STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
NEWSLETTER

Summer/Fall 2008 Volume 8 — No.1

INSIDE THIS ISSUE:

A MESSAGE FROM YOUR CHAIR

Several years ago, Robert Wilson (of Lubbock) and a small cadre of determined and focused lawyers set out to accomplish something that the nay-sayers said could not be done. After much planning, long drafting sessions, multiple telephone calls and late-night conference calls, the group did indeed succeed in its quest to do something no other State Bar had done -- create a Bankruptcy Section within the State Bar of Texas. Oh, there were the usual and somewhat expected complications along the way, but for the most part, the journey was generally fairly smooth sailing. Since its inception, it is fair to say that the Bar has watched with curiosity and sometimes, perhaps even a little awe, as our Section has grown and prospered. Our former leaders (Robert, Charlie Beckham, Deborah Williamson and Debbie Langhennig), each nationally respected in their own right, worked tirelessly and diligently to assure the continuing success of the Section. We all owe them, singularly and collectively, a large debt of gratitude.

As we begin a new Bar Year, our Section is indeed well-positioned. We have a very strong cast of leaders:

(Continued on page 7)

CONSUMER CORNER:

Northern District of Texas Releases En Banc Opinion on Early Completion of Chapter 13 Plan

by Stephen W. Sather, Barron & Newburger, P.C.

The six judges of the Bankruptcy Court for the Northern District of Texas have released an opinion on when a debtor can pay off a chapter 13 plan prior to its scheduled completion date under BAPCPA. In re *Howard L. McCarthy, Jr.,* No. 06-40127-DML-13 (Bankr. N.D. Tex. 6/11/08). The judges ruled that absent modification of the plan to increase the payments or bad faith by the debtor, that the court must enter a discharge once payments are completed.

In the *McCarthy* case, the Debtor had above median income and was required to file a 60 month plan. The Court confirmed a plan providing for payments of $49,260. This payment would pay about 60% of the unsecured claims. The Debtor had to pay more than the amount of his disposable income in order to satisfy the chapter 7 liquidation test. After six months, the Debtor sold his non-exempt real estate pursuant to court order and paid the proceeds to the

(Continued on page 7)

Practice and Procedure:
Kane v. National Union Fire Ins. Co., No. 07-30611, 2008 WL 2721157 (5th Cir. July 14, 2008)

By Cory E. Feldman (cfeldman@smu.edu), Judicial Extern to the Honorable Harlin D. Hale, U.S. Bankruptcy Judge

In a case regarding the application of judicial estoppel to Chapter 7 debtors who failed to disclose a personal injury lawsuit in their bankruptcy schedules, the United States Court of Appeals for the Fifth Circuit held that judicial estoppel did not bar the Chapter 7 trustee from pursuing the claim, distinguishing this case from its previous decision in *Superior Crewboats, Inc. v. Primary P&I Underwriters*, 374 F.3d 330 (5th Cir. 2004).

On April 18, 2002, Mr. Kane and Mr. Comstock, an employee of Qwest Communications, were involved in a car accident in which Mr. Comstock was allegedly acting within the scope of his employment. Mr. and Mrs. Kane (the "Debtors") subsequently filed a personal injury action against Comstock and Qwest (the "Defendants"), as well as Qwest's insurer, National Union Fire Insurance Company, in Louisiana state court seeking damages arising from the accident. The Debtors then filed for Chapter 7 bankruptcy on October 13, 2005, while the lawsuit was still pending in state court, and failed to disclose their claim on the bankruptcy schedules. The Debtor's Chapter 7 trustee (the "Trustee"), was never informed of the pending claim. On March 13, 2006, the bankruptcy court entered an order discharging the Debtors from bankruptcy.

