

CAPITAL REGION BANKRUPTCY BAR ASSOCIATION

NEWSLETTER

Published By:
C.R.B.B.A.

Editor: Brenda Lubrano-Birken, Esq.
Assistant Editor: Todd Ritschdorff, Esq.

SUMMER 2005

IN THIS ISSUE

<i>President's Message</i>	1-2
<i>25 Changes to Personal Bankruptcy Law</i>	2-6
<i>Proposed Bankruptcy Legislation</i>	6-7
<i>Decision of Interest - Rousey v. Jacoway</i>	7-8
<i>A Second Call to C.A.R.E.</i>	8
<i>C.A.R.E. Presentation Experiences</i>	8-9
<i>Mindful Lawyering: Awake at Work</i> <i>(Part II)</i>	9-11
<i>Clerk's Corner</i>	11-13
<i>Pro Bono Representation Needed</i>	13
<i>Member News</i>	13
<i>CRBBA Board Meetings</i>	13
<i>Judge's Motion Dates</i>	14
<i>Upcoming Seminar: Consumer</i> <i>Bankruptcy and the New Law</i> ...	See Flyer Insert

2005 OFFICERS AND BOARD OF DIRECTORS

President	Paula M. Barbaruolo
President-Elect	Bonnie S. Baker
Vice President	Francis J. Brennan
Secretary	Brenda Lubrano-Birken
Treasurer	James E. Doern
Director	Barbara Whipple
Director	Anthony Arcodia
Director	Henry Collins
Director	William Schiller

PRESIDENT'S MESSAGE

As I sit in my yard on a beautiful Sunday morning in June, listening only to the sound of chirping birds, I have an opportunity to actually reflect on what has occurred during the last couple of months or so in the world of bankruptcy law.

As you all must know by now, on April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act. The law takes effect on October 17, 2005 with some of the provisions already effective. The American Bankruptcy Institute website is a good resource for information on the new law; it can be found at www.abiworld.org.

The Bankruptcy Code with which we are familiar will cease to exist in about four months. The process will be fundamentally different: There is a means-based test debtors must pass before qualifying for Chapter 7 bankruptcy relief; debtors will need to attend credit-counseling sessions before filing for relief; budget items will be based on IRS tables; and, cram-downs in a Chapter 13 have been limited. The changes are almost too numerous to list in this message. There is, however, a list of the top 25 changes contained in this Newsletter.

We will all need to learn the new law. It will be upon us before we know it. There are numerous bankruptcy seminars going on around the country dealing specifically with the massive Bankruptcy Code changes. The CRBBA will be conducting its own educational programs for the benefit of its members. In early August the CRBBA will offer a two-hour "Hit the Highlights"

luncheon/discussion program designed to be an overview of the major changes. Thanks to the invaluable assistance of Andrea E. Celli, on September 16, 2005 the CRBBA will conduct a full-day program, which will be modeled on the seminar created by the National Association of Chapter 13 Trustees (which is being presented in July in Florida). You should have received a "Save the Date" flyer for this program within the last month. Please note that the date has been changed due to a conflict with another regional bankruptcy seminar.

These CLE programs are being coordinated by Bonnie Baker, Andrea Celli, Diane Davis, Cynthia Platt, and I. If you have any questions or suggestions, please contact me at 782-9100 or pbarbaruolo@oblawyers.com.

Please note that if you did not attend the 2004 Annual Seminar in Cooperstown, you may not have paid your 2005 dues. If you have not paid the annual dues, you must do so as soon as possible to continue to receive CRBBA mailings. If you are not sure if you are currently an active member of the CRBBA, please contact Henry Collins at 449-3900.

While the passing of the new legislation is in the forefront of our minds, the CRBBA is also continuing to provide other valuable services. Members of the bar, led by Barbara Whipple (for the CRBBA) and Joann Sternheimer (for the Capital District Womens Bar Association), have recently taken The CARE Program to many high schools and have scheduled more presentations in the near future. You can read more about CARE and other programs sponsored by the CRBBA within this Newsletter.

Remember, Board meetings are open to the association. Due to the new Court calendar system, meetings now take place on the second Tuesday of each month at 8:15 a.m. at my office at 12 Cornell Road, Latham. Hope to see you there. ■

*Paula M. Barbaruolo,
President*

25 CHANGES TO PERSONAL BANKRUPTCY LAW*

*By: Samuel J. Gerdano***

1. Means Test for Chapter 7 Eligibility

The Trustee or any creditor can bring a motion to dismiss under §707(b) if the debtor's income is greater than the state median income. Abuse is presumed if the debtor's currently monthly income (as determined by an average of the previous 6 months) less secured payments divided by 60, less priority debts divided by 60, less the allowed expenses permitted by the IRS, less certain other allowed expenses, is greater than \$100 per month of a Chapter 13 plan. Debtors who meet this new standard would be shifted to 5 year repayment plan in Chapter 13.

If a debtor's income falls below the state median, the court may still find abuse but the creditors do not have the standing to file the motion.

In determining whether the median threshold has been reached, the law looks at the number of people in the debtor's household (which the census bureau defines to be all the people occupying a dwelling unit) compared to census figures adjusted by the CPI.

The presumption of abuse may only be rebutted by demonstrating "Special circumstances that justify additional expenses or adjustments of current monthly income."

2. Mandatory Credit Counseling

No individual may be a debtor under title 11 unless they have, within 180 days prior to filing, received credit counseling from an "approved nonprofit budget and credit counseling agency", either in an individual or group briefing. Said counseling agencies are to be approved by the U.S. Trustee. (There are exceptions where there is an emergency and the person could not receive counseling within five days, or where the U.S. Trustee has determined that the approved agencies are not adequate to provide the required counseling). If a debt management plan is developed it must be filed with the court.

3. Limit on Auto Lien Stripping in Chapter 13

A Chapter 13 plan must provide that a secured creditor retain its lien until the payment of the entire debt,

not just the secured portion, where the creditor holds a security interest in a motor vehicle purchased within 910 days of the filing.

