

CAPITAL REGION BANKRUPTCY BAR ASSOCIATION

NEWSLETTER

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PRESIDENT'S MESSAGE

It is hard to believe that it has been over ten years since the Association, an idea, a brainchild of a handful of people, came into existence. Since then, it has become much more than that for many of us. My introduction into the Association in 1996, or shortly after I joined the Chapter 13 Trustee's Office, was met and continued to expose me to individuals whose enthusiasm, and commitment, to ever changing times and needs, is endless.

It was clear, in its genesis and before New York state mandated Continuing Legal Education, that we had an association comprised of individuals who were committed to not only keeping themselves abreast of the most current issues and trends in bankruptcy, but to educating the public on the bankruptcy process as well.

In 1996, in collaboration with the Central New York Bar Association, CRBBA planned and held its First Annual Conference at the Otesaga Hotel in Cooperstown, New York. The immediate success of this endeavor made it clear that members not only sought, but almost yearned, to have the opportunity to gather and be part of a bankruptcy "think tank". Indeed, the annual conference has been, more successful from one year to the next. The success of this conference, as well as our Continuing Legal Education luncheon programs, can only be attributed to the sincere sense of responsibility and commitment of our members. I have no doubt that it is for this reason that New York State Continuing Legal Education did not waiver in granting our organization Continuing Legal Education provider status.

In addition to its commitment to Continuing Legal Education, several members of the association have demonstrated an unprecedented willingness to provide our community with equal access to the justice system by representing individuals on a pro bono basis. In early 2000, CRBBA in conjunction with the Capital District Women's Bar Association's Legal Project, joined forces and created the Bankruptcy and Credit Program to provide debt counseling clinics and referrals to the "working poor". In particular, Paula Barbaruolo took the reigns at our end, and worked with Wendy Durand of the Project. In less than two short years, the number of individuals serviced by CRBBA members has risen to approximately 47 per clinic. The clinic is another example of member responsiveness to the needs of both our legal and non-legal community.

Beginning this year, the format of these clinics has changed. The clinics will be held on one night, three or four times a year. Client meetings are now scheduled every 20 minutes, and the clinic will take place at The Legal Project, located at 2 Tower Place, Executive Park, Albany, NY. For further information concerning future clinics, please contact either of our current Pro Bono Co-chairs Bonnie Baker at 436-0344 or Laura Silva at 377-3408. I encourage everyone to participate in this worthwhile endeavor.

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CALENDAR OF EVENTS

June 5 July 3 August 7 September 4 October 2 & 30 December 4	2002 Board Meetings start at 8:00 a.m. and are held at the Chapter 13 Trustee's Office, 350 Northern Boulevard, Albany, New York 12204. All members are welcome.
May 29, 2002 8:00 a.m.	CRBBA CLE Breakfast
June 11, 2002 5:00-7:00 p.m.	Bankruptcy and Credit Program Clinic @ The Legal Project
June, 2002	Annual Legal Assistants' Program
Nov. 8-9, 2002	CRBBA and CYNBBA Annual Conference, Cooperstown, NY

If this past decade is a "snapshot" and provides an indication of things to come, I can only say it is due to each and every one of you and to your commitment to the practice of law, to equal access to justice, and your willingness to contribute your valuable time. These are just a few of the reasons why I am honored to serve as your President this year. Please feel free to contact me with any suggestions or ideas, that you may have. Meanwhile, I look forward to working with a dynamic board and with you in anticipation of yet another fulfilling year.♦

- Diane Davis

By: *Andrea E. Celli, Esq.*, Chapter 13 Trustee

(Presented to the New York State Creditors Association
on March 20, 2002)

A Chapter 13 Trustee has certain duties which are defined under the U.S. Bankruptcy Code §1302. Those duties include duties proscribed to Chapter 7 Trustees such as the duties to account for property received, to assure that the debtor performs the intentions specified, to investigate the debtor's financial affairs, to examine proofs of claim and object if allowance would be improper and those specifically proscribed to the Chapter 13 Trustee such as to oppose the Chapter 13 Discharge (if advisable), to furnish information to parties in interest, to file a Final Report and Account and also to appear and be heard on hearings concerning the value of property subject to liens, confirmation of the plan and modification of a confirmed plan, to disburse the money received in a Chapter 13 case, to advise and assist the Chapter 13 debtor in the performance of the plan, to insure that the debtor begins making payments within 30 days of the filing of the plan and to conduct an additional financial investigation of the debtor's affairs, if the debtor is engaged in business.