"In distinguishing Kane from Superior Crewboats, the panel focused on the formal abandonment of the claim by the trustee…"

On July 10, 2006, the Defendants moved for summary judgment in the personal injury action, contending that because the Debtors failed to disclose the claim on their bankruptcy schedules, they were now judicially estopped from asserting the claim. The Debtors subsequently filed a motion to reopen their bankruptcy proceeding, and on September 28, 2006, the bankruptcy court granted the motion to reopen. The Defendants then removed the personal injury action to federal district court and moved for summary judgment, arguing again that Debtors should be judicially estopped from bringing their personal injury claim. The Trustee filed a response to Defendants' summary judgment motion, asking to substitute himself for the Debtors, as the real party in interest, to pursue the personal injury claim on behalf of the estate. On May 29, 2007, the United States District

(Continued on page 9)

Chapter 11 Practice:
Piccadilly Predicament Concerning Pre-Confirmation Transfers

By Aubrey P. Boswell (aboswell@smu.edu), 3L, SMU Dedman School of Law, Extern to the Honorable Harlin D. Hale, U.S. Bankruptcy Judge

In its recent decision in *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, the U.S. Supreme Court addressed the issue of whether the stamp tax exemption under 11 U.S.C. § 1146(a) applies to asset transfers made *before*, as opposed to *after*, a plan of reorganization is confirmed under 11 U.S.C. § 1129. The Court held that the stamp tax exemption applies only to transfers made after a Chapter 11 plan has been confirmed. The Court justified this reading based on the "natural" reading of the statute, the provision's placement in the Bankruptcy Code, and applicable canons of statutory construction. This holding resolves a split that existed among the circuit courts that had considered this issue.

In *Piccadilly*, Piccadilly Cafeterias, Inc. ("Piccadilly") filed for Chapter 11 bankruptcy and requested the Bankruptcy Court to conduct an auction of substantially all of Piccadilly's assets. At the auction, Piccadilly Investments, LLC, made the highest bid of $80 million. The Bankruptcy Court later approved the sale of Piccadilly's assets to Piccadilly Investments, and held that the sale was exempt from stamp taxes under § 1146(a). The Bankruptcy Court denied a motion by the Florida Dept. of Revenue ("Florida") to reconsider, or amend the sale order. Piccadilly subsequently filed a Plan of Liquidation. Florida objected to the plan and commenced an adversary action by filing a complaint against Piccadilly, seeking a declaration that the stamp taxes were not exempt under § 1146(a). The Bankruptcy Court overruled the objection and confirmed the plan. Florida then filed an amended complaint in the adversary proceeding, and both Piccadilly and Florida filed motions for summary judgment. After a hearing, the bankruptcy court granted summary judgment in favor of Piccadilly, holding that the asset sale was exempt from stamp taxes under § 1146(a). The bankruptcy court reasoned that the sale of substantially all of Piccadilly's assets was a transfer "under" its confirmed plan of reorganization because the sale was necessary to consummate the plan. On appeal, the district court affirmed the bankruptcy court's order granting summary judgment to Piccadilly.

Florida appealed the district court's order to the Eleventh Circuit, arguing that the district court erred in holding that the § 1146 stamp tax exemption may apply to pre-confirmation asset sales. In a per curiam decision, the Eleventh Circuit upheld the decision and rejected Florida's argument, holding that the stamp tax

(Continued on page 10)

CALL FOR ARTICLES AND ANNOUNCEMENTS

The **State Bar of Texas Bankruptcy Law Section** is dedicated to providing Texas practitioners, judges, and academics with comprehensive, reliable, and practical coverage of the evolving field of bankruptcy law. We are constantly reviewing articles for upcoming publications. We welcome your submissions for potential publication. In addition, please send us any information regarding upcoming bankruptcy-related meetings and/or CLE events for inclusion in the newsletter calendar, as well as any items for our "Troop Movements" section (changes in practices).

If you are interested in submitting an article to be considered for publication or to calendar an event, please either e-mail your submission to chufft@velaw.com or eborrego@whc.net or mail it to a member of the Editorial Staff (addresses below).

Please format your submission in Microsoft Word. Citations should conform to the most recent version of the Bluebook, the Texas Rules of Form, and the Manual on Usage, Style & Editing.

Should you have any questions, please visit our website at http://txbankruptcylawsection.com.

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UPCOMING EVENTS

September 18-19, 2008	24th Annual Advanced Consumer Bankruptcy Course (for more details, see http://www.texasbarcle.com/materials/Programs/1742/Brochure.pdf). Register online at www.texasbarcle.com.
September 19-20, 2008	UT CLE Bankruptcy Litigation Seminar, U.S. Courthouse, Dallas, Texas. