs over the last year speak volumes for Caryl and Donald's dedication to the TBBBA.

Luis Martinez-Monfort chaired our Publications and Newsletter Committee. Every year our newsletters get better

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CLERK'S CORNER

by Chuck Kilcoyne
Deputy-in Charge

With the Tampa Division's move to mandatory use of ECF by local attorneys, our two-year District-wide transition to CM/ECF is complete. Well, not really. In the coming months we will of course be implementing newer versions of CM/ECF that make accommodations for the revisions required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. We have been told to expect revisions to the program in August and December. As we are able to learn more about these revisions, we will provide more information on our web site and to all registered users.

For those of you who have recently appeared before the Honorable Michael G. Williamson in courtroom 10B, you probably noticed the Judge has elected to use a digital court reporting system as opposed to a live court reporter. In addition to Judge Williamson, Judge K. Rodney May here in Tampa and Judge Karen S. Jennemann in Orlando use the system. The electronic court reporting system being used in their courtrooms is call FTR Gold and allows for the digital recording of events in the Courtroom. The audio is recorded on a computer hard drive and on a disc thus providing

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2005 Bankruptcy Reform Legislation: Uncharted Waters for Consumer Debtor Attorneys

By Honorable Michael G. Williamson
Tampa, Florida

Section 707(b)(1) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Act") provides that chapter 7 cases may be dismissed by the court if the granting of relief under chapter 7 would be an "abuse" of chapter 7. Subparagraphs 707(b)(2) and (3) set out the standards to be applied by the Court in determining whether a case may be dismissed as an abuse of chapter 7. They do so through an objective "means" test under (b)(2) and the subjective concepts of "bad faith" and "totality of the circumstances" under (b)(3). Section 707(b) then goes on to explicitly provide for liability of attorneys representing debtors or creditors in chapter 7 cases under certain circumstances. The attorney liability provisions for debtors are found in subparagraph 707(b)(4) and for creditors in subparagraph 707(b)(5).[1]

A. Debtor's Attorney Liability—§ 707(b)(4) .

1.Liability Where Court Grants Motion to Dismiss for Abuse—§§ 707(b)(4)(A) and (B).

Subparagraphs 707(b)(4)(A) and (B) make clear that an attorney who represents a debtor whose case is dismissed for "abuse" under subparagraph 707(b)(1) may be subject to liability under Rule 9011. While the earlier versions[2] of subparagraph 707(b)(4) provided that such liability was mandatory, the version that was enacted provides that a court "may" award sanctions rather than "shall" award sanctions. In addition, the prior versions provided that such sanctions "at a minimum" would include assessment of a civil penalty. The term "at a minimum" has been deleted from these provisions as enacted.

Furthermore, language was added to the current version that makes it clear that a motion seeking sanctions in the context of the granting of a motion to dismiss under section 707(b), must be "in accordance with the procedures described in rule 9011." Thus, it appears that as presently written, subparagraph 707(b)(4)(A) simply makes clear that rule 9011 applies to chapter 7 voluntary petitions—something that is already clear from the plain language of rule 9011 which states in pertinent part:

> By presenting to the court … by signing … a petition … an attorney … is certifying that to the best of the [attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose ...;
>
> (2) the claims, … and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Given the applicability of rule 9011 to attorneys who file petitions under the law in effect at the time of the enactment of the new provision, one may conclude that the language of subparagraphs (b)(4)(A) and (B) does not add anything to current law. However, these provisions must be read in the context of section 319 of the Act which clarifies what may otherwise appear to be a meaningless provision. That section provides:

> It is the sense of Congress that rule 9011 … should be

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CASE LAW UPDATE

Focus on Fraud: 11th Circuit Supplants the "Mere Conduit" Fiction for Certain Subsequent Transferees

by Hans Christian Beyer Saxon, Gilmore, Carraway, Gibbons, Lash & Wilcox, P.A.

On May 3, 2005, the Eleventh Circuit Court of Appeals released a 41-page opinion in connection with the bankruptcy case *In re International Administrative Services, Inc.* ("IAS") which enunciated a new legal theory for suing certain subsequent transferees of property which originated with a debtor. The court also considered issues relating to when and how a bankruptcy may extend the limitations period set forth in § 546(a) of the Bankruptcy Code, what constitutes adequate tracing in a complex fraudulent transfer case, and from what point in time an award of prejudgment interest is appropriate.

Factual Background

Charles J. Givens, Jr., a colorful entrepreneur and gifted speaker, started the precursor to IAS, The Charles J. Givens Company, in 1986 after dabbling in such diverse businesses as music production and real estate speculation. IAS was promoted through late night infomercials as having information which would permit ordinary people to accumulate "wealth without risk" (also the titles of a series of best selling books by Mr. Givens). This information could be accessed through the purchase of a membership in the Givens organization followed by the purchase of various financial self-help products and seminars. Although little of the information offered by IAS to its members was proprietary or confidential, the charisma of Givens and skill of his public relations handlers produced an organization which, by the early 1990's, could boast over 250,000 members and annual sales of over $100 million. As the Eleventh Circuit noted, IAS had become a "leviathan in the world of get-rich-quick schemes."

Unfortunately for IAS, at the same time that its sales were skyrocketing, storm clouds were gathering on its financial horizon. The financial advise offered by IAS was often not custom tailored to the laws of the states in which its individual members resided. For example, advise which the organization provided regarding the desirability of canceling their uninsured motorist insurance proved disastrous for citizens of various states who were involved in serious automobile accidents with uninsured drivers. This bad advice spawned a series of expensive class action lawsuits against the company and Mr. Givens. At the same time, the company was targeted by the attorneys general of various states for its refusal to pay sales tax in those states and both the company and Givens were targeted by the Securities and Exchange Commission in connection with certain real estate investment schemes. Finally, the Federal Trade Commission joined the fray by launching investigations into the company's business practices.

By this point, it became clear to the management of IAS that the company would be facing some very serious financial

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President's Message

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and better, and Luis certainly continued this trend. Great job Luis!

Carrie Beth Baris headed up our Membership Committee. Carrie was responsible for, among other things, updating our membership records and the preparation and distribution of the Association's ever-handy Membership Directory. Under Carrie's leadership, our membership increased substantially over the last year.

Al Gomez and Pat Tinker co-chaired the Judicial Liaison Committee. In this role, they helped preserve and enhance our Association's relationship with the Judiciary and the Clerk's Office. These relationships are vital to our organization. Thanks Al and Pat.

Kelly Petry chaired our Community Service Committee and, in this capacity, helped to organize a lawyer referral program that enlists

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difficulties in the immediate future. In response to this threat, Givens retained the services of asset protection attorney David H. Tedder, his law firm, and his company, The Institute for Asset & Lawsuit Protection, to devise a complex, multi-national scheme to protect IAS and Givens from their legitimate creditors. Tedder moved to Florida, where IAS was based, to implement this exceedingly complex program which included, among other things, sham employee leasing arrangements, a bogus income stabilization program, the purchase of a series of "private annuities" which had no value, and the creation of massive liens securing questionable loans. The end result was a comprehensive asset protection strategy which permitted Givens to remove over $50 million from IAS while simultaneously assuring IAS's creditors that the company had no assets due to its massive "secured" obligations to foreign lenders and financial institutions.

By 1996, IAS had hemorrhaged so much capital through the ministrations of Messrs. Tedder and Givens that it could no longer fund its ongoing operations. Accordingly, on June 20, 1996, IAS filed for voluntary relief under chapter 11 of the Bankruptcy Code. A creditors' committee was appointed and began an investigation into the finances of the debtor which soon revealed significant potentially fraudulent activities. At the request of the creditors' committee, the debtor transferred its avoidance powers to that committee to avoid any conflict of interest with the debtor's management, which was still controlled by members of the Givens family. This transfer of certain recovery powers survived confirmation of the debtor's reorganization plan which created the position of stock trustee to continue the attempts to recover fraudulently transferred assets for the benefit of IAS's creditors. Since confirmation, the stock trustee has been North Carolina bankruptcy lawyer **John A. Northen** (the "Trustee") who had previously acted as the chairman of the creditors' committee. Attorney **Hans Christian Beyer** initially represented the creditors' committee in the IAS Bankruptcy Case and related litigation and, post-confirmation, has represented the Trustee.

The investigation into the potentially fraudulent transfers made by the debtor, under the ultimate control of Givens, for the benefit of the Givens family was routinely hampered by Givens and his professionals. After a motion seeking sanctions for failure to produce documents was filed by the Trustee, Bankruptcy Judge **Karen S. Jennemann** appointed a special master to investigate the alleged discovery abuses on behalf of the Givens family. The special master eventually concluded that documents crucial to the development of the Trustee's cases had been intentionally hidden or destroyed by Givens and his professionals.

Notwithstanding these efforts by Givens and his professionals to hamper his investigation, the Trustee eventually filed suit against various transferees who had improperly received property of the debtor through the workings of the asset protection plan. Two of these were IBT, Inc. ("IBT") and South California Sunbelt Developers, Inc. ("SCSD" and, collectively with IBT, the "Defendants"), both companies owned by a business partner of Tedder. After a three day trial, the bankruptcy court entered judgment against IBT and SCSD for the full amount of the funds transferred from the debtor together with prejudgment interest from the date of the initial transfer to SCSD. The Defendants appealed but the District Court for the Middle District of Florida affirmed the bankruptcy court's judgment. The Defendants then appealed to the Eleventh Circuit Court of Appeals.

Issues on Appeal

The Defendants raised issues on appeal in four general areas. First, they maintained that both the bankruptcy court and the district court had erred as a matter of law when they permitted the Trustee to recover a fraudulent transfer from subsequent transferees without first suing the initial transferees. Second, the Defendants raised a number of issues relating to the ability of a bankruptcy court to extend the limitations period set forth in § 546(a) of the Bankruptcy Code. Next, the Defendants maintained that the bankruptcy court erred by finding that the Trustee had satisfied his burden of tracing the relevant funds from the debtor to the Defendants. Finally, they questioned the bankruptcy court's ability to award prejudgment interest from the date of the initial transfer of the debtor's property to the Defendants. As discussed in greater detail below, the Eleventh Circuit Court of Appeals affirmed Judge Jennemann's original ruling on each of these points.

Recovering Directly from Subsequent Transferees

On appeal, Defendants argued that the clear language of § 550(a) of the Bankruptcy Code required the Trustee to sue the initial transferees of the debtor's property as a condition precedent to bringing suit against the Defendants as subsequent transferees. The Trustee sued the Defendants under the fraudulent transfer provisions of Florida law as made applicable to the IAS bankruptcy case through § 544 of the Bankruptcy Code, the so-called strong arm provision. The Trustee never sued the initial transferees, in this case judgment-proof companies some of which had undergone liquidation proceedings in Panama. Section 544(b) requires a transaction to be avoided by a plaintiff before it can be recovered under § 550. The support for the Defendants' argument that an initial transferee must actually be sued before suit can be brought against a subsequent transferee is found in § 550(a) dealing with the scope of permitted recovery.

In relevant part, § 550(a) provides that "to the extent that a transfer is avoided under section 544…the trustee may recover for the benefit of the estate property transferred, or if the court so orders, the value of such property from (1) the initial transferee … or (2) any immediate or mediate transferee of such initial transferee." Defendants' argument is based on the phrase "to the extent that the transfer is avoided" which they interpret to mean that a recovery of property can only been made "to the extent that the transfer <u>has previously been</u> avoided." In other words, according to the Defendants, § 550 of the Bankruptcy Code required the Trustee to avoid

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the initial transfer of the property at issue before bringing suit against the Defendants as subsequent transferees.

In support of their position, Defendants relied upon *In re Trans-End Technology, Inc.*, 230 B.R. 101 (Bankr. N.D. Ohio 1998), in which a bankruptcy court interpreted § 550(a) as requiring the actual avoidance of the initial transfer before seeking recovery from subsequent transferees. In reaching this interpretation, the *Trans-End* Court characterized the relevant language of § 550(a) was "unarguably … unambiguous and plain." 230 B.R. at 104. The Eleventh Circuit, however, disagreed with the *Trans-End* Court both with respect to this characterization and that court's ultimate ruling.

The Eleventh Circuit found that the strict interpretation of the language found in § 550(a) imposed by the *Trans-End* Court and embraced by the Defendants "produces a harsh and inflexible result that runs counterintuitive to the nature of avoidance actions." Specifically, the Eleventh Circuit found, following the majority position on this point outside of the Eleventh Circuit, that the phrase "to the extent that transfer is avoided under section 544" found in § 550(a) refers to the extent of the property which may be recovered rather than to the timing of the avoidance action. In other words, the language simply means that a plaintiff can only recover a transfer of a debtor's property to the extent that such a transfer is avoidable under § 544. This interpretation is consistent with the legislative history of § 550. *See* 24 Cong. Rec. H. 11,097 (Sept. 28, 1978), S 17,414 (Oct. 6, 1978).

While the position adopted by the Eleventh Circuit in the IAS Case is consistent with that of the majority of the courts considering this issue and with the legislative history of § 550, it is not entirely consistent with the Eleventh Circuit's previous treatment of subsequent transferees in fraudulent transfer actions. In past cases in which the Eleventh Circuit permitted fraudulent transfer actions to proceed against subsequent transferees, the court avoided the strict interpretation of § 550(a) which requires avoidance of the transfer to the initial transferee before proceeding against subsequent transferees by modifying the definition of "initial transferee." *See for example In re Chase & Sanborn Corp.*, 904 F.2d 588 (11th Cir 1990). Those cases involved an initial transferee, such as a bank, which did not have an ownership interest in or control over the property transferred and which did not act in bad faith. Accordingly, such an entity could be deemed a "mere conduit" in the transaction and thus disregarded as an initial transferee.

In the instant case, however, the initial transferees were not third party financial institutions with no material interest in the overall transaction but rather special purpose entities created by Tedder at the behest of Givens; these were entities with guilty knowledge which do not fit into the mold of a "mere conduit." Therefore, the Eleventh Circuit altered its position on initial transferees to find that although the Defendants were subsequent transferees, rather than initial transferees, they could still be sued in the first instance by the Trustee because the distinction between initial transferees and subsequent transferees for avoidance purposes is entirely irrelevant provided that the entities being sued either exercised dominion and control over the property transferred or "held some beneficial right in it." In reaching this decision, the Eleventh Circuit was careful to note that its ruling should not be viewed as eroding its existing conduit theory but rather providing an alternative theory of liability for cases involving multiple fraudulent transfers and no initial transferees which could credibly be characterized as mere conduits.

Statute of Limitations Issues

Defendants also raised a number of statute of limitations issues in their appeal involving whether and how a bankruptcy court may enlarge the limitations period set forth in § 546(a) of the Bankruptcy Code. Section 546(a) required the Trustee to commence his avoidance action against the Defendants within two years after the entry of relief in the IAS Bankruptcy Case. Since the IAS Case was filed on June 20, 1996, the § 546(a) period for bringing suit would normally have expired on June 20, 1998. While the Trustee did not file his complaint until February 10, 1999, he did file a motion seeking to extend the § 546(a) period prior its expiration; the bankruptcy court granted this motion and extended the § 546(a) period.

The Defendants argue that the Trustee's complaint was not timely because the bankruptcy court does not have the authority to enlarge the § 546(a) period, i.e., that § 546(a) creates a jurisdictional bar (which cannot be extended) rather than a statute of limitation (which is subject to waiver, equitable tolling, and equitable estoppel). This argument was rejected by the Eleventh Circuit on several grounds. First, the court noted that reading "a jurisdictional bar into § 546(a) would lead to absurd results" and therefore § 546(a) should be viewed as a statute of limitations which may be extended by a bankruptcy court under appropriate circumstances. Second, the Eleventh Circuit found that the Trustee had demonstrated an equitable basis to toll the § 546(a) limitations period. Specifically, the court found that where, as in the instant case, a trustee acts diligently but does not learn the details of a fraudulent transaction due to "fraud or extraordinary circumstances beyond the trustee's control," then the doctrine of equitable tolling will act to prevent the expiration of § 546(a)'s limitations period. Citing *In re Levy*, 185 B.R. 378 (Bankr. S.D. Fla. 1995) and *Lampf, Pleva Lipkind, Prupis & Petigrow v. Gilberson*, 501 U.S. 350, 363; 111 S.Ct. 2773, 2782; 115 L.Ed.2d 321 (1991).

Tracing and Prejudgment Interest

The final issues raised by Defendants on appeal dealt with the sufficiency of the Trustee's proof of tracing offered at trial and the propriety of the bankruptcy court's imposition of prejudgment interest against Defendants commencing from the original date that they received property of the debtor. With respect to tracing, Defendants argued that the Trustee had failed to trace every dollar from the debtor to the Defendants. The Eleventh Circuit held that while a plaintiff seeking recovery

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Focus on Fraud

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of a fraudulent transfer clearly has the burden of tracing the funds which it claims originated with a debtor, "it is also true that proper tracing does not require dollar-for-dollar accounting." In a complex fraud case, the Eleventh Circuit found that a plaintiff needs to show by a preponderance of the evidence that the funds for which recovery is sought originated with the debtor, flowed through certain pathways, and were eventually transferred to the defendant.

Finally, Defendants argued that the bankruptcy court's award of prejudgment interest against Defendants from the date upon which they originally received property of the debtor was improper. The Eleventh Circuit disagreed holding that while the Bankruptcy Code does not specifically authorize awards of prejudgment interest, the instant case with its findings of "massive fraud … calls for the award of such interest" as compensation to IAS's creditors for the improper use of funds which rightfully belonged to those creditors as represented by the Trustee.

Clerk's Corner

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the desired redundancy should one of the disc drives fail. From the Court's perspective, the use of the system eliminates the need to contract for and schedule a "live" court reporter and also allows the Judge, chambers' staff, and attorneys to easily and quickly review the proceedings at any time without the delay of waiting for a transcript to be provided. Anyone can easily order an audio CD of the hearings that have occurred in one of our FTR courtrooms by following the instructions located on our web site. The software needed to listen to the CDs is free and easily downloaded. When a written transcript is required, one can be ordered by following the instructions on our web site.

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THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION
2004-2005
Committee Chairs

The Association is looking for volunteers to assist us this coming 2004-2005 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.