Generally speaking, a Chapter 13 Trustee's objective to assist debtors and creditors in the formulation, performance and completion of a Chapter 13 plan which provides the debtor with a fresh start and provides creditors with proper classification and payment of their claims, including all of the debtor's disposable income for at least 36 months.

The Trustee is a party in interest

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accomplished, then all payments (which have not been made to the secured creditor or other parties for several months) must be addressed in an Amended Plan.

How do you short circuit this delay? If you are a secured mortgageholder (the defendant in the adversary), negotiate, negotiate, negotiate your treatment if possible! If you are a secured claimholder (not a defendant), consider seeking pre-confirmation adequate protection payments on your secured claim. In order to do so, you must make the appropriate motion on notice to all secured creditors being paid through the Chapter 13 plan (B.R. 7004). You may seek your pro rata share of monthly payments based on the proposed plan as your adequate protection while these issues are being litigated. If you are an unsecured creditor in the case, be aware that these lien issues may take six to eight months to be resolved.

4. The §341 meeting is adjourned and therefore confirmation is adjourned because the Trustee's or creditors' request for information is outstanding. If the issue remains outstanding, the Trustee may file a motion to dismiss a Chapter 13 plan based upon the debtor's "failure to cooperate" which will always include an averment that the delayed is prejudicial to creditors. Creditors may seek this relief on the same grounds.

Creditors' Frustration No. 3:

"How are plan payments distributed to creditors in Chapter 13?"

"When I can expect payment from the Trustee?"

"Why do I receive different payment amounts from the Trustee monthly?"

The Trustee will generally follow this distribution scheme when distributing money to creditors under the plan: First, administrative claims are paid first and in full, then secured claims established at confirmation are paid pro rata until paid in full, then priority unsecured claims are paid pro rata until paid in full, and then general unsecured claims are paid pro rata. This is the distribution scheme unless the plan specifically dictates otherwise and any detrimentally affected creditors have received notice of the plan terms. If the debtor seeks an alternative distribution scheme, the Trustee will require that plan confirmation be delayed so that notice of the change will be sent to all affected creditors.

With respect to different monthly amounts, the Trustee distributes pro rata based upon the funds received during the previous month. If the Trustee does not receive the same amount every month, the pro rata distribution of creditors will not be the same. To prevent this from occurring in your cases, creditors may demand that the debtor submit to a voluntary payroll deduction for his Chapter 13 payments. With a payroll deduction Order in place, creditors are assured that, as long as the debtor is working, the Trustee will receive the same payment amount every month and their pro rata share of that payment will be the same.

Finally, if you are a secured creditor, establish yourself as secured and the treatment of your claim at the time of confirmation. If the plan treats you as unsecured, object to resolve the issue.

Creditors' Frustration No. 4:

"I received motion papers but I cannot figure out from the notice what the debtor is asking for – or more importantly, how it affects payment to me."

The only way to clarify what the debtor is seeking and most importantly how it affects your claim, is to respond to the motion in writing within the timeframe set forth in the notice. Most motions are done on 30 days notice or less, so there may not be sufficient time to contact the debtor or the debtor's counsel by phone to verify the relief requests in the motion. A written response assures that your concerns are considered by the Judge, if a resolution cannot be reached.

Creditors' Frustration No. 5:

"How do I complete the Proof of Claim form so that I receive what I should?"

The Proof of Claim form is complex and despite the efforts by the National Rules Committee, can be confusing. When in doubt, fill out the front as completely as possible, and add an addendum to the Proof of Claim providing a breakdown of the different elements of your claim (principal, interest, late charges, attorneys' fees, etc.). Remember, more information is better. The more details you provide, the less likely it is that debtor or debtor's counsel will need to object to your claim because they cannot understand what you are asking for and why. Be certain that all relevant documentation is attached to your Proof of Claim, including any copies of the original loan documents and proof of perfection of your lien, if you are a secured creditor. Be sure to also attach copies of any relevant Court Orders.

Send an extra copy of the Proof of Claim to the Court so that a time-stamped copy can be returned to you. Also, send a copy of your filed Proof of Claim to the debtor's attorney. Remember, the Clerk and the Chapter 13 Trustee's Office handles thousands of claims each year. Retain proof of your filed Proof of Claim in the event that a question arises.

If you amend your claim after the bar date, send a copy of your Amended Proof of Claim to the Chapter 13 Trustee with a letter indicating that the claim was amended and why. This is critical to assure payment on your amended claim promptly.

Creditors' Frustration No. 6:

"How can I learn the status of a Chapter 13 case?"