4. Mandatory Debtor Education

The court may not grant a Chapter 13 discharge unless the debtor has completed an education course in personal financial management as approved by the U.S. Trustee. A debtor can be denied discharge under §727 if the debtor fails to complete the course.

5. Scope of Discharge

Debts owed to a single creditor totaling more than \$500 for luxury goods incurred within 90 days of filing are presumed non-dischargeable; cash advances of \$750 within 70 days are similarly treated.

6. Serial Filings (Chapter 20)

A discharge will not be granted in Chapter 13 if the debtor obtained a discharge in Chapter 7, 11 or 12 within the 4 years prior to the date of filing of the pending case, or in a Chapter 13 case filed within 2 years of the pending case. This provision, though, does not prevent the debtor from filing a Chapter 13 case, and receiving the benefits of the stay, including the ability to cure arrearages on secured claims over a period of time.

7. Time between Discharge

Chapter 7 Debtor cannot receive a discharge if a prior discharge was received within 8 years (rather than 6) of the new filing.

8. Homestead Exemption

Debtors may elect state exemptions in the state in which they have lived for the 730 days prior to the bankruptcy. If they have moved during that 730-day period, the state exemptions are those for the state in which they lived the majority of the time for the 180 days before the 730-day period. Regardless of the level of state exemptions, the debtor may only exempt up to \$125,000 of interest in a homestead that was acquired within the 1,215-day period prior to the filing, but the calculation of that amount does not include any equity that has been rolled over during that period from one house to another within the same state. For those who have violated securities laws or engaged in certain criminal conduct, the cap is \$125,000, notwithstanding a higher State law allowance. To the extent the homestead was obtained

through fraudulent conversion of nonexempt assets during the 10-year period before the filing, the exemption is reduced by the amount attributed to the fraud.

9. Reaffirmations

Section 524 now contains extensive new disclosures, detailing the rights that the debtor has and specifying the amount of debt reaffirmed, rates of interest, when payments will begin, filing requirements with the court, the right to rescind, a certification that the agreement does not impose an undue hardship on the debtor. Such agreements are presumed to create a hardship if the debtor's expenses including the reaffirmed debt exceed income. If there is such a presumption, the debtor must explain to the court why it can, nevertheless, still afford to satisfy the debt (but no such requirement applies if the reaffirmed debt is owed to a credit union). The disclosure requirements are satisfied if "given in good faith." A creditor can accept payments under a non-compliant reaffirmation as long as the creditor "believes in good faith" that the agreement is effective.

10. Limit on Automatic Stay

The new law limits the application of the stay or provides that it does not go into effect, in certain circumstances, where there are serial filings under circumstances that would indicate bad faith or abusive filings. The stay terminates after 30 days if there is a filing by an individual in Chapter 7, 11 or 13 (but not Chapter 12) within 1 year after the prior case (under any Chapter) was dismissed (except for a case re-filed in another chapter after a dismissal of a Chapter 7 case based on the means test). A party in interest (including the debtor) may move to extend the stay and show that the filing is in good faith. A case is presumed to be in bad faith for this purpose if more than one case was pending in Chapters 7, 11 or 13 (again, not in Chapter 12) and at least one such case was dismissed for failure to file required documents without substantial excuse, to provide adequate protection, or to complete a plan, and there is no showing that the debtor's financial situation has changed so as to allow a final discharge or completion of a plan. If two or more cases under any Chapter were dismissed during the prior year, the automatic stay does not go into effect at all until the court so orders after a hearing and a demonstration that the filing was made in good faith. The same bad faith factors noted above are also applicable to this determination. The law also provides that the stay will terminate if the debtor does not timely file (i.e., within 30 days after the petition date) its statement of intent with respect to property subject to a security interest and timely

(i.e. within 30 days after the first date set for the §341 meeting) complies with the stated intention. The court may extend the stay upon the motion of the trustee if the property is of the value to the estate and adequate protection is afforded to the creditor.

11. Notice to Creditors

Notice to be given by a debtor to creditors must be to the address designated by the creditor, either in communications to the debtor or by the creditors preferred address as provided to the court. Such notice to creditors must include account numbers.

12. Duration of Chapter 13 Plans

If the Chapter 13 debtor's income is greater than the state median income, the plan proposed must be for 5 years. On the anniversary date of a confirmed plan, a debtor must file a new statement of income and expenses.

13. Dismissal for Failure to file Documents and Schedules

In addition to the list of creditors, schedules of assets liabilities, income and expenses, debtors must provide:

- a. certificate of credit counseling;
- b. evidence of payment from employers, if any, received 60 days before filing;
- c. statement of monthly net income and any anticipated increase in income of expenses after filing;
- d. tax returns or transcripts for the most recent tax year;
- e. tax returns filed during the case including tax returns for prior years that had not been filed when the cases began; and
- f. a photo ID, among other items.

Failure to provide the documents within 45 days after the petition has been filed (with a possibility of a 45-day extension) results in automatic dismissal of the case after the time period has passed.

14. Attorney Verification Required

Attorneys must make "reasonable inquiry to verify that the information contained" in petitions and schedules are "well grounded in fact." "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 petitions is incorrect."

15. Disposable Income Test in Individual Chapter 11 Case

Under the newly-added §1115, property of the estate includes, in addition to the property specified in §541, all property "that the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted" and "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted." Under an amendment to §1129, the plan must commit the debtor's disposable income for the 5 year plan period.

16. Debtor's Statement of Intent

Debtor must perform §521 statement of intent as to secured property within 30 days after the date set for the first creditors meeting. Failure to either redeem the property or reaffirm the debt within 45 days after the §341 meeting results in termination of the automatic stay (as noted above) and allows the creditor to exercise whatever remedies it has under applicable non-bankruptcy law, subject to a request by the trustee to extend the stay upon providing adequate protection to the creditor.