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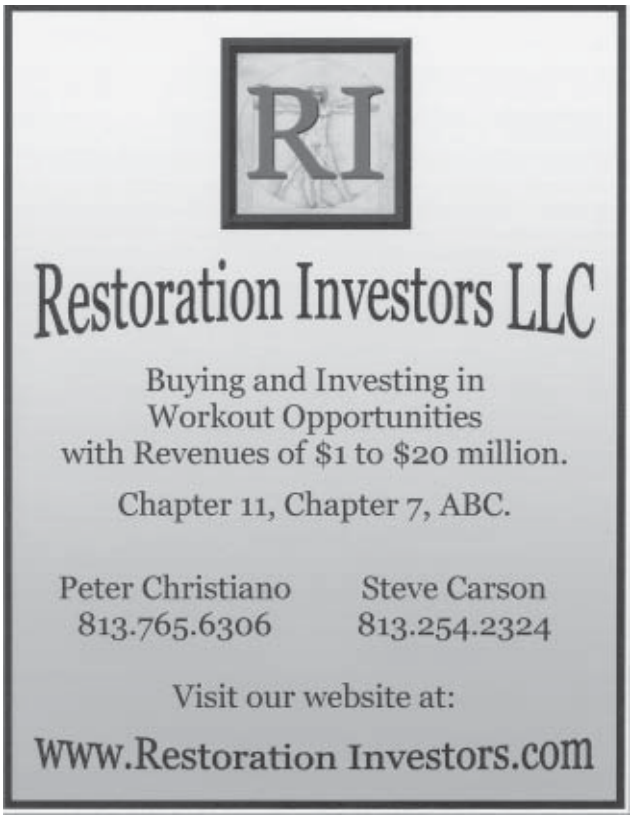

Clerk's Corner

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a witness on the witness stand and, as they may be some distance from one of the microphones, this results in degrading the audio that is being recorded. The courtroom deputy can and does monitor the quality of the recording but will not normally interrupt the proceedings to ask someone to step closer to the microphone unless the deputy believes that you are so far away that no sound is being recorded. The other drawback is that if two people talk at the same time, it may be difficult to provide an accurate transcript or even discern the different speakers when listening to the audio. However, given the advantages of the system both for the court and the attorney, we hope that you will keep these limitations in mind when you appear in one of our FTR courtrooms and support our use of this system.

In closing, let me congratulate David Tong and all the new members of the Board as they assume their new roles within the Association. Every member of this Court appreciates the help and support we routinely receive from the Tampa Bay Bankruptcy Bar Association. We are truly lucky to enjoy such a positive relationship with our Bar.

TWO TAMPA JUDGES ANNOUNCE FORM ADEQUATE PROTECTION ORDERS WILL BE ENTERED IN MOST CHAPTER 13 STAY LITIGATION

by Dennis LeVine, Esq.
Dennis LeVine & Associates, P.A.

Judge Michael Williamson and Judge Rodney May in the Tampa Division have instituted a new procedure for motions to lift stay in Chapter 13 cases which relate to homestead property and personal vehicles. Effective **April 1, 2005**, when a creditor files a motion to lift the automatic stay, the Court will enter a preliminary order directing counsel for the creditor to file a proposed form adequate protection order within ten (10) days. If an adequate protection order is not submitted within the ten days, the motion isdenied without further order of the Court. The preliminary order also provides that if the debtor's plan states an intent to surrender the collateral (or the debtor has communicated this to you, or has already surrendered the collateral), the Court will immediately enter a lift stay order upon submission of an affidavit of surrender. [Exceptions to these procedures are when the Debtor is *pro se*, or additional relief language is contained in the motion. When this occurs, the Court will schedule a hearing.]

The form adequate protection order provides that the debtor must cure any post-petition arrears by paying the regular contractual amount for the next payment due after the filing of the motion. Thereafter, the debtor must make a payment and one-half (1½) until all post-petition arrears are cured. The form adequate protection order also contains provisions for evidence of insurance, an accounting, inspection of the collateral, and default. In addition, the form order provides for the creditor to be allowed a claim for attorneys' fees and costs (where appropriate), and indicates how these fees should be asserted.

Once the form adequate protection order is entered, any party can request reconsideration of the form order by filing a motion for reconsideration. In such cases, the Court will promptly schedule a hearing.

The form adequate protection orders can be found on the Bankruptcy Court's website – http://www.flmb.uscourts.gov/Forms.htm.

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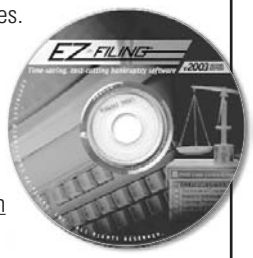

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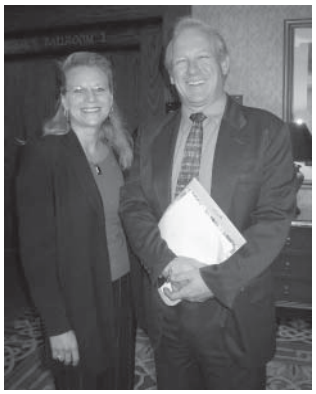

President's Message

Continued from page 4

our members to volunteer to take bankruptcy cases from the Bay Area Legal Services at reduced rates. Kelly has worked tirelessly in this role over the last couple of years. Thanks Kelly.

Cheryl Thompson was in charge of our Technology Committee. Her responsibilities included the maintenance and efficient operation of our Attorney Research Room. Cheryl also worked very hard in efforts to assist our members' transition to the CM/ECF Program.

Randy Hiepe did a fantastic job as the first-ever chair of the Consumer Lawyer Committee. Randy coordinated many programs which focused on the consumer bankruptcy practitioner and expanded the role of the consumer lawyer in our Association.

I also want to extend a special thanks to our Bankruptcy Judges who have always been there to assist our organization in any way they can, whether by continued participation in our CLE programs and social events throughout the year or providing guidance and assistance on the issues of the day. I also want to extend a special thanks to David Olivera and Chuck Kilcoyne. They have been extremely helpful in identifying issues and concerns relating to the Clerk's Office and Judiciary, as well as providing helpful information to disseminate to our members.

Finally, I want to thank all our members who volunteered their time and talents throughout this last year. If the strength of our Association can be measured by the active participation of our members, then I can report we have a very strong Association.

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CALENDAR OF EVENTS

Event	Date	Location
½ Day Trustee Seminar and Luncheon regarding new Bankruptcy Laws	September 30, 2005	Marriott Waterside
Full Day "Judges" Seminar and luncheon regarding new Bankruptcy Laws	October 14, 2005	Hyatt Downtown
New Bankruptcy Counseling (UST & Counsel Services)	November 15, 2005	Hyatt Downtown
Holiday Program – evening	December 2005	Hyatt Downtown

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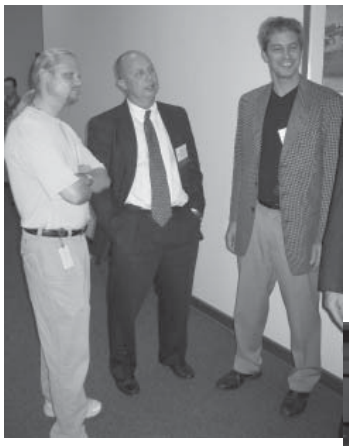

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2005 Bankruptcy Reform Legislation

Continued from page 3

modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors' attorneys have made *reasonable inquiry* to verify that the information contained in such documents is—

(1) well grounded in fact; and

(2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Act, § 319 (emphasis added).

Accordingly, practitioners can anticipate that rule 9011 will be amended in the coming months. It should be noted, however, that notwithstanding the reference in section 319 to schedules, subparagraph 707(b)(4)(A) and (B) have nothing to do with the debtor's schedules except arguably to the extent that the "means" test calculations may be considered part of the schedules. Rather, they impose liability in cases where the court grants a motion to dismiss under section 707(b). To do so the court must either find that abuse is presumed by application of the "means" test under section 707(b)(2)(A) or that the petition was filed in bad faith or the totality of circumstances demonstrates an abuse of chapter 7 under section 707(b)(3).

If a court dismisses the case based on "abuse" under section 707(b), on the court's own motion or the motion of a party in interest, the court may then consider whether the attorney signed the petition in violation of rule 9011. While the motion for sanctions may be filed by any party in interest, reasonable attorney's fees may only be awarded where it is the chapter 7 trustee who brings the motion to dismiss under section 707(b). The party liable for the attorney's fees is the attorney for the debtor and not the debtor client.

Most likely, just as with current practice, it will be the rare case that a chapter 7 trustee brings such a motion. There is a substantial financial disincentive for a chapter 7 trustee to engage in prolonged litigation either under section 707(b) or section 727 when the successful outcome in most

Continued on page 16

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cases jeopardizes their source of compensation (although if there is a conversion the chapter 7 trustee and attorney's fees will an administrative expense) but also guarantees that there will be no distribution in the occasional "asset" case.

There may be instances in which a trustee may retain counsel who is representing a particularly aggrieved creditor under section 327(c) for the "special purpose" of prosecuting a 707(b) motion. The trustee could seek attorney's fees in such cases. More likely, as in current practice, it will be the United States Trustee who will bring these actions. In the more typical situation of the motion being filed by the U.S. Trustee, sanctions will take the form of a "civil penalty" which will be paid to either the chapter 7 trustee or the U.S. Trustee.

2. Investigation of Circumstances that Give Rise to Petition—§ 707(b)(4)(C).

In light of the expected amendment to rule 9011, subparagraph 707(b)(4)(A) & (B) should also be read in conjunction with the requirements imposed by subparagraph 707(b)(4)(C). This provision provides:

> (C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—
>
> (i) performed a *reasonable investigation into the circumstances that gave rise to the petition*, pleading, or written motion; and
>
> (ii) determined that the petition, pleading, or written motion—
>
> (I) is well grounded in fact; and
>
> (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

11 U.S.C. § 707(b)(4)(C)(emphasis added).

This subparagraph only applies to a "petition, pleading, or written motion." These are terms of art and appear to have been carried over from rule 9011 which has a similar reference to "Every petition, pleading, written motion." By definition, a petition is the paper that commences a case under sections 301, 302, and 303 of the Bankruptcy Code and Bankruptcy Rules 1002, 1003, and 1004. A pleading is a complaint, answer, reply, cross-claim, and third party pleading under Rule 7(a), Fed. R. Civ. P. A motion is a request for an order under Bankruptcy Rule 9014.

Importantly, neither a schedule nor statement of affairs falls within any of these definitions. They are distinct from the petition and are dealt with separately in the Bankruptcy Rules and in the text of subparagraph 707(b)(4)(D). In fact, rule 9011 specifically states that "petition, pleading, written motion, and other paper," does not include schedules and statements.

Accordingly, it is apparent that in the context of a motion to dismiss under section 707(b), subparagraph 707(b)(4)(C) deals exclusively with the attorney's signature on the petition. That signature constitutes a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition…." The phrase "that gave rise" suggests that the inquiry concerns the cause for the filing of the bankruptcy, that is, what gave rise to the filing.

The issue confronting attorneys is what constitutes "reasonable investigation" for purposes of subparagraph (b)(4)(C). Given that this investigation only concerns the "circumstances that gave rise to the petition," it would appear that the scope of the investigation is a narrow one. Further, the "circumstances" are those that would result in a court finding that the filing was an abuse of chapter 7 either by the failure of the debtor to meet the "means" test or due to subjective "bad faith" or a "totality of the circumstances" that indicate abuse. "Investigation" by definition implies a systematic examination. Merriam-Webster Collegiate Dictionary (10th ed. 1999) at 616.

It appears that this systematic examination must be done both with respect to the "means" test and subjective bad faith and totality of the circumstances. As an initial matter, counsel will need to be diligent in performing the calculations required by the "means" test. However, once application of this test becomes routine and standards are established as to what expenses are to be allowed, application of the "means" test may well become relatively simple. Indeed, a substantial portion of its application is done by resort of certain IRS standards and do not depend on the debtor's actual circumstances. To

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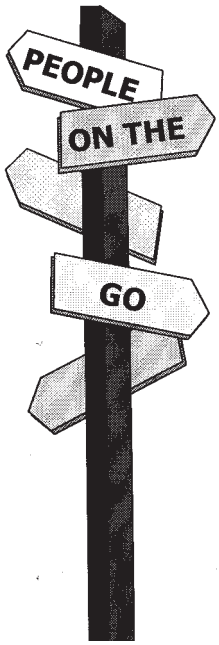

by Andrew T. Jenkins, Esq.
Bush Ross, P.A.