The easiest way to learn the status of a case is to call the Court's toll free 800 number (800-206-1952). This is an

automated system which will provide you with the status of the case. In addition, you may wish to consider subscribing to the Court's PACER service which will provide you with access to full case dockets and claims registers. If you still have questions or need more information, contact the Chapter 13 Trustee's Office. If the case has been filed within the last six months, you may wish to speak to Courtroom Paralegal Kim Waxman regarding the status of the confirmation. If the plan is confirmed, almost anyone in the Chapter 13 Trustee's Office can give you general information about the case, who has been paid and how much, if a voluntary payroll deduction Order is in place, and the status of payments.

The good news is that by 2003, the Chapter 13 data will be available electronically on a website established by the Trustee. Once the website has been established, the Trustee will be in contact with all potential users for registration and training. The data will be free to parties in interest.◆

NEW YORK STATE BAR ASSOCIATION ENCOURAGES EXPANSION OF PRO BONO CLE CRITERIA

By: Francis J. Brennan, Esq.

Recently, Steven C. Krane, Esq., President of the New York State Bar Association, encouraged the New York State Continuing Legal Education Board to expand its criteria for awarding Continuing Legal Education (CLE) credit to include uncompensated *pro bono* legal services performed on behalf of non-profit organizations serving low-income individuals and communities. To facilitate this enhancement of CLE credit for *pro bono* services, Mr. Krane encouraged the Continuing Legal Education Board to approve as *pro bono* providers non-profit organizations providing charitable, religious, civic and educational services to poor persons, as Approved *Pro Bono* CLE Providers under the CLE Board Regulations and Guidelines.

In support of this enhanced program, Mr. Krane noted that CLE credit is currently available to attorneys rendering *pro bono* services directly to poor individuals and often such individuals are served by non-profit groups. Further, the Lawyers Code of Professional Responsibility encourages the provision of professional legal services at no or reduced fees "to public service or charitable groups or organizations" as a means of fulfilling an attorney's professional responsibility to provide *pro bono* services. Similarly, rendering *pro bono* services to non-profit and charitable organizations can ensure that the mission of the organization is carried out to the fullest extent possible by involving legal counsel to assist the organizations themselves while enabling the organizations to devote the bulk of their resources to their programs rather than seeking outside non-*pro*

bono counsel to assist the organizations with corporate, tax, real estate and other legal issues.

Mr. Krane also points out that attorneys specializing in corporate, real estate and other business law fields often do not participate in rendering *pro bono* services because attorneys practicing in such areas are often unfamiliar with the legal issues most often confronting the poor. Permitting the award of CLE credit for *pro bono* services rendered directly to non-profit organizations would tap such unused legal resources to the benefit and enhancement of the organizations and the people they serve, particularly in such areas as corporate, tax, real estate and regulatory matters. Finally, Mr. Krane notes the apparent incongruity of awarding CLE credit to attorneys who provide services directly to low-income and poor persons while denying it to attorneys who provide similarly invaluable services to the organizations that serve the very same constituency. In short, giving CLE credit to attorneys providing legal services to non-profit organizations serving the poor enhances the organizations' ability to assist the communities in which they operate to the benefit of both the organizations and the people they serve.

CLE Update- As of January 15, 2002, new mandatory continuing education rules took effect which preclude the award of partial CLE credit for attendance of only a portion of a CLE program, thus mandating that attorneys attend and complete the entire course or program in order to be eligible to receive CLE credit. Also, no CLE credit will be awarded for repeating a program or course for which CLE credit has already been awarded, even if the subsequent program is taken during a subsequent bi-annual reporting cycle. The CRBBA, as an accredited CLE provider, regularly reviews its programs to ensure that there is no repetition of prior programs which would preclude some attorneys from receiving CLE credit based upon this rule change.◆

PRO BONO CORNER

By: Laura Silva

The first Pro Bono Bankruptcy Clinic of 2002 held on March 5 and 6, 2002 was a tremendous success. The clinic was able to service 47 individuals from Albany, Rensselaer and Schenectady counties. Forty-five of the 47 clients went on to receive representation. Seventy-three percent of the clients who passed through the clinic qualified for pro bono legal services; four percent qualified for a reduced rate and twenty-two percent were deemed to be full fee clients or those who required Chapter 13 plans. Of those who participated in the clinic, thirty-eight percent were on SSI or SSD; nine percent were unemployed; four percent were employed part-time and forty-five percent were employed full-time.