17. Domestic Support Obligations

Support obligations are a first priority, but the administrative costs of a trustee are paid ahead of the support costs to the extent that the trustee is administering assets that can be used to pay support costs. To the extent such support claims have been assigned to or are directly recoverable by a governmental entity, such claims are subordinated to the support of claims that are not assigned. The stay does not apply to the payment of a domestic support obligation from property that is not property of the estate or to the enforcement of a wage withholding order under a judicial or administrative order, or statute, including obligations accruing from both before and after the filing. Failure to remain current on support claims is grounds for conversion or dismissal of a case, the debtor must be current on post petition obligations in order to confirm a plan, the plan must provide for priority payment

or support debts (with a limited cramdown available for claims assigned to or owed directly to a governmental unit), and the debtor may not obtain a discharge unless such obligations are paid in accordance with the terms of the plan.

18. Superdischarge in Chapter 13 Reduced

Debts for trust fund taxes, taxes for which returns were never filed or filed late (within two years of the petition date), taxes for which the debtor made a fraudulent return or evaded taxes; fraud and false statements under §523(a)(2), unscheduled debt under §523(a)(3), defalcation by a fiduciary under §523(a)(4), domestic support payments, student loans, drunk driving injuries, criminal restitution and fines and civil restitutions or damages rewarded for willful or malicious personal actions causing personal injury or death are now excepted from discharge.

19. Attorneys as “Debt Relief Agencies”

Must disclose to the public in advertising that “we help people file for relief under the Bankruptcy Code.” They cannot advise a debtor to incur more debt in contemplation of bankruptcy. They must disclose all their costs, enter into a written contract with the debtor and disclose that an attorney is not necessary to file bankruptcy, among other disclosures.

20. Asset Protection Trusts

Under new §548(e), a trustee can avoid the debtor’s transfer in an interest in property made within 10 years of the filing if the transfer was made to a self-settled trust or similar device by the debtor for the benefit of the debtor and the transfer was made with the actual intent to hinder delay or defraud any creditor.

21. “Ride-through” Prohibited

The “fourth option” in Chapter 7 cases authorized by some circuits, to retain secured property without reaffirmation by continuing payments (installment redemption), is no longer allowed. The provisions of the §521 and §362 overlap, but are somewhat contradictory. §362(h)(1) and §521(a)(2) provide that the requirements to file the intention and timely perform it apply to any debt secured by property of the estate and that failure to comply terminates the automatic stay. §521(a)(6) appears to set out a different process and time period for the subset of property secured by a purchase money security interest, but the rights provided there appear to be less generous

than those already provided by the broader language in Sections 362(h)(1) and 521(a)(2), so it is not clear which would apply.

22. Changes in Treatment of Taxes

Taxes related to a fraudulent return or that the debtor attempted to evade are made non-dischargeable in Chapter 11. The debtor is required to pay administrative tax claims whether or not the government files a “request”. The new law requires periodic cash payments of priority tax under Chapter 11 over not more than five years from the petition date and, in any event, under terms not less favorable than those accorded to the most preferred unsecured non-priority creditors (excluding “nuisance” claim payments). The rate of interest on tax claims is the rate specified under applicable non-bankruptcy law.

23. Eviction Proceedings

The stay will not prevent or halt a detainer action if the debtor failed to pay rent after filing.

24. Tax Returns Mandatory

The Debtor must provide a copy of their latest tax return or a transcript at least 7 days before the meeting of creditors or the case “shall” be dismissed. Said information must also be provided to any creditor who requests. All tax returns must be filed for a plan to be confirmed in Chapter 13. The debtor must file all returns from 4 years prior to the Chapter 13 filing.

25. Nondischargeability of Student Loans Expanded

Student loan nondischargeability is extended to for-profit and non-governmental entities.

* Reprinted with permission from the American Bankruptcy Institute (www.abiworld.org). With more than 10,000 members, ABI is the largest multi-disciplinary, non-partisan organization dedicated to research and education on matters related to insolvency. Founded in 1982 to provide Congress and the public with unbiased analysis of bankruptcy issues, ABI is the premier professional organization in the field. Members span the entire spectrum of professionals and include attorneys, accountants, auctioneers, judges, lenders, academics, turnaround specialists, credit professionals and many others.

** Samuel J. Gerdano has served as the Executive Director of the American Bankruptcy Institute (ABI) since 1991. Prior to his work with the ABI, Mr. Gerdano acted as Chief Counsel to Senator Charles Grassley on the Senate Subcommittee on Courts and Administrative

PROPOSED BANKRUPTCY LEGISLATION

By: Todd A. Ritschdorff, Esq.

109th Congress, 1st Session, S.594

Introduced on March 10, 2005 by Senator Arlen Specter [R-PA], S.594, which was referred to the Committee on the Judiciary, would amend Section 1114 of Title 11 of United States Code to prohibit the bankruptcy court from terminating or modifying the payment of coal industry health insurance benefits by a Chapter 11 debtor-employer to retired employees if such benefits are required by the Internal Revenue Code to be provided by such debtor-employer as the last operator signatory to a coal wage agreement.

“Billionaire’s Loophole Elimination Act”
109th Congress, 1st Session, H.R. 1278

Introduced on March 14, 2005 by Representative Rahm Emanuel [D-IL], H.R. 1278, which was referred to the House Committee on the Judiciary and the Subcommittee on Commercial and Administrative Law, would amend Section 548 of Title 11 of the United States Code to permit the bankruptcy trustee to avoid a transfer to an asset protection trust of an interest of the debtor in property made within ten (10) years before filing of the bankruptcy petition, if the transfer amount—or the aggregate amount of all transfers to the trust within the ten-year period—exceeds \$125,000, to the extent that the debtor’s beneficial interest in the trust does not become property of the estate because of a restriction enforceable under applicable non-bankruptcy law (because it is income from a spendthrift trust reasonably necessary for the support of debtor and dependents). H.R. 1278 defines an asset protection trust as one settled by the debtor, in which the debtor has a direct or indirect beneficial interest or under which the trustee may distribute property to or for the benefit of the debtor, and as to which a restriction on the voluntary or involuntary transfer of the debtor’s beneficial interest in the trust is enforceable under applicable non-bankruptcy law. Excluded from the meaning of asset protection trust are specified retirement funds, charitable trusts, and certain educational trust, funds, or accounts.