Keith T. Appleby has joined the law firm **Fowler White Boggs Banker** in Tampa as an associate. Mr. Appleby practices in the areas of bankruptcy and creditor's rights, and general business litigation.

Donald R. Kirk, a shareholder with the law firm of **Fowler White Boggs Banker,** has been elected Chair-Elect of the Children's Dream Fund.

Andrew T. Jenkins, an associate with the law firm of **Bush Ross, P.A.,** was elected to the Board of Directors for the Young Lawyers Division of the Hillsborough County Bar Association.

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the extent that the debtor's expenses fall into the itemized expenses, counsel may require the debtor to bring in copies of payment invoices received in the prior 90 days. Note that these are also needed in order to obtain the correct mailing addresses and account number for the creditors as otherwise required by section 342(c).

With respect to the issues of abuse resulting from bad faith or the totality of the circumstances, counsel will need to inquire of the debtor concerning the facts and circumstances leading up to the current financial problems. Possibly a questionnaire followed by an interview of the debtor by counsel as to these circumstances concerning the financial problems would satisfy this requirement if accompanied by an independent check with PACER concerning any prior filings by the debtor. Assuming that the questionnaire, interview, and checks with PACER do not raise any issues that require further follow up, it would appear that such an investigation would be reasonable under the circumstances.

If the debtor "passes" the "means" test and there is no presumption of abuse and if the case involves the typical situation of financial problems brought on by health problems, loss of job, divorce, or simply creeping credit card debt over an extended period of time, counsel who conducts the sort of analysis described above should have no worry about a finding of a violation of subparagraph (b)(4)(C).

3. No Knowledge After Inquiry of Incorrect Information in Schedules — § 707(b)(4)(D).

The provision that seems to have caused the most concern among consumer debtor attorneys is subparagraph (b)(4)(D) which provides: "The signature of an attorney on the petition shall constitute a certification that the attorney has *no knowledge after an inquiry* that the information in the schedules filed with such petition is incorrect." Importantly, this subparagraph does not use the term "investigation" as appears in subparagraph (b)(4)(C) concerning the duty to conduct a reasonable investigation into the circumstances giving rise to the petition.

Rather, a lesser standard is implied in the use of the term inquiry, which means an "examination into facts" or "a request for information." Merriam-Webster Collegiate Dictionary (10th ed. 1999) at 604. The issue confronting attorneys is to whom and at what level must this inquiry be made. Some guidance as to the level of inquiry required of counsel can be gleaned from the language of section 527 which governs disclosures that are required to be made by a "debt relief agency" who provide services to an "assisted person." Attorneys for the typical consumer debtors are considered "debt relief agencies" under the Act and consumers are considered "assisted persons" under the Act. Relevant to this issue is the following language of section 527(c) which provides: "Except to the extent that the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted

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person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules, or statement of affairs…." Section 527(c) then goes on to set forth certain information which the "debt relief agency" who does not assist in the preparation of the petition, schedules, or statement of affairs must provide to the debtor.

Section 527(c) implies a standard of care to conduct "reasonably diligent inquiry of the assisted person or others" so as to obtain "information reasonably accurate." This language supports the conclusion that attorney in no way guarantees the truthfulness of the information contained in the schedules. Rather, it only implies that after a reasonably diligent inquiry, the attorney has no knowledge that any of the information contained in the schedules is not correct.

One early article on this issue suggests that courts may look to the Supreme Court case of *Field v. Mans* for guidance on this issue.[3] As stated in *Field v. Mans* in the context of the standard to be applied in a section 523(a)(2) case:

> [I]t is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own.

Field v. Mans, 516 U.S. 59, 71 (1995).

It appears that this provision simply makes rule 9011's requirements that factual contentions in motions and pleadings are not known to be false to the attorney signing the pleading or motion applicable to schedules.

B. Creditor's Attorney Liability—§ 707(b)(5).

Importantly, section 707(b) also contains a provision under which the debtor may be awarded reasonable costs – including attorney's fees – incurred in contesting a motion under section 707(b) if the court denies the 707(b) motion and finds that either the creditor violated rule 9011 or the attorney who filed the motion did not comply with the requirements of clauses (i) and (ii) of subparagraph (b)(4)(C). As discussed above in the context of the signature of a debtor's attorney on the petition, these clauses require a "reasonable investigation in the circumstances that gave rise to the … written motion" and a determination that the "written motion … is well grounded in fact …."

While at first reading this may appear to simply make explicit what is already the law, that is, that rule 9011 applies to motions under section 707(b), the language used in (b)(4)(C)(i) – "well grounded in fact" – is a higher standard than the language found in current rule 9011 which only requires that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Importantly, sanctions under section 707(b)(5) may not be awarded against the trustee or the U.S. Trustee — the parties most likely to bring such motions. Also insulated from liability under this section is the occasional creditor's attorney that represents the trustee for the "special purpose" under section 327(c) of bringing the section 707(b) motion. However, other parties in interest will be under a duty conduct an investigation into the circumstances of the case to insure that the motion is well grounded in fact. The time limit under current Bankruptcy Rule 1017(e) to bring such a motion is 60 days after the first date set for the meeting of creditors. Presumably, the Bankruptcy Rules will be amended to include other parties in interest within the coverage of Bankruptcy Rule 1017.

Interestingly, a "small business" as defined in 707(b)(5)(C) is not subject to such sanctions even though the small business files a motion that violates rule 9011. This provision will have very little effect since it defines a small business as one holding a claim of less than $1,000. It is very unusual for holders of such small claims to participate in bankruptcy cases because of the costs involved in retaining counsel.

C. Applicability of Section 707(b) Attorney Liability Provisions.

It is clear that the attorney liability provision contained in section 707(b) apply only in chapter 7. 11 U.S.C. § 103(b). It is less clear, however, how broadly they should apply in chapter 7 cases outside the context of a motion under section 707(b). That is, do they only apply to section 707(b) motions or can they be read to apply, for example, to a motion to determine secured status?

