

CAPITAL REGION BANKRUPTCY BAR ASSOCIATION

NEWSLETTER

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PRESIDENT'S MESSAGE

It seems when whenever I am writing pieces for the Newsletter, it always concerns a holiday. Well, here I go again. We have just turned the corner with a late Labor Day and we are now moving into the fall season. I would like to take this opportunity to make a couple of comments that have been on my mind.

We are now moving into the part of the year when our Bar Association, along with the Central New York Bankruptcy Bar Association, conducts our annual fall CLE program at the Otesaga. This is the 9th annual edition of this event and everyone should know how beneficial this CLE has become. This year Deborah Kelly of our Association, who organized the first Otesaga conference, has returned to chair this one along with Mark Swimelar on behalf of Central New York. They have been working diligently to produce a conference that will be as good or better than any of the previous conferences. So why am I touting the seminar when most of the people who are reading this article already have attended? Perhaps there are some new practitioners or others who have not taken advantage of attending this wonderful program and need just a little push to sign up. I believe that we will once again be over subscribed as we get closer to the date of the conference. For that reason I encourage all of you who plan on attending, but have just not gotten around to it, to make your reservations as quickly as possible so that you don't get shut out. The year of the 7th annual conference when I co-chaired the event with President-Elect Paula Barbaruolo, we had to add chairs to the

CALENDAR OF EVENTS

October 13 November 10 December 8	2004 Board Meetings start at 8:00 a.m. and are held at the Office of Pasquariello & Weiskopf, LLP, One Marcus Boulevard, Suite 200, Albany, New York 12205. All members are welcome.
October 22, 2004 October 23, 2004	Annual Bankruptcy Conference, Otesaga Hotel, Cooperstown

lecture room along the windows and down the center aisle to accommodate all who signed up. There are only so many additional chairs that can be added into the room before we are at full capacity. At last year's conference, we had to add additional chairs as well. Hopefully, you will get out your check book or credit card and make your reservation as soon as you read this newsletter.

Richard H. Weiskopf,
President

LAYO/POND UPDATE

By: Barbara A. Whipple, Esq.

The second thing I would like to address is how practicing bankruptcy law always provides simulation and challenge. I was thinking back over the last few years about the "hot button" issues that affect our practice and how it always seems that there is at least one such thing going on at all times. Just randomly thinking back over the last few years, a few cases come to mind (some of which I was happy to be involved with) such as Valenti, Boodrow, Pond and Dominick. Currently we are seeing individuals who own a house and file for Chapter 7 relief facing the possibility of losing their house to an outside investor. The recent Court Decision *In Re: Carrow*, signed by Judge Littlefield on September 8, 2004 allowing debtors to convert post-discharge, from Chapter 7 to Chapter 13, will affect many of those Chapter 7 cases. Our practice is certainly not static, but rather a dynamic, evolving forum of ideas and practices. One can only imagine what will be the next "hot button" issue. All one can be advised is to stay tuned and certainly one will evolve.

I do want to report, also, that our Board has directed me to contact our State Legislators about the amount of the current homestead exemption found in CPLR §5206. If I am not mistaken, the \$10,000 amount was established in 1977 when it was increased to \$10,000 from the previous \$2,000. With the passage of 27 years, one would think that for a debtor to have the same exemption that a debtor had in 1977, would equate with a value at least three times that amount. It is interesting for me since I purchased my current residence in 1977 and knowing what I paid for it and what it's worth now, a three times multiple for the exemption is about right. I will be networking with other Bankruptcy Bar Association leaders in upstate New York, and representatives of the Bar Associations in the western New York that have bankruptcy sections, in an attempt to convince the Legislature that in fairness this number should be revised.

I look forward to seeing all of our members in Cooperstown on Friday, October 22, 2004. Enjoy our colorful fall season until then. #

On August 30, 2004 Judge Littlefield issued a decision in the case *In re Robert* 03-18304 (Bankr. N.D.N.Y.). As you may recall in *Robert*, Orlando & Barbaruolo, PLLC on behalf of the debtors asked the Court to decide whether an adversary proceeding is required to obtain relief pursuant to *In re Pond*, 252 F.2d 133 (2d Cir. 2000). After reviewing the relevant case law Judge Littlefield, found that a debtor may strip a wholly unsecured lien pursuant to *Pond* by motion practice and that an adversary proceeding was no longer required.