As the bankruptcy clinic continues to gain exposure, through the efforts of the Legal Project and satisfied clients, we expect that participation in the clinic will continue to grow by leaps and bounds. Therefore, continued participation from the bankruptcy bar is crucial to the continued success of this program. At the March 2002 clinic, twenty-four attorneys participated either in providing consultations to clients during the evenings of March 5 or 6, 2002 or by accepting a case or two for representation. We would like to take this opportunity to thank the following attorneys for their participation:

Bonnie Baker	Shannon Frazier	Steven Reilly
Paula Barbaruolo	Fred Goodman	Laura Silva
Brenda Birken	Marty Goodman	Karen Simons
Frank Brennan	Kristie Hanson	Jaime Thomas
Kieran Broderick	Gayle Hartz	Annette Tambasco
Brian Bronsther	Libby Jochnowitz	Linda Taverni
Christian Dribusch	Michael O'Connor	Richard Weiskopf
Marc Ehrlich	Sandy Pemburn	Richard Weisz

CLE credits are now available!!!!!! Pro bono representation hours may be turned into CLE credits at the rate of 300 minutes of representation time per 1 hour of CLE credit. This is calculated as six 50 minute CLE hours. You can count up to six pro bono/CLE credits toward your MCLE requirements within a reporting period. These credits cannot be used for the requirements in the area of ethics and professionalism, but can be used for the skills and practice areas.

The next clinic is scheduled for **June 11, 2002** at the Legal Project offices at 6 Executive Park Drive (behind Stuyvesant Plaza in Guilderland). Free consultations begin at 5:00 pm and will end at approximately 7:30 pm. Please contact Laura Silva at 377-3408 if you would like to participate by providing consultations on the evening of June 11, 2002 or if you are willing to accept a case or two for representation.◆

STATE LAW FRAUDULENT CONVEYANCE ACTIONS; A POWERFUL TOOL

By: Marc Ehrlich, Esq.

I have been recently confronted with an interesting set of facts in a case in which I am Trustee. And saying a case has interesting facts seems to become code words for contested matters which invariably give rise to written decisions.

The facts are relatively straight forward. I have simplified the facts for the purposes of this article.¹ The facts are as follows: Debtor owned a business in New York City and owed a creditor a debt for the purchase costs associated with buying the business. As happens in countless cases numberless times, our debtor ceased paying the creditor. The debt in question was approximately \$340,000.00. Debtor owned his house jointly with his wife. At around the same time as debtor stopped paying the creditor, debtor sold the house and took his portion of the net proceeds and put the funds in a bank account in his wife's name. Debtor's portion of the sale proceeds subverted into debtor's wife's account exceeded \$100,000.00. Debtor then filed a Chapter 7 petition and lists as his major creditor the creditor who sold him the business in New York City. The property was sold and the funds were transferred to his wife within six (6) years, but more than one (1) year prior to the date of the filing of debtor's Chapter 7 petition. To make it even more fun, debtor's wife did not file.

Wow. It seems like we are back in law school looking at a Final Exam question. But we are not in law school anymore. When confronted with this problem as a debtor's attorney or as a Trustee, what do we do here? Joining the Peace Corp is not an option. I am told that I am too old to run away and join the Circus.

Lets look together beyond the facts to the real question presented.

Can the Trustee avoid the transfer of the money from debtor to his wife occurring more than one year but less than six (6) years prior to the date of filing?

The Bankruptcy Code allows a Trustee to avoid transfers as preferences made within the ninety (90) days prior to the date of filing for non-insiders and one (1) year on transfers to insiders. The Trustee in this situation has to look beyond the Bankruptcy Code and incorporate creditor's remedies available under state law.² One of the state law remedies available to the Trustee is New York Debtor Creditor Law section 273 *et seq.* which allows a creditor to bring an action to avoid a fraudulent conveyance such as occurred in the fact pattern above if it occurred within the six (6) years prior to the date of filing, assuming all of the other conditions of the fraudulent conveyance action are met.

Many practitioners make the common mistake on relying on the language of Question #10 in the Statement of Financial Affairs which require that debtors disclose transfers made within one year of the date of filing. Seeing the one (1) year language in the Official Forms has given many the false impression that the rule is one year on transfers, thus wait for the one year to expire, then file your petition and then debtor is home free. Don't get sucked into this trap for the unwary, Trustees can avoid certain transfers going back for six (6) years.

Can a Trustee avoid all transfers going back six (6) years? To answer that question, we must look at the statute:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to the creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

(New York Debtor Creditor Law Section 273)

And then to make the meaning of the law clearer, the above section is to be read in conjunction with the following section:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

(New York Debtor Creditor Law Section 276)

So if the transfer was made by the debtor to another party without fair consideration to either render the transferor insolvent or to defraud the transferor's present or future creditors, that transfer is the potential subject of an avoidance action by the Trustee.

The period of time in which this action can be brought is six (6) years under state law.³

Applying the law to the facts gives the Trustee in the above fact pattern the power to use state law to avoid the transfer from debtor to his spouse. The money subverted by debtor from the sale of his residence into his wife's bank account which appears to have been transferred for the sole purpose of keeping the funds out of the hands of the creditor who sold debtor his business can be recovered by the Trustee for the benefit of debtor's creditors.

It is relatively easy to apply the law to the facts in a hypothetical set up in an article to illustrate a point. The real question is what are the practical implications which can be drawn from this. The practical implication for debtor's attorneys is that in questioning a debtor regarding transfers of money or property, the attorney needs to ask about all transfers made within the six (6) years prior to the date of filing and not just the one (1) year as set forth in Question #10 of the Statement of Financial Affairs. The failure to ask these questions prior to filing can and have resulted in actions being brought by the Trustee to avoid transfers made by the debtor which the debtor did not know could be avoided. It has been my experience that the transfers made by debtors to third parties more than one (1) year but less than six (6) years prior to the date of filing have invariably been made to the non-filing spouse.

The implications for the Trustee panel is that state law fraudulent conveyances remedies are powerful tools to be used for the recovery of assets. But if in questioning a debtor at a section 341 meeting we don't ask about transfers made within the six (6)

years prior to filing we will probably never find out about the assets we missed due to the current wording of the Official Forms.

¹ The facts are set forth in detail in Judge Littlefield's decision in Marc S. Ehrlich, Chapter 7 Trustee v. David F. O'Keefe and Mary Lou O'Keefe, Case No. 00-13394. A copy of the decision can be found on the Court's Web Site.

² See 11 U.S.C. Section 544(b)(1).

³ See New York CPLR 213.

“YOU THOUGHT YOU WERE A BANKRUPTCY LAWYER?” MATRIMONIAL ISSUES IN BANKRUPTCY

*By: Richard H. Weiskopf, Esq.
Fred L. Goodman, Esq.*

I. NONDISCHARGEABILITY OF MARITAL DEBT

Any discussion concerning the crossroads of matrimonial law and bankruptcy law must begin with a review of the nondischargeability provisions of 11 USC 523(a)(5) and 11 USC 523(a)(15) which are set forth below.

Sec. 523. - Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that -

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless -

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

However, before reviewing the substantive law differences between these seemingly complementary subsections of the statute, the practitioner must be aware of the significant procedural distinctions which can prove catastrophic for the unwary. The nondischargeability provisions of 11 USC 523(a)(5) are absolute, and can be considered by the Bankruptcy Court or by an appropriate state court after the Bankruptcy Case has been closed. The nondischargeability provisions of 11 USC 523(a)(15), are waived by the non-debtor spouse unless the provisions of 11 USC 523(c) and Bankruptcy Rule 4007(c) are followed and an adversary proceeding is brought within 60 days of the first date set for the meeting of creditors.

Sec. 523(c)

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) (emphasis added) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

(Rule 4007(c))

A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

A wise practitioner representing the non-debtor spouse should upon the commencement of a Bankruptcy Case bring an adversary proceeding seeking a judgment of nondischargeability; pleading in the alternative both 11 USC 523(a)(5) and 11 USC 523(a)(15). This is important even in cases in which the state court has granted maintenance, support or alimony. In the prior state court action the New York Judge made a ruling under the applicable New York law as to how an item is labeled. The determination of dischargeability is intrinsically an issue of federal law which was not previously decided by the state court. The Bankruptcy Court is not bound by the labels placed on a payment or stream of payments by the state court in a divorce action.

“The state court conclusion that the debt is equitable distribution is highly persuasive. However, the determination of whether a monetary award is in the nature of alimony and/or maintenance, and therefore nondischargeable is an issue of federal law.” Vincitore v. Guidarelli (Bankruptcy Court NDNY (Littlefield, J.) 2001)

“[T]he label that the parties attach to a payment is not dispositive; the court must look to the substance, and not merely the form, of the payments.” In Re Brody 3 F.3d 35 (2d. Cir. 1993)

The characterization of the payments made pursuant to a Separation Agreement which has been incorporated into the divorce judgment upon the consent of both parties, likewise is not dispositive. Any court (Bankruptcy or state) will make an independent inquiry to determine the proper label under the federal law to determine dischargeability. If an adversary proceeding has not been brought within the 60 days allowed by Bankruptcy Rule 4007 and a determination is later made that the payment was not in the nature of maintenance, support or alimony the non debtor spouse will no longer be able to seek a judgment of nondischargeability under 11 USC 523(a)(15).

An adversary proceeding which has been timely brought will provide the non-debtor spouse two possible avenues to obtain a judgment of non dischargeability.