In this regard, by its terms, attorney liability under subparagraph (b)(4)(A) only arises if the court grants a motion under section 707(b). Thus, by its terms, it clearly does not apply to any other type of contested matter.

While (b)(4)(B) can be read to apply to any rule 9011 violation, the context in which it is found following (b)(4)(A) also suggests that it was not intended to amend rule 9011 to provide a civil penalty in matters arising under other provisions of chapter 7. This conclusion is reinforced by the language, "If the court finds that the attorney for the debtor violated rule 9011…." A reasonable construction of this language is that the rule 9011 violation referenced is the one in the prior paragraph which deals exclusively with a section 707(b) motion.

Similarly, subparagraph (b)(4)(C), as applied with respect to a debtor's attorney's determination that the filing "does not constitute an abuse" under section 707(b)(1), also only relates clearly relates to a section 707(b) motion.

Another instance in which liability may be imposed under section 707(b), is where a creditor's attorney files an unsuccessful section 707(b) motion on behalf on behalf of a creditor. In such cases, the attorney for the creditor may be liable for failing to conduct the "reasonable investigation" required by subparagraph (b)(5)(A)(ii)(II). Again this liability only arises in the context of a motion under section 707(b).

The one exception to this general conclusion is in the context of subparagraph (b)(4)(D). Subparagraph (b)(4)(D) deals with false information in the debtor's schedules – an issue that

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generally is not critical to a section 707(b) motion except to the extent that scheduled information is pertinent to the "means" test. It appears that if this issue is raised separately, for example, at the conclusion of an action under section 727(a)(4)(false oath), then attorney liability may result outside the context of a section 707(b) motion.

We can conclude, therefore, from a reading of these provisions that the expansion of attorney liability under the Act will relate only to section 707(b) motions and with respect to the debtor's schedules. In all other circumstances, rule 9011 will continue to govern attorney responsibility for papers they sign and file with the court.

Addendum

Excerpts from § 707. – Dismissal.

707(b)(4)—Debtor's Attorney Liability Provisions

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion brought under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subparagraph; and

(ii) the court—

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of the civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

(C) The signature of an attorney on a petition, pleading , or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

* * *

707(b)(5)—Creditor's Attorney Liability Provision

(A) Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subparagraph if—

(i) the court does not grant the motion; and

(ii) the court finds that—

(I) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B) A small business that has a claim of an aggregate amount less than $1,000 shall not be subject to subparagraph (A)(ii)(I).

(C) For purposes of this paragraph—

(i) the term 'small business' means an unincorporated business, partnership, corporation, association, or organization that—

(I) has fewer than 25 full-time employees as determined on the date on which the motion is filed; and

(II) is engaged in commercial or business activity; and

(ii) the number of employees of a wholly owned subsidiary of a corporation includes the employees of—

(I) a parent corporation; and

(II) any other subsidiary corporation of the parent corporation.

* * *

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signing of papers.

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court.

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By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations.

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery.

Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) Verification.

Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. §1746 satisfies the requirement of verification.

(f) Copies of signed or verified papers.

When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

* * *

§ 527. Disclosures

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subparagraph (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including—

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

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Judge Thomas E. Baynes, Jr. : The Man Behind the Robe

By: Elena Paras Ketchum, Esquire
Stichter, Riedel, Blain & Prosser, P.A.

I have always found that the most fascinating aspect of interacting with other attorneys is what I normally would not learn about them in going about the day-to-day business of the law. This is particularly true of our judges who remain somewhat separated from the rest of the legal community due to their role within our legal system. I recently had, however, the wonderful occasion to have lunch with Judge Baynes to ask him questions and hear great stories of his life and interests both in and beyond the law. I asked Judge Baynes everything from his inspiration for some of his favorite "Baynesisms", to his favorite music and books, to what profession other than the law would he like to try, and even his favorite beer. He answered each and every question with great enthusiasm and with the true art of a great storyteller. I share with you some of his thoughts and stories.

Thomas E. Baynes, Jr. grew up in Augusta, Georgia attending the Academy of Richmond County for the last two years of high school. The Academy, chartered in 1783, is the oldest educational institution in the State of Georgia. Actually, during the years of 1865-1867 Union troops used the school as headquarters. While in high school, Judge Baynes, active in the Boy Scouts, would spend a couple of weeks during the summer with the Forestry Service. Intrigued with Forestry as a profession, he entered the University of Georgia joining its Forestry program. During his first year of college, he learned from his senior fraternity brothers that the job market in Forestry was not exactly booming. So, he changed his academic focus to economics and law. He completed three years of college earning a Bachelor of Arts in Economics and a minor in Ancient Greek Civilization. He also enjoyed such other subjects as physics. During his fourth year at UGA he began his law school career, while also serving as a teaching assistant to his economics professor. After returning from a four-year tour of duty in the Navy, Judge Baynes completed his law school education at Emory University receiving both a J.D. and LL.M. Judge Baynes also received an LL.M. from Yale University School of Law.

From his college days, Judge Baynes tells the story of how during the final exam of the newly taught college course named "Macroeconomics" the professor wrote seven formulas over the expanse of the board and then left the room. Returning to the classroom with the Dean, the professor remarked as he gestured to the board, "isn't that just the meanest SOB your ever saw?" leaving the students stunned. It is no surprise that to this day Judge Baynes gets a chuckle from this story since he is a bit of a prankster himself. For the April 1994 edition of this very publication (the April Fool's edition), he authored the totally fictitious "Order on McGillicuddy Motion to Lift Stay" which addresses a debtor wanting to intern his deceased spouse, tragically run over by a pie wagon, in a mausoleum on the debtor's property over the trustee's objection. The ruling (faux, of course) was "We will keep everyone on ice (at the estate's expense) until the Court hears the Objection to Exemptions." What a splendid punch line.