Judge Littlefield reached his decision by analyzing 11 U.S.C. §1322(b)(2) in connection with 11 U.S.C. §506(a), Bankruptcy Rule 3012 and emerging trends in the case law. The Court found that since a *Pond* lien avoidance implicates valuation of the collateral and not the "validity", "priority" nor the "scope" of the lien than an adversary proceeding is not necessary. In other words since the underlying question is to the value of the property (whether the lien has anything to which to attach) and not the existence, legitimacy, rank or enforceability of the lien, motion practice is sufficient.

The Court did, however, make it clear that in order to obtain a lien strip by motion certain due process requirements must be met. For example, the petition must clearly identify the property; the mortgage holders must be clearly identified and the amount of each claim must be set forth; the plan should expressly propose to strip the mortgage based upon the absence of any equity; and the value of the property must be established (in this case we submitted an appraisal). Finally, we had the benefit of having had the creditor appear through counsel and we were able to serve counsel with the motion and some of the due process concerns were alleviated. Finally, we believe that the Chapter 13 Trustee will continue to hold the lien releases until the completion of the plan.

In the future we intend, if possible, to make *Pond* motions returnable at Confirmation. Hopefully, this will allow us to have the cases confirmed a bit quicker and to allow our clients to begin the process with a running start. #

CARROW UPDATE

By: Barbara A. Whipple, Esq.

On September 8, 2004 Judge Littlefield issued a crucial decision in the case *In re Carrow* Case No. 02-17838 (N.D.N.Y.). On September 9, 2004 Trustee Wolinsky appealed the decision and requested a stay pending appeal, which is currently scheduled for October 21, 2004.

If upheld, *Carrow* will be the case cited every time an issue arises when a Chapter 7 debtor wishes to convert to Chapter 13. The facts of *Carrow* are unique but the issue implicated is not. In *Carrow*, Judge Littlefield was asked to determine whether a Chapter 7 debtor, in this case post-discharge, has the absolute right/ability to convert to Chapter 13. This was a question of first impression in this jurisdiction. Conducting a detailed analysis of 11 U.S.C. §706(a) and relevant case law, Judge Littlefield determined that a debtor has an “unfettered” right to convert provided he or she can meet the requirements of 11 U.S.C. §706. The only obstacles to conversion, as found by the Court, are prior conversion and ineligibility pursuant to 11 U.S.C. §109.

In addition to this decision, Judge Littlefield determined that the proper method for conversion was by motion practice. In the past conversions from Chapter 7 to Chapter 13 could be done by ex parte application and order. However, Judge Littlefield, who is always conscious of due process issues, has determined that a motion on notice requesting conversion will now be required.

The motions to convert can be done by default and the Court will review whether there was a prior conversion. By way of opposition, creditors and parties in interest would have the opportunity to raise the issue of eligibility pursuant to 11 U.S.C. §109. However, it must be noted, as I understand it, these motions are not intended to become mini-confirmation hearings. Issues of good faith, feasibility and the attendant confirmation issues will remain just that: confirmation issues. The conversion motion is merely a vehicle for the Court to determine whether the debtor has “regular income” and whether the debt structure is within the monetary limits of 11 U.S.C. §109(e).

If *Carrow* is upheld the ramifications are obvious. We will keep you posted and will continue to update you to the status of the appeal and the stay pending appeal.

CLERK'S CORNER

By: Anne J. Sadlemire, Esq.

The percentage of documents being filed electronically has increased dramatically over the last few months. As of August 31, 2004, we are at 92% of all documents including Petitions for the Northern District being filed electronically. Thank you for your cooperation in making our ECF transition a success. Here are a few tips to help make the filing process a little easier:

ζ The docket entry for the “Notice of Voluntary Conversion to Chapter 7” is found under “Bankruptcy” – > “Notices.”

ζ To avoid Notices of Noncompliance and Orders to Show Cause for Noncompliance with the Administrative Order to be entered in error, notices of change of an address, cc's to the court, letters adjourning hearings, etc. need be filed electronically first. Then, if you wish to submit a conventional copy to chambers with respect to a hearing, send the hard copy to the court marked “**ECF CHAMBERS COPY.**”

ζ Keep in mind that electronic case filing moves a case through the bankruptcy process faster. You can expect to see discharges issued sooner after the objection's deadline has expired than in the past, which in turn, allows us to close the case sooner. This faster time line may affect your filing of reaffirmations, motions, amendments, objections to discharge-dischargeability, etc.

ζ An amended Form B 21, Statement of Social Security Number(s), **SHOULD NOT** be filed electronically. A conventional copy of an amended Form B 21 should be sent to the clerk's office. The Clerk's Office will change the social security number(s) in the electronic case filing system so that a debtor's right to privacy is not violated.