II COURT ANALYSIS

A. LEGAL STANDARDS

Upon the commencement of an adversary proceeding, in the Bankruptcy Court, within the 60 day period the non-debtor spouse will attempt to preserve the prior state court judgment or separation agreement.

The first analysis which the bankruptcy court will make is whether or not the debt falls within the nondischargeability provisions of 11 USC 523(a)(5). If the debt is an exception to discharge under the applicable Federal law defining an obligation of alimony, support for maintenance the analysis under 11 USC 523(a)(15) is not required and the non-debtor spouse will have prevailed and the debt will be nondischargeable.

If after the initial analysis the court finds that the obligation is for property distribution further analysis must be undertaken to determine the dischargeability, as the debt may in fact be dischargeable.

At this juncture the Bankruptcy court must make determinations that would appear on their face to have many of the same issues that were before a state court when deciding both support and property distribution. The court must make the two pronged analysis as set forth in the statute. If the court finds that the debtor does not have the ability to pay such debt from his [her] income or property not reasonably necessary for either debtor's or his [her] dependents support, the debt will be dischargeable. If the debtor is not able to prevail on the first prong of this test he (she) may still obtain discharge of the debt if the debtor can prove by a preponderance of the evidence that the benefit to the debtor outweighs the detrimental consequences to the spouse, former spouse or child of the debtor.

These determinations are ultimately fact based issues which will be unique to each case.

B. BURDEN OF PROOF

The plaintiff has the initial burden of proving the elements of nondischargeability; but once having proven those elements the defendant is "required to prove that either he did not have the ability to pay or that the potential discharge of this debt would be more beneficial to him than denial would be to the plaintiff." Clause v Clause (Bankruptcy Court NDNY (Littlefield, J.) 2001); but see In re: Williams, 271 B.R. 449 (NDNY Gerling, J. 12/2001)

III WHAT IS PROPERTY

Property in the context of a proceeding brought pursuant to the Bankruptcy Code is a concept similar to what is learned in a first year property course.

When entering the field of New York divorce law, an entirely new concept of property emerges. Domestic Relations Law

Section 236 distinguishes between marital property (property earned during the course of the marriage) and separate property, which is not subject to equitable distribution.

NY DRL 236 The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held . . .

The analysis of property does not stop with what seems to be a relatively simple statutory definition. Since the equitable distribution law went into effect in 1980 New York courts, in an effort to equitably divide the fruits earned during a marriage, have greatly expanded the traditional definition of property.

The Court of Appeals Grunfeld v. Grunfeld 94 NY 2d 696 (May 2000) upheld a principal of law, believed to be unique to New York, stating "[I]n O'Brien v O'Brien (66 NY2d 576), this Court ruled that, to the extent that it is acquired during marriage, a professional license is marital property subject to equitable distribution (*id.*, at 584). In addressing the issue of valuation, we held that "[t]he trial court retains the flexibility and discretion to structure the distributive award equitably"

Under any traditional analysis a license is not property. Within the bankruptcy court, the license would not be considered an asset of the estate to be distributed for the benefit of creditors. A license (with limited exceptions) is a personal right which is not capable of being sold or transferred so it does not have the distinction of property. This dichotomy produces the result of a large Equitable Distribution award which can only be satisfied out of other property or future payments.

The requirement to make future payments on account of an Equitable Distribution award valuing the net present value of the future income stream is on its face a property distribution subject to being dischargeable unless the non-licensed spouse can prove non dischargeability pursuant to 11 USC 523(a)(15). However, a line of cases starting with McSparron v. McSparron 87 NY 2d 275, require that a New York trial court insure that the equitable distribution award and maintenance award when taken together do not provide the non-licensed spouse with a double or triple payment from the same future income stream. Therefore counsel for the non-licensed spouse should argue to the Bankruptcy Court that to the extent maintenance has been reduced to avoid a double recovery due to the value of the license or professional practice, that a portion of the equitable distribution is in fact support or maintenance. (See the analysis of the overlap in a non license asset case in Cummings v. Cummings, 244 F.3d 1263, (2001)). Without such a proposition the non-licensed spouse in New York is limited to making a claim under 11 USC 523(a)(15) for at least a portion of the funds which may be required for basic living necessities.

In addition to the valuation of the monetary value of a license the divorce court also needs to value in the business interests which are owned by a party to a divorce action. In bankruptcy the court will look to a liquidation value in most cases. The divorce court values a going business or a professional practice based on the stream of income which can be provided by the operation of the business enterprise.

In the case of a law practice the bankruptcy value for a Chapter 7 proceeding would be the value of the furnishings fixtures equipment and accounts receivable of the law practice; while the same practice would be valued for its ability to produce a stream of income when determining equitable distribution.