“Customs Business Fairness Act of 2005”
109th Congress, 1st Session, H.R. 1294

Introduced on March 15, 2005 by Representative Henry Brown [R-SC], H.R. 1294, which was referred to the House Committee on the Judiciary and the Subcommittee on Commercial and Administrative Law, would amend Section 507(a) of Title 11 of the United States Code governing priority among claims and expenses to place in the tenth order of priority allowed unsecured claims for duties, taxes, or other charges paid to the U.S. Customs Service by customs brokers and sureties on behalf of the debtor arising out of the importation of merchandise entered for consumption within one year before the date of the filing of the petition in bankruptcy.

109th Congress, 1st Session, H.R. 1367

Introduced on March 17, 2005 by Representative Frederick Boucher [D-VA], H.R. 1367, which was referred to the House Committee on the Judiciary and the Subcommittee on Commercial and Administrative Law, expresses the sense of Congress that the abuse of the provisions of bankruptcy law by certain coal industry employers is damaging to the economic health of the United States, as well as to the employees who are directly harmed by such legal abuses. H.R. 1367 would amend Section 101 of Title 11 of the United States Code to include new definitions of Coal Industry Employer and Covered Facility of a Coal Industry Employer and Section 363 of Title 11 of the United States Code to declare that a sale by the bankruptcy trustee of a facility owned or operated by a coal industry employer involved in coal production, processing, or transportation is subject to the labor rights of the current and former employees of the debtor and to state that if employees at such facility are represented by a labor organization, such organization is conclusively presumed to enjoy majority support for a period of one year from the date of such sale, or such longer period as required by applicable non-bankruptcy law. H.R. 1367 would also amend Section 1113 of Title 11 of the United States Code to set forth criteria for approval of an application to reject a collective bargaining agreement by a coal industry employer relating to a covered facility and to state that obligations arising under the terms of a collective bargaining agreement before the entry of bankruptcy relief are secured by a lien on all of the debtor’s assets. H.R. 1367 would further amend Section 1114 of Title 11 of the United States Code to declare that all members of a debtor’s controlled group of corporations are jointly and severally liable for damages

arising as the result of the court-approved application for the modification of retiree benefits owed by a coal industry employer relating to a covered facility and would declare that all such claims are entitled to priority status pursuant to Section 507(a)(1). ■

DECISION OF INTEREST

By: Todd A. Ritschdorff, Esq.

*Rousey v Jacoway*¹

On Monday, April 4, 2005, the United States Supreme Court ruled that creditors may not seize Individual Retirement Accounts (IRAs) when people file for relief under the Bankruptcy Code.

Petitioners, husband and wife, filed a joint petition under Chapter 7 of the Bankruptcy Code a few years after they had taken retirement funds from their pension plans and rolled the funds over to IRAs. The Rouseys wanted to shield portions of their IRAs from creditors by claiming them as exempt from the bankruptcy estate under Section 11 U.S.C. 522(d)(10)(E), which includes a “debtor’s right to receive...a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of ...age.” Respondent – Jacoway, Chapter 7 Trustee – objected to such exemption and moved for the IRA’s turnover. The Bankruptcy Court sustained her objection and granted the motion and the Bankruptcy Appellate Panel concurred in that ruling. The Eighth Circuit Court of Appeals affirmed and concluded that even if the Rouseys’ IRAs were “similar plan[s] or contract[s] on account of ...age” as identified in Section 522(d)(10)(E), their IRA’s provided them no right to receive payment “on account of age”; instead, the Eighth Circuit ruled that IRAs were savings accounts readily accessible at any time and for any purpose. The Supreme Court disagreed with the Eighth Circuit, holding that IRAs fulfilled both requirements at issue and that the IRAs could be exempted under Section 522(d)(10)(E).

The requirement under Section 522(d)(10)(E) that the payment be “on account of age” was first at issue. The Chapter 7 Trustee argued that the Rouseys’ right to receive payment from their IRAs was not “because of” any of the factors listed in the statute. In particular, the Trustee asserted that the Rouseys could withdraw funds from their IRAs for any reason at all, so long as they are willing to pay a ten (10%) percent tax penalty. Thus, the Chapter 7

Trustee maintained that there was no causal connection between the Rouseys’ right to payment and age (or any other factor), because their IRAs provided a right to payment on demand.² The Court highlighted that the right to withdraw funds is restricted by a ten (10%) percent tax penalty for all withdrawals from IRAs made before the accountholder turns 59½, and contrary to the Trustee’s contention, that this tax penalty was substantial.³ The Court continued to conclude that the deterrent to early withdrawal suggests that Congress designed it to preclude early access to IRAs and cited low rates of early withdrawals consistent with the notion that this penalty substantially hinders early withdrawals from such accounts.⁴ Because the penalty applied proportionally to any amounts withdrawn, it prevented access to the ten (10%) percent that the Rouseys would forfeit should they withdraw early, and thus, it effectively prevented access to the entire balance in their IRAs. Therefore, held the Court, the penalty limited the Rouseys’ right to “payment” of the balance of their IRAs, and because this condition is removed when the accountholder turns age 59½, the Rouseys’ right to the balance of their IRAs was a right to payment “on account of” age.⁵

Section 522(d)(10)(E)’s second requirement—that payment is made “under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract” – was next at issue. The Court found the Trustee’s claim unpersuasive that the IRAs could not be “similar plans or contracts” because the Rouseys have complete access to them and also rejected the Chapter 7 Trustee’s argument that the availability of IRA withdrawals exempt from the ten (10%) percent penalty rendered the Rouseys’ IRAs more like savings accounts.⁶ In discarding these contentions, the Court specifically relied on clause (iii) of Section 522(d)(10)(E), which states that a right to receive payment is not exempt and a debtor cannot use this exemption, if “such plan or contract does not qualify under section 401(a), 403(a), 403(b) or 408 [the Section that governs IRAs found in Title 26 of the United States Code] of the Internal Revenue Code of 1986.”⁷ Thus, held the Court, “it makes little sense to exclude from the exemption plans that fail to qualify under § 408, unless all plans that do qualify under § 408, including IRAs, are generally within the exemption. If IRAs were not within 11 U.S.C. § 522(d)(10)(E), Congress would not have referred to them in its exception.”⁸ The Court continued to state that “[m]ore specifically, clause (iii) suggests that plans qualifying under 26 U.S.C. § 408 (2000 ed. and Supp. II), including IRAs are similar plans or contracts.”⁹ ■

¹ 125 S.Ct. 1561 (2005)

² See *id.* at 1566.

³ See *id.* at 1567-68.

⁴ See *id.* at 1567 n.1

⁵ See *id.* at 1567-68

⁶ See *id.* at 1569-70

⁷ See *id.* at 1570

⁸ See *id.* at 1571

⁹ *Id.*

A SECOND CALL TO C.A.R.E.

By: Barbara Whipple, Esq.

When I undertook the responsibility of being the CARE (Credit Abuse and Resistance Education) Coordinator for the Capital Region Bankruptcy Bar Association, I never expected the program to expand as it has. Now that I have conducted several CARE presentations I cannot believe it has taken so long for this program to become what it is and I am eager to see what it can become.

I have had the wonderful opportunity to conduct CARE presentations at Colonie High School and Ichabod Crane High School. These experiences are difficult to describe but wonderful nonetheless. The students were bright and enjoyable to deal with and thus far I have not gotten hit with any spitballs. At the end of these classes I could not help but wonder if the presentations had an effect on the students. Maybe only time will tell and maybe I am overly optimistic but I do believe that at some point these students are going to remember something I have said and that makes a difference.

I was so pleased with my CARE education experiences that I started scheduling myself for the presentations whenever I was contacted. I really need to get better help and that is why I am once again requesting that anyone who is interested in this program contact me.

I can't say enough about the experience and I encourage all attorneys to give at least one presentation. You won't regret it! I have compiled materials and outlines for presentations and will be happy to forward them to anyone who would like to be a CARE educator. In addition, the CARE website – www.careprogram.us – as a plethora of materials and information.

There have been numerous CARE presentations and we would not have been able to reach all of the

students if it had not been for the attorneys who so graciously gave their time. To those attorneys, and to all the other attorneys who continually volunteer for these presentations, I thank you. I would also like to thank Joann Sternheimer who has taken the lead in coordinating these programs on behalf of the Women's Bar Association.

I am currently scheduled to bring the CARE program to several teacher workshops this summer and statewide all business teachers will be contacted in August regarding the CARE program. We expect we will need many more volunteers so, as previously noted, if you are interested in giving a little time with great rewards please contact me at:

Barbara Whipple
Orlando & Barbaruolo, PLLC
12 Cornell Road
Latham, New York 12110
(518) 782-9100. ■

C.A.R.E PRESENTATION EXPERIENCES

Albany High School
By: Leigh Hoffman, Esq.

On April 26, 2005 I spoke to Ms. Demarco's twelfth-grade students at Albany High School about the CARE program. I was hoping to not bore them to sleep with busy numbers about which they could not have any concern, but much to my pleasure they were truly interested and involved. Ms. Demarco's students were typical teenagers in that they could not believe that charging interest for going to college was LEGAL! They also could not believe that paying for a wardrobe fifteen years later was possible. Many of the students were college bound and had not considered any expense other than tuition and room and board, so budgeting for those other expenditures was fun to review with them. I felt as though the information that I had the opportunity to convey might actually help prepare them for college and perhaps even real life. The CARE website – www.careprogram.us – was extremely helpful in preparing my materials and hopefully the same will be useful to the students as reinforcement for the presentation. Speaking with the students was an incredibly welcome change in my weekly routine and I would highly recommend that all attorneys consider giving such a presentation because of

the positive impact that it has not only on the students but also on the presenter.

Albany High School
By: Henry Collins, Esq.

On April 26, 2005, I made a CARE presentation to two combined business and economics classes at Albany High School. Primarily using materials drawn from the CARE website, I covered five topics, as follows: What is credit? How to use credit wisely and correctly; How to use credit very stupidly; The potential consequences of being stupid about credit; and finally, How to do it right.

Both classes were remarkably engaged and attentive. In response to my introductory questions, a majority of the students indicated that they planned on attending college and that they knew someone who had abused credit. That first question came up later when we touched on the amount of credit they would be offered at school (and why they should run, not walk, away from those offering the credit cards and a nifty free gift for signing up), and how misused credit could affect their ability to attend college, and many other things, because of its impact on their ability to obtain student loans.

Using a few specific examples of the true cost of credit, and how much such credit would actually cost computed over time, the students seemed to come away with an enhanced appreciation of the “power” of credit, both positive and negative.

Finally, we talked about how (and why) to establish good credit, specific means of doing so, and certain warning signs that a person’s use of credit was entering the danger zone. ■

see how often and easily we become involved in and get carried away by a torrent of thinking.¹ Meditation encourages us to trade our constant planning, worrying, and rehearsing past or future events in exchange for this present in-breath, this present out-breath. In “guided” sitting meditations, teachers will often ask, “where is your mind right now?” If we are “away,” the training invites us to lead our wandering mind back to our breath, as we would a puppy or small child. As we do this work, we come to *see* how much of our life is habitually spent in the past and future and begin to focus on life as it is here and now; the result is a growing ability to keep our consciousness “where the action is,” in the present.