ζ When you have completed the ECF training, you receive a login and password to the “Live” system as well as to the “Test” system. The “Test” system is for you to practice filing a new type of document that you may not have filed in the past or one that you have not filed in a while *before calling the Help Desk*. If you still need to call the Help Desk after practicing in the “Test” system, you will have a better understanding of the how the docket entry works and will know the questions that you still need to ask to file the document.

ζ For technical issues including but not limited to browser issues, troubleshooting connection issues, providing information on installing and using Adobe Acrobat, providing information on creating documents using Adobe Writer, helping users while navigating the CM/ECF sites, and chargeable items, contact the *PACER Service Center at 800-676-6856* or visit their website at www.pacer.uscourts.gov for additional information.

ζ For NDNY procedural ECF problems or questions, to report an ECF error, or other technical issues not addressed by PACER, please contact the *Northern District of New York’s Help Desk at (518) 257-1616*. You should leave a detailed message containing your name and telephone number, the case number, and a general description of the ECF problem. This information will allow a member of the automation staff to do some preliminary investigation into the problem before calling you back.

ζ If a registered attorney does not have the necessary equipment or his/her equipment is down, the Courts in the Northern District have made available locations that may be utilized to file their documents electronically and be in compliance with the District’s Local Rules. The Bankruptcy Court has public areas in Albany and Utica equipped with the required hardware and instruction manuals. The District Court has Attorney Lounges in Albany, Binghamton, Syracuse and Utica that have complete computer set-ups that include a high speed internet connection and a flat bed scanner.

ζ Our internet site, www.nynb.uscourts.gov, is a valuable resource of information for you. In addition to our “Court News & Motion Dates” section which is used to update you on recent changes, we will be adding two new sections for listing procedural changes made in Chambers and in the Clerk’s Office. These changes will then be included in the next update to our local rules.#

THE LEGAL PROJECT ANNOUNCES A WINNER

By: Lisa A. Frisch, Esq.

Ehrlich, Hanft, Baird & Arcodia, LLP Wins The Legal Project’s Barry A. Gold Law Firm Leadership Award!

Ehrlich, Hanft, Baird & Arcodia was awarded the second annual Barry A. Gold Law Firm Leadership Award by The Legal Project at their 9th Annual Pro Bono Reception on October 7, 2004. This award is presented to a law firm that has made an important difference in The Legal Project’s programs through the *pro bono* participation of its partners and associates. It is named for the late Barry Gold, from the firm Thuillez, Ford, Gold, Johnson & Butler LLP, who throughout his distinguished career, was dedicated to the pro bono ideal and demonstrated this through his generous and selfless donation of his time and energies to those in need. The firm was chosen for this award in recognition of the important work that they do to support The Legal Project’s Bankruptcy Clinic co-sponsored by the Capital Region Bankruptcy Bar Association. Founding partner Anthony Arcodia, Jr., is currently the coordinator of the clinic. Founding partner Marc S. Ehrlich is a two time winner of the Distinguished Service Award for Private Attorney Involvement for *pro bono* work by The Legal Aid Society of Northeastern New York, Inc. and was awarded the President’s *Pro Bono* Attorney Award by the New York State Bar Association in 2001. He has served as a Chapter 7 Trustee for the Northern District of New York since 1991. In the Bankruptcy & Credit program alone, the firm has provided 76 consultations to those needing to file for bankruptcy and represented 44 clients in their proceedings – an impressive commitment. Their law firm is a true model on how to achieve the goal of providing legal services to the less fortunate members of society who cannot afford representation.#

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We would also like to acknowledge those attorneys accepting Pro Bono Cases through The Legal Project’s Bankruptcy Clinic since our last newsletter:

Anthony Arcodia
Kieran Broderick

Frank Brennan
Guy Criscione

Phil Danaher
Marc Ehrlich
Gayle Hartz
Matt Mann
Michael O'Connor
Bryan Simmerman

Christian Dribusch
Martin Goodman
Leigh Hoffman
John McBride
Laura Silva
Richard Weisz

9TH ANNUAL BANKRUPTCY CONFERENCE

CALL TO CARE

By: Barbara A. Whipple, Esq.

The Capital Region Bankruptcy Bar Association in connection with the Capital District Women's Bar Association has initiated contact with several high schools in the area to determine whether the schools would like to host a CARE presentation. You will recall that CARE is the Credit Abuse Resistance Education program that was started and has enjoyed great success under the guidance of Chief Bankruptcy Judge John Ninfo. The goal of CARE is to stress to High School and Junior College students the consequences of obtaining and utilizing credit cards and incurring credit card debt.

We are beginning to receive responses from interested schools and anyone who is interested in participating in this program is asked to contact me. The program consists of attorneys, who specialize in bankruptcy (representing both creditors and debtors), volunteering their time, traveling to the schools, and making presentations of approximately one-hour to the students. Judge Ninfo has assembled a detailed package of materials for presentations and a CARE web site exists that provides even more materials. Therefore, anyone who is interested in this worthwhile program would not have to produce any materials.

If anyone is interested in finding out more about this program or would like to assist us in this project please contact:

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By: Deborah Kelly, Esq.

The 9th Annual Bankruptcy Conference, co-sponsored by the CNYBBA and the CRBBA, will be held at The Otesaga Hotel on October 22-23, 2004. With just a couple of weeks remaining until the big event, co-chairs Deborah Kelly and Mark Swimelar are busy making final travel arrangements for speakers, reviewing materials to be included in the Conference binder and handling last-minute registrations.

As in past years, this year's Conference will be filled to capacity (180-185 attendees). The Conference will feature a total of 19 speakers and/or panelists, and Chief Judges Gerling and Ninfo are scheduled to be dinner speakers. If you would like to attend and have not yet registered for the Conference, please contact Deborah Kelly ASAP at dkelly@hodgsonruss.com or by telephone (518-433-2402).

MEMBER NEWS

On September 15th, Chapter 13 Trustee Andrea Celli Moderated an Open Forum to Discuss Chapter 13 Procedures. Some Notes from the Meeting Are as Follows:

ECF CHANGES TO KEEP IN MIND:

If you don't file complete case (all schedules, SOFA and plan) – please mail the Trustee a hard copy of each when they are filed.

The Trustee downloads all documents filed the proceeding day, the following morning. In light of the volume of documents received, docketing these can take up to 48 hours. If you are filing a document in response to a motion to dismiss or other motion to be heard within 48 hours, please advise the trustee by phone or fax!

The Trustee is no longer serving attorneys by mail. That includes all value, payoff notices, notices of claims filed, claim motions, objections to confirmation and responses to motions.

If you are relying on ecf service, must file in time so immediate service is timely !

SOMETHINGS TO CONSIDER:

A FORM CHAPTER 13 PLAN –Is it a Good Idea?

Please advise the Trustee if you would like to serve on a committee to discuss, and possibly, develop a form plan for comment.

The Robert decision – a motion for pond relief is granted!

Need: proof of value attached and proper (7004) service.

Make your motion returnable on confirmation date!

LOAN APPROVAL FORMS:

Requests to refinance and payout plans are still coming in fast and furious! The Trustee has concerns about the appropriateness of refinancing to close in less than 36 months (must pay 100%), as well as the debtors' disclosures of changes in income, windfalls etc. The Trustee may require attorney's review before acting on the requests. May delay process – your thoughts?

Are the loans closing? We don't know! Therefore, claims affected by loan *will continue to be paid* until written verification of closing has been received by the Trustee.

341 MEETINGS – SCHEDULING:

The Trustee schedules 9 cases per hour so that the Trustee can stay on schedule. The Trustee has also segregated cases by attorney on the adjourned meeting date to assist everyone. We still have many non-appearances and no information received.

We have many more cases and therefore more meeting days, which means the Trustee is out of office more! With 341s and court hearings, the Trustee is out at least 10 days or two weeks every month!!

ADJOURN OR CLOSE?

(Client concerns/paper shuffle – or email/managing your calendar-handling the Thursday calendar)

The Trustee's objections to confirmation are due one week before the hearing. If we close the 341 meeting, AEC needs all documents at least 2 weeks before the date so they can be docketed, make it to our file and be reviewed (to avoid an objection).

If we adjourn, you can send documents ahead or bring them to the adjourned 341. If you are at the meeting, the Trustee will try to review them and discuss confirmation issues (if any) with you.

WHAT SHOULD WE DO?

Practically, once the matter is on the calendar, it may only get resolved with a Thursday appearance.

The Trustee and her attorney are both doing calendars – less time for pre-review but trying to resolve more “on the spot”.

CALENDER MATTERS:

Send your list/notes by noon the previous day – if seek review. Come early if you can – some already do.

Be prepared with case numbers / 12:00 vs 1:00pm matters.

CONVERSION ISSUES (7-13):

Read Carrow – absolute right to convert/discharge does not preclude claims from being filed (Ct website).

Now need a motion on notice to all creditors and Chapter 7 Trustee when converting to 13.

When values/possible Chapter 7 sale were at issue, the Trustee will require evidence of value.

If the Chapter 7 Trustee has liquidated assets, be prepared to have claim for Trustee commissions.

If Chapter 7 Trustee has chased your client for assets/done legal work, be prepared for a claim for fees.

Remember to amend schedules and serve plan for confirmation as quickly as possible – avoid a good

faith argument or a Motion to Dismiss!

THE CHAPTER 13 TRUSTEE'S WEBSITE:

It is being beta tested now.

There will be a 24–48 hour delay in information as a result of downloading from our system to the site.

You will be able to access case information by case number – receipts, payments on claims, etc.

You will be given access to any case in which you are a party in interest.

Know your case before you review the Trustee's records! Check PACER if necessary – Every plan modification (waiver/ pp chg etc.) to compute defaults, calculate plan base.

Log on to the Trustee's website for the Access Agreement. Please sign and mail it to the Trustee. It will take approx. 2 weeks to get you access once we receive your signed Agreement – password assignment etc.

DEBTOR EDUCATION CLASSES WILL BE OFFERED!

Classes will be offered starting February 2005. A "preview" class to be offered for attorneys in January. The class will be taught by Deborah Kelly, Esq. It will be 3 hours and will be free to all debtors. Pre-registration will be required.

*** More information to follow!**

* * * *

If you are interested in becoming a director of CRBBA, please contact Paula Barbaruolo at pbarbaruolo@oblawyers.com. New directors will be announced at the annual meeting in December.

NOTICE

2004 Motion dates for Judge Gerling are set forth below.

PLEASE NOTE: The first Syracuse day each month will be for Chapter 7 and 11 motions only. The second Syracuse day each month will be reserved for Chapter 13 motions at 10:00 a.m. and Chapter 13 Confirmation Hearings at 2:00 p.m. Also, please note the time changes for Binghamton and Utica.

Syracuse Cases:

October 5, November 2, December 7
10:00 a.m. Motions in Chapters 7 & 11
2:00 p.m. Pretrials/Chapter 11 Status Conferences
(Scheduled by Court)

October 19, November 16, December 21
10:00 a.m. Motions in Chapters 12 & 13
2:00 p.m. Chapter 13 Confirmation Hearings

Binghamton:

October 12, November 9, December 21
10:00 a.m. Motions in Chapters 12 & 13
1:00 p.m. Chapter 13 Confirmation Hearings

October 28, November 30, December 23
10:00 a.m. Motions in Chapters 7 & 11 and
Motions in the Bennett Funding Case
1:00 p.m. Pretrials/Status Conferences (Scheduled
by Court)

Utica:

October 26, November 23, December 16
10:00 a.m. Motions in all Chapters
1:00 p.m. Chapter 13 Confirmation Hearings
2:00 p.m. Pretrials/Chapter 11 Status Conferences
(Scheduled by Court)

Articles for publication in the newsletter are welcome and should be submitted to: Bonnie S. Baker, Deily, Mooney & Glastetter, LLP, 8 Thurlow Terrace, Albany, New York 12203.

Please send address change information and/or membership issues to: Henry Collins, Esq., Cooper, Erving & Savage, 39 North Pearl

Street, 4th Floor, Albany, New York 12207.

NOTICE

2004 Motion dates for Judge Littlefield are set forth below.

- (A) Motions in Chapter 7 shall be scheduled at 9:00 a.m.
- (B) Motions in Chapter 11 shall be scheduled at 10:30 a.m.
- (C) Motions in Chapter 13 shall be scheduled at 1:00 p.m.
- (D) Motions in Chapter 12 shall be scheduled at 11:00 a.m.
- (E) Submit original motions with an affidavit of service and proposed Order when applicable.

Albany Cases:

October 7, 14, 21, 28
November 4, 10, 18
December 2, 9, 16, 22

All requests for pretrials, trials, hearing on Chapter 11 Disclosure Statements and Confirmations, as well as matters related to confirmation should still be sent to the Court for Scheduling.

Due to Judge Littlefield's conflicts, any motion in a Chapter 12 or 13 with a case commenced prior to May 1, 1995 should still be forwarded to the Court for scheduling. (The last conflict case, 95-11613, Blanchard, was filed on April 28, 1995.)

Judge Littlefield's motion calendar schedule will be posted at the Courtroom and the Clerk's Office. You are responsible for checking this Schedule prior to serving your motions.

2004

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