IV HYPOTHETICAL SCENARIOS FOR DISCUSSION

A. Debtors divorce judgment requires payment above \$1.5 million equitable distribution award to former spouse. At time of filing bankruptcy debtor owned a 100 unit residential apartment complex valued at \$3 million.

B. Debtors divorce judgment requires payment above \$1.5 million equitable distribution award to former spouse. At time of filing bankruptcy debtor, a surgeon, had a medical practice valued by the equitable distribution court, one month prior to the bankruptcy filing, to be \$3 million.

V RECENT NDNY DECISIONS

A. Claus v. Claus, (In re: Steven L. Clause) Littlefield, J. 10/23/2001.

B. Williams v. Williams (In re: Jeanna Williams) Gerling, J. 12/28/2001.

C. Rowan v. Rowan (In re: Mark S. Rowan) Gerling, J. 6/27/2001.♦

TRUSTEE'S FORUM

By: *Karen Simons*

The Capital Region Bankruptcy Bar Association is pleased to announce the "Trustee's Forum", a column that will run in each Newsletter. The column provides the United States Trustee's Office with a conduit to reach many bankruptcy attorneys in the Capital Region with information on case administration and practice in this District. It is also designed to provide practitioners with the opportunity to Ask the Trustee questions. Members are encouraged to submit questions to Karen Simons by mail at 817 Madison Avenue, Albany, New York 12208 or e-mail at ksimons@nycap.rr.com.

Distributions in Chapter 7 Asset Cases¹

It is naive to assume that asset chapter 7 cases are so few that they are not worth tracking for your debtor or creditor client. As debtor's counsel, you may usually respond "yes" to the trustee's 341 meeting inquiry - "Is this a no asset case counselor?" Your usual response does not, however, negate the fact that in several hundred cases each year the trustees liquidate nonexempt assets and recover substantial amounts for creditors. You are missing an opportunity, when representing a creditor, if you assume that a potential asset case will not provide an adequate recovery to justify the time or effort to stay abreast of its progress.

Since August 1992, the field offices of the United States Trustee Program (USTP) have collected data on the distributions² made by all chapter 7 trustees. More than 278,000 cases are now included in the national database. The USTP Office of Review and Oversight reports that during the five-year period January 1, 1997 through December 31, 2001, trustees disbursed \$7,863,865,139 in 164,442 cases. General unsecured creditors received \$1,948,849,951, or an annual average 24.8 % of the \$7,863,865,139 total receipts.

In recent years, Congress and academics have asked for more detailed information on how the bankruptcy process works. These statistics provide a valuable national resource to examine the outcome of asset cases considering location, size of case, and recovery by class of creditor. For our purpose, it is enough to be alert to the fact that each year substantial sums are distributed by the local trustees. The panel trustees monitored by the Albany Office of the United States Trustee,³ over the same five-year period discussed above, fully administered 1,854 asset cases and disbursed \$56,923,484 to creditors. Locally, general unsecured creditors received \$15,321,802 or 26.9% of total receipts, slightly higher than the national average.

For the period January 1, 2001 through December 31, 2001, Northern District of New York (Albany Division) trustees disbursed \$5,668,106 in 212 cases. The distribution to general unsecured creditors was \$1,539,026 or 27.2% of total receipts. Several of these cases were "surplus money" cases. A name commonly used to describe a case in which creditors have received full payment with interest on allowed claims, and the monies remaining are refunded to the debtor pursuant to 11 U.S.C. § 726(a)(6). In fact, in excess of \$450,000 was returned to debtors, oftentimes because creditors simply failed to file proofs of claim.

The lesson to be learned should be apparent. There are substantial sums administered by the chapter 7 trustees. It is effortless to track activity in a case using PACER. The advent of Case Management/Electronic Case Filing ("CM/ECF") will allow you to run queries on cases and will further simplify monitoring cases. Most important, you can use these electronic tools to further your client's cause.

Do not give up on a recovery for your creditor client when you receive the first notice stating there are no assets in the case. Monitor the case using one of the Court's electronic databases, and if there is activity (*e.g.*, objections to exemptions, sale notices, or adversary proceedings) which indicates there may be assets, file a notice of appearance. In the alternative, advise your client to be alert for the receipt of the notice pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 3002(c)(5), notifying creditors of the existence of assets and the bar date for filing proofs of claims. Then be sure they timely file a proof of claim.