It is this wit and humor that we all came to expect and enjoy in hearings before Judge Baynes. Perhaps one of the most recognizable "Baynesism" is the sliding down the razorblade of life metaphor. When asked the inspiration for this metaphor, Judge Baynes quickly explains that it is a line from a song of Tom Lehrer, a Harvard math professor and songwriter/performer/satirist. The song entitled "Bright College Days" found on Lehrer's album "An Evening Wasted with Tom Lehrer" is a spoof on college alma maters. The full stanza toward the end of the song goes "Oh, soon we'll be out amid the cold world's strife. Soon we'll be sliding down the razor blade of life." Another well known "Baynesism" is "the name of the game is". This saying sums up his advice to new attorneys which is to read **all** the rules (especially the local rules which should be committed to memory and enforced at every opportunity) for these set out how the legal game is played. Just as you would not play Monopoly without knowing the rules, attorneys should not play the legal game without knowing the parameters.

When the question of his favorite Baynesism was posed, he could not pick a single favorite, but is fond of the following two sayings: "no good deed goes unpunished" by Clare Booth Luce, *in H. Faber, The Book of Laws, 1980* and "the wicked fleeth when no man pursueth: but the righteous are bold as a lion" from *Proverbs 28: 1*. The boat which the TBBBA gave to Judge Baynes as a gift upon his retirement from the bench is named "Good Deed". Judge Baynes adds that quotes to fit any circumstance can be found in either the Bible or the works of Shakespeare. How true.

As Judge Baynes has previously mentioned, books are like "old friends". As we have all come to learn, Judge Baynes is very well-read and on his lengthy drives to and from the courthouse would listen to various books on tape. Considering the number of books read, I was interested in learning what book was his favorite and which book he suggests every attorney to read. The books mentioned by him highlight both the lure which the courtroom has on him and his interest in human relationships and dynamics.

One of Judge Bayne's favorite books is Robert Traver's *Anatomy of a Murder* - a courtroom drama captivating the reader with the various trial tactics. Perhaps Judge Baynes is drawn to this story because he always wanted to be a trial lawyer and the most enjoyable aspect of being on the bench for him was being in the courtroom embroiled in the day to day battles and issues brought therein. On the other hand, perhaps he is drawn to the story because it pits a big city prosecutor (picture George C. Scott who plays this role in the 1959 adaptation of this novel) against a small town defense attorney (picture Jimmy Stewart). His favorite movie is "Harvey" also with James Stewart.

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Judge Thomas E. Baynes, Jr.

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This same David and Goliath story was played out on a smaller scale on one occasion in the Celotex case. An attorney from Georgia filed a motion seeking relief from the automatic stay so his client could proceed with a personal injury action in state court. Having not been able to reach agreement with Debtor's counsel, the attorney had to travel from Georgia to Tampa for the hearing. At the hearing held before Judge Baynes, the Georgia attorney began to argue the merits of the motion to the Court. Learning the attorney was from Augusta, Judge Baynes asked him if he attended the Academy of Richmond County. The attorney had. Upon learning this, the attorney and Judge Baynes exchanged pleasantries concerning various teachers, etc. As Judge Baynes came to hear about it later from a Bankruptcy judge in Georgia, the attorney from Georgia, upon returning home, was praised for having earned a hometown advantage in the big city of Tampa, hundreds of miles from his own.

The books suggested for every attorney to read are *The Partners* (1974) and *The Education of Oscar Fairfax* by the author Louis Auchincloss. When questioned as to his selection of these books, Judge Baynes responded, "because they portray who we (attorneys) are." These books provide a glimpse into the nature of our profession and the real dramas that take place without falling victim to hyperbole or romanticism. The focus is on the dynamics between people. This is the same focus when Judge Baynes describes any one of the cases which were before him, whether it be a complex case such as Celotex, a confirmation hearing or an adversary hearing. When I pondered the meaning of this focus, I realized that through it one sees the humor, sadness and humanity in who we (attorneys) are and what we do.

Outside of reading, Judge Baynes enjoys listening to both jazz and classical music. He has a large jazz music collection with some of his favorite artists being Dave Brubeck, Ella Fitzgerald and the Modern Jazz Quartet. In addition, he enjoys listening to the cellist Mstislav Rostropovich and the tenor Placido Domingo. Some of Judge Baynes' other interests extend to the outdoors, such as gardening and fishing. In fact, the Deschutes river located in Central Oregon is his favorite place for trout fishing. Perhaps he also likes Deschutes because this is the site of the brewery, Deschutes Brewery in Bend, Oregon, which brews is his favorite beer, Deschutes Porter (for the latest calendar of events at the brewery visit www.deschutesbrewery.com). Judge Baynes is also a dog lover, owning two yellow Labrador retrievers. It is not surprising then that his favorite poem is "An Introduction to Dogs" by Ogden Nash which proclaims that a "dog is man's best friend" and "upright as a steeple".

Judge Baynes is truly a student of life with a ravenous curiosity concerning just about everything. He has an incredible wit. In addition, he has a true gift to seamlessly draw connections between people, places and things – such as, when discussing a book, he draws upon the movie adaptation or even when discussing his favorite beer he tells you about the river for which it is named and the great fishing which can be found therein.

We thank Judge Baynes for his many years of service on the bench. In addition, we are truly fortunate that Judge Baynes will be remaining active within our legal community and the TBBBA having affiliated with Charles Castagna Mediation group as a mediator/arbitrator. We look forward to seeing him and learning of his latest trip or the latest book he has read at the next bar luncheon.

Author's Note: Special thanks to Judge Thomas E. Baynes, Jr. for taking the time to meet and for all of his great stories and insights! Thank also Richard C. Prosser, Esq. and the other attorneys of Stichter, Riedel, Blain & Prosser, P.A. for their invaluable input on this article.

2005 Bankruptcy Reform Legislation

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(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

* * *

Sec. 319. Sense Of Congress Regarding Expansion Of Rule 9011 Of The Federal Rules Of Bankruptcy Procedure.

It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App.) should be modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors' attorneys have made reasonable inquiry to verify that the information contained in such documents is—

(1) well grounded in fact; and

(2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(Endnotes)

[1] For reference, the relevant portions of section 522 and related provisions as amended are set forth in the addendum to these materials.

[2] S. 420 passed by the Senate on March 15, 2001 and H.R. 333 passed by the House March 1, 2001.

[3] Catherine E. Vance, *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition of Sanctions Against Debtor 's Counsel,*

106 Com. L.J. 241, 270 (2001).

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