Additionally, mindfulness practice intentionally suspends the reactivity and judging that are so conditioned in attorneys and professionals. It asks us to pay close attention to and notice what is happening externally and internally, *without* judging, even as we are participating in any given situation or scenario, so that we may appropriately respond to it.

For example, suppose I represent the defendant in a sexual discrimination claim that was filed a few months ago. I am on the telephone with opposing counsel, who has just received my notice to take the deposition of his client, the plaintiff. During this conversation, opposing counsel makes some very unflattering observations about my client, and then comments that anyone who represents such a person is likewise “suspect and probably cannot be trusted.” If I am practicing mindfully, I am listening closely and watching what these comments are conjuring for me – anger, astonishment, hurt, protectiveness. I notice my physical reactions to them – a quickening pulse and heartbeat and a warming sensation permeating my ears and face. I take a mindful breath or two. I may consider possible reasons for counsel’s comments, my client’s interests and options available to me. And then, from a place of depth and spaciousness, I am ready to act with balance and purpose. Writing this article now, I cannot know for certain what I would say or do next. But I do know that it would likely be a *response* to the situation, as opposed to a knee-jerk, emotionally driven *reaction* to what the other attorney said. This means that my own ego is less likely to be driving my response, and this is good news for everyone involved, me included. My personal experience is that mindful decision-making often brings new imagination and creativity to my response. Whether I choose to make a strong statement to let counsel know that he is out of line, try a new tack, or say nothing at all, I am making the decision consciously and because it is decidedly the best course of action.

MINDFUL LAWYERING – AWAKE AT WORK (PART II)*

*By: John Monterisi, Esq.***

*The Advantages of Not Thinking,
Not Acting, Not Judging*

Mindfulness is all about paying attention. If we do this simple – but not necessarily easy – work every day, the utility and power of mindfulness meditation becomes apparent after a few weeks of practice. For example, we

Becoming aware of the distinction between response and reaction, and looking at how we make our judgments, are two additional ways that mindfulness practice can make a big difference in our lives as lawyers. We are taught from the beginning to sharpen our abilities to react quickly and judge constantly, whether in the context of the Socratic method used by law school professors or years of on-your-feet experience that goes into making a fine trial lawyer. These abilities are valuable of course, but so much less so when what we are judging or reacting to is, to a great extent, a product of our own thinking. The mindful lawyer has the advantage of being very much aware of and focused on what is actually happening both around her and inside her own head. That awareness gives her perception that is clear, sharp, and in accord with reality, so that her responsive actions are likely to be appropriate to the circumstances.

Mindful Listening

When you bring mindfulness practice into daily life the effects are often dramatic. The potential upside resulting from mindful listening is colossal for every one of us, and extends far beyond our lives as attorneys. Listening with presence and undivided attention is all too rare, especially in today's world of constant distraction. The next time you have a five-minute conversation with anyone, try to notice where your attention is during the whole of that interaction. Were you planning your next statement before the other person was finished speaking? Did your mind wander to that phone-call you need to return or your next appointment? Lawyers devote precious little of their learning to mindful listening; certainly it was not taught when I attended law school. Yet, what single skill could be more important to the relationship between an attorney and her client, the attorney and her adversary, or the attorney and the ruling body before which she appears? Listening with great attention and without judgment is absolutely necessary to understanding a client's needs, an adversary's position, a judge's ruling, a witness's answer to a question while on the stand, or your associate's problem with your work assignment; it is also requisite to being a good mate, parent, and friend. Meditation practice allows us to slow down our thinking mind, lose some of our obsession with the content of our own thinking, and attend to what is *actually happening* in the moment, such as our client's words, tone, countenance, emotions, non-verbal behavior, etc. We cannot afford to miss this information, as it may provide very important clues for our work, and by broader application, to our life in general.

Mindfulness-based Stress Reduction: Changing How We Work and Live

In the last twenty-five years or so the value and utility of mindfulness practice has been carried from the meditation halls of Asia into the modern western worlds of professional athletics, major corporations, prisons, the Pentagon and law firms. A vanguard of this work, Dr. Jon Kabat-Zinn, Ph.D. at the Center for Mindfulness in Medicine, Health Care and Society at the University of Massachusetts Medical School, founded a clinic in 1979 that teaches participants mindfulness practice as a means of taking care of themselves, transcending physical limitations and moving toward greater health and well-being.² Some participants in the clinic suffer from medical and psychological problems such as chronic back pain, depression, sleeplessness, addiction, cancer or hypertension. Many are referred by doctors and therapists. Others are spiritual "seekers." The clinic at The Center for Mindfulness has become the archetype for instruction in mindfulness outside of Buddhism or other "religious" settings and has spawned similar programs in seven countries and thirty-eight states. The clinic's methodology involves a relatively intensive eight-week introduction to and training in mindfulness practices as a way of living, explores their practical benefits, and supplements them with group discussion, about forty-five minutes of daily "homework," audio cassettes, and inquiry exercises. It is commonly referred to as mindfulness-based stress reduction ("MBSR").

Roughly two decades of published research on the effects of MBSR and detailed feedback from programs like this one have documented numerous and varied benefits of this practice. Such research has shown significant reductions in pain and pain-related symptoms for patients referred by doctors across a broad range of medical diagnoses and significant reductions in participants' psychological distress factors. Many participants reported increased ability to listen, improved concentration, less reactivity, lasting decreases in physiological and psychological symptoms, and positive changes in brain and immune functions.³ Also, the clinical model of MBSR was brought to the Boston law firm of Hale and Dorr, LLP. for eight weeks in 1998. Lesser forays in mindfulness practice have been used as part of retreats designed for law students, or as part of classroom instruction in various law school courses.