If you represent the debtor, be certain creditors with nondischargeable claims have filed claims. If not, the debtor has the right to file a claim on their behalf pursuant to 11 U.S.C. § 501(c) and FRBP 3004. Failure to file the claim will hamper the debtor's "fresh start" with an obligation that could have been at least partially satisfied through the case distribution. The debtor may also want to ensure a creditor who is a relative, friend or even a vendor who the debtor intends to continue to do business with has filed a claim to participate in the distribution.

Regardless of who you represent, debtor or creditor, identifying and tracking the chapter 7 asset cases can ensure that your client's position in the case is maximized.

1 Kim F. LeFebvre is the Assistant United States Trustee in the Albany Office of the United States Trustee. The views expressed herein are the views of the author and are not intended to reflect the views of the Department of Justice, the Executive Office for United States Trustee or any United States Trustee.

2 The term distribution is not limited to disbursements made pursuant to 11 U.S.C. § 726 and Federal Rule of Bankruptcy Procedure 3009. The data includes all gross receipts disbursed (*e.g.*, exempt funds, satisfaction of liens at closing, etc.).

3 These trustees include those administering chapter 7 cases in the Northern District of New York (Albany Division), the District of Vermont, and the Southern District of New York (Poughkeepsie Division).

OTESAGA UPDATE

By: Paula M. Barbaruolo

The Capital Region and Central New York Bankruptcy Bar Associations' Seventh Annual Bankruptcy Conference is to be held on November 8 – 9, 2002. As in the past, the program will be held at The Otesaga Hotel, one of Central New York's finest hotels, in Cooperstown, New York.

The conference boasts an exciting group of speakers who have committed to the including Chief Judge Frederick J. Scullin, Judge Jed S. Rakoff, Chief Judge Stephen J. Gerling, Judge Robert E. Littlefield, Jr., Judge Barry S. Schermer, David A. Lander of Thompson Coburn, LLP, Michael Cook, Esq., of Schulte, Roth & Zabel, LLP, Michael J. O'Connor, Esq. of O'Connor, O'Connor, Mayberger & First, PC, Louis Testa, Esq., Paul Fisher, Esq., Gregory Harris, Esq., Diane Cagino, Esq., David Demeter, Esq. of NYS Tax and Finance, and William Continelli from the Internal Revenue.

Some of the many topics to be discussed include UCC Revised Article 9, avoidance and preferences, handling mass torts in bankruptcy, Chapter 13 Judge's discussion panel, Chapter 7 and Chapter 11 round table break-out sessions, tax issues and ethics.

We expect to have the brochures sent within the next month. Be sure to register early because the Seventh Annual Bankruptcy Conference promises to rival years past!♦

ANNOUNCEMENT

Louis J. Testa, Esq. has moved and can be reached at the following addresses:

Home: 3 East Road, Storrs, CT 06268

Work: Zeisler & Zeisler, PC, 558 Clinton Avenue, Bridgeport, CT 06605; 203-368-4234, ext 221; email: ltesta@zeislaw.com.♦

IN MEMORY

In Memory of Billie Daffner, wife of esteemed colleague Howard Daffner, Esq., CRBBA made a donation to the American Heart Association.♦

NOTICE

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:

June 4, July 2, August 6, September 3

10:00 a.m. Motions in Chapters 7 & 11

2:00 p.m. Pre-trials/Chapter 11 status conferences *

June 13, July 23, August 22, September 17

10:00 a.m. Motions in Chapter 12 & 13

2:00 p.m. Chapter 13 confirmation hearings

Binghamton cases:

June 18, July 9, August 20, September 10

10:00 a.m. Motions in Chapters 12 & 13

1:00 p.m. Chapter 13 confirmation hearings

June 27, July 25, August 29, September 26

10:00 a.m. Motions in Chapter 7 & 11 and

Motions in The Bennett Funding Group, Inc.

12:00 p.m. Pre-trials/Chapter 11 status conferences*

Utica cases:

June 25, July 30, August 27, September 24

10:00 a.m. Motions in all chapters

1:00 p.m. Chapter 13 confirmation hearings

2:00 p.m. Pre-trials/Chapter 11 status conferences *

* Scheduled by Court

Articles for publication in the newsletter are welcome and should be submitted to: F. Matthew Jackson, Deily Dautel & Mooney, LLP, 8 Thurlow Terrace, Albany, New York 12203.

Please send address change information and/or membership issues to: Karen Simons, Esq., 817 Madison Avenue, Albany, New York 12208.

NOTICE

Albany return dates for Judge Littlefield are set forth below:

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

The following are Judge Littlefield's 2002 motion dates:

June 12, 28

July 3, 19, 25

All requests for pre-trials, trials, hearings 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 filing was on April 28, 1995, Case No. 95-11613, Blanchard.)

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.

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