In a more specific context, Leonard L. Riskin, C.A. Leedy Professor of Law and Director of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law, has written at length

about the potential contributions on mindfulness meditation to the legal profession.⁴ Since 1999 he has made mindfulness meditation a “substantial component” of his course “Understanding Conflict,” part of the required study for the Doctor of Laws program in Dispute Resolution at the University of Missouri-Columbia School of Law. He has also taught mindfulness meditation at Pepperdine School of Law on a more limited basis. Professor Riskin claims that his work has helped to aid students in developing emotional self-awareness, awareness of others, and patience, while reducing stress and enabling them to achieve more satisfaction in their professional roles.⁵ Participants uniformly reported significant stress reduction through meditation. Most participants thought that the practice had “enhanced their understanding of themselves and others”; some felt that they had experienced beneficial changes in their attitudes toward adversaries and the legal system.⁶

Conclusion: Lawyering and Living From the Inside

Is mindful lawyering the next frontier in improving the quality of our lives and work as lawyers? I earnestly propose that learning and using your own mindfulness practice is one of the most rewarding and empowering things you can do for your law practice and your life. By training your mind’s innate powers of concentration and attention you will learn a lot about your mind and self-image, you will enhance your ability to listen and make decisions, and you will enjoy greater balance and self-confidence. Simultaneously, perhaps, you will learn to nourish and encourage yourself in the presence of life’s challenges. While doing this work requires some commitment in terms of time and lifestyle, these costs are minimal when weighed against the benefits reviewed above and the ability to be truly awake for our professional and personal lives.

ATTENTION CRBBA MEMBERS MINDFULNESS-BASED STRESS REDUCTION WORKSHOP

In August or September 2005, Deily, Mooney & Glastetter, LLP will be hosting a workshop on mindfulness-based stress reduction for attorneys and staff entitled, “Awake at Work: MBSR for Legal Professionals”. Once a date is finalized, a separate mailing will go out to all members. In the interim, all interested people should check the "News" section of the Deily, Mooney & Glastetter, LLP website at www.deilylawfirm.com after July 1, 2005 for more information.

* Continued from the Winter/Spring 2005 CRBBA Newsletter.

** John Monterisi has been an attorney for 25 years and is a partner at Deily, Mooney & Glastetter, LLP. He has practiced mindfulness meditation for the last eight years. In the Summer of 2004 he participated in an eight-week teaching practicum including a clinic at the Center for Mindfulness at University of Massachusetts Medical School.

¹ Sit quietly with your eyes closed for one minute, simply noticing your body inhaling and exhaling breath. How many times did thoughts take you somewhere else?

² See JON KABAT-ZINN, FULL CATASTROPHE LIVING 1 (1990).

³ See Richard J. Davidson, et al., *Alterations in Brain Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMATIC MEDICINE 564–70 (2003); Michael Speca, et al., *A Randomized, Wait-List Controlled Clinical Trial: The Effect of a Mindfulness Meditation-Based Stress Reduction Program on Mood and Symptoms of Stress in Cancer Outpatients*, 62 PSYCHOSOMATIC MEDICINE 613–22 (2000). These results are consistent with my observations and experience during my participation in the Center for Mindfulness Clinic at the University of Massachusetts Medical School in the Summer of 2004.

⁴ See, e.g., Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions in Mindfulness Meditation to Lawyers, Law Students and Their Clients*, HARV.NEGOT.L.REV., VOL 7:1, 2002.

⁵ See *id.* at 40 n.177.

⁶ See *id.* at 44–45. ■

CLERK’S CORNER

E-Orders

The United States Bankruptcy Court for the Northern District of New York will soon begin implementing an electronic order program. This program will allow users to electronically submit proposed orders (in PDF format) to a secured location for signature by the Judge. This feature will be fully integrated with our existing ECF program and will appear as an additional menu item called "**Order Upload.**" We plan to provide instructions to all external filers once our start date has been established.

Local Rules Due for Comment

Coming soon, slightly revised local rules will be published for comment. The revised rules will contain

changes made by the full local rules committee in 2002 and changes made by the Clerk's Office as a result of CM/ECF. The *Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers by Electronic Means* have also been revised and will be released in June. New local rules and new procedures made necessary by the new bankruptcy legislation will initially be covered in a new Administrative Procedure. The official local rules will be updated again at a later date.

Case Upload Program

The Court now supports the case upload program for filing petitions. Check with your software vendor to see if your software program offers this feature. This feature has been added to the "Bankruptcy" menu in ECF as "CaseUPLoad."

Letters Adjourning Hearings

Letters adjourning hearings should not be filed conventionally (in hard copy) with the Clerk's Office. Please electronically file your letter on the corresponding case using the ECF system. You may then follow up by faxing your request to Chambers in Albany and Courtroom Services in Utica.

Credit Card Expirations

Please notify the Clerk's Office when your on-file credit card expires. Contact Lisa Cardinal in Albany with your updated information. The updated information can be faxed to Lisa at 518-257-1643 or by e-mailing her at lisa_cardinal@nynb.uscourts.gov.

Fillable Forms Available

The Court's website contains forms that can be filled out online. The forms available are the Official Forms including the voluntary petition and all schedules, Procedural Forms, and Local Forms. Visit the Court's website at www.nynb.uscourts.gov to access the forms. The use of these forms will be especially useful if you have to amend the petition and/or schedules, but filed the petition using a one-touch system and cannot generate amended schedules. Follow the links on our website to the Official Forms, save the forms to a file and edit as necessary.

Bankruptcy Forms Manual Available On-line

The Bankruptcy Forms Manual is published by the Administrative Office of the United States Courts and is an excellent reference tool. The Manual contains the Official Bankruptcy Forms, together with instructions on completing them. It also contains additional procedural forms with instructions on completing them. The Manual can be found at www.uscourts.gov. Once at the site click *U.S. Bankruptcy Courts > Official Bankruptcy Forms*.

ECF Tips

If you are dismissing an Adversary Proceeding pursuant to FRBP 7041, note that **Notice of Voluntary Dismissal** can be found under *Adversary > Notices*. If you are filing a motion by the debtor to dismiss a case, use **Dismiss Case** under **Motions/Applications** rather than the 707(a) or 707(b) entries.

Chapter 13 Tips

On occasion, when filing a Chapter 13 case online, an attorney will forget to docket the plan separately and the error is not found in the Quality Control process. If the plan is not electronically filed as a separate document, the First Meeting notice will not contain confirmation hearing information and the plan will not be served on creditors. When the plan is not noticed as part of the original first meeting entry it is the responsibility of the attorney to notice the plan and confirmation hearing date.

Also, please note that the Case Administrators will be putting confirmation hearings on the court calendar in those instances where the attorney noticed the confirmation hearing because the plan was filed later than the petition. You can accomplish this without Case Administrator intervention by using the **Notice of Hearing** entry rather than the **Notice of Hearing on Default Motion** entry.

Help Desk Assistance

When leaving a message at the help desk, in addition to leaving your name and phone number, please leave information regarding your problem or issue and the case number if your question is case related. When we return your call we can have this information in front of us and will have some familiarity with your problem. The Help Desk number for Albany is 518-257-1616 and the Help Desk number for Utica is 315-266-1118.

Letter Withdrawing Motion and Termination of Pending Motions

In ECF, if motions are shown as pending on a case, this status will prevent a case from being timely closed. If you e-file a letter withdrawing a motion, terminate the appropriate motion when presented with the screen. If you simply press **Next** and by-pass the screen, the case will not appear on our Cases Eligible for Closing List. ■

ATTENTION CRBBA MEMBERS

PRO BONO REPRESENTATION NEEDED

According to Legal Aid, the largest unmet need in our region is pro bono Chapter 7 bankruptcy representation. Thus, a call for volunteers is being issued and all interested should contact the law offices of Deily, Mooney & Glastetter, LLP or Legal Aid directly. As an added incentive to answering our region's legal need, CLE credit will be awarded for each case a volunteer accepts.

For more information on becoming a volunteer please contact:

Bonnie S. Baker, Esq. OR	Elena Rich, Esq.
Deily, Mooney & Glastetter	Legal Aid Society
8 Thurlow Terrace	55 Colvin Avenue
Albany, NY 12203	Albany, NY 12206
Tel: (518) 436-0344 ext. 244	(518) 462-6765
Fax: (518) 436-8273	
http://www.deilylawfirm.com	
bbaker@deilylawfirm.com ■	

MEMBER NEWS

Congratulations to Joann Sternheimer who was made a partner at the law firm of Deily, Mooney & Glastetter, LLP on July 1, 2005. ■

CRBBA BOARD MEETINGS

2005 Board Meetings start at 8:00 a.m. and are held on the **2nd Tuesday of each month** at:

Orlando & Barbaruolo
12 Cornell Road
Latham, New York 12110

All members are welcome.

Articles for publication in the newsletter are welcome and should be submitted to: Brenda Lubrano-Birken or Todd A. Ritschdorff, Honen & Wood, P.C., 126 State Street, 5th Floor, Albany, New York 12207, email: bbirken@honenwood.com or tritschdorff@honenwood.com.

Please send address changes and email information and/or membership issues to: Henry Collins, Esq., Cooper, Erving & Savage, 39 North Pearl Street, 4th Floor, Albany, New York 12207, email: hcollins@coopererving.com.

NOTICE

2005 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 12 and 13 Confirmation Hearings at 2:00 p.m. Also, please note the time changes for Binghamton and Utica.

Syracuse Cases:

August 2, September 6

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

August 16, September 20

10:00 a.m. Motions in Chapters 12 & 13
2:00 p.m. Chapter 13 Confirmation Hearings

Binghamton:

August 9, September 8

10:00 a.m. Motions in Chapters 12 & 13
2:00 p.m. Chapter 13 Confirmation Hearings

August 4, August 25, September 29

10:00 a.m. Motions in Chapters 7 & 11
2:00 p.m. Pretrials/Status Conferences
(Scheduled by Court)

Utica:

August 23, September 27

10:00 a.m. Motions in all Chapters
2:00 p.m. Chapter 13 Confirmation Hearings
2:00 p.m. Pretrials/Chapter 11 Status Conferences
(Scheduled by Court)

NOTICE

2005 Motion dates for Judge Littlefield are set forth below.

PLEASE NOTE: Albany will now have Two (2) Motion Days.

Chapter 12 and Chapter 13 will still be heard on Thursdays: All Chapter 12 and any Trustee Swimelar matters at 11:00 a.m.; Chapter 13 motions at 9:00 a.m.; and confirmation hearings at 1:00 p.m. Trustee dismissal and claims motions will be scheduled at the same time they are currently scheduled (12:15 p.m. and 12:30 p.m.). **Chapter 7 and 11 will be heard on Wednesdays:** Hearing times will stay the same.

(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 12 shall be scheduled at 11:00 a.m.
(D) Motions in Chapter 13 shall be scheduled at 9:00 a.m.
(E) All requests for pretrials, trials, hearings on Chapter 11 Disclosure Statements and Confirmations, as well as matters related to Chapter 11 Confirmations should still be sent to the Court for scheduling.
(F) File motions with an affidavit of service electronically. Please submit proposed orders conventionally with the ECF Case-Chambers copy or under separate cover.
(G) Please file the Court's ECF Case-Chambers copy o motions and related pleadings pursuant to the Court's Administrative Order No. 02-03.

Albany Cases:

Chapter 7 and Chapter 11 (Wednesday's)

July 27
August 17, August 24
September 14, September 21, September 28
October 5, October 12, October 19, October 26

Chapter 12 and Chapter 13 (Thursday's)

July 28
August 18, August 25
September 15, September 29
October 6, October 13, October 20, October 27

Judge Littlefield's motion calendar schedule will be posted on the Court's website (www.nynb.uscourts.gov) at the Courtroom and the Clerk's Office. You are responsible for checking this schedule prior to serving your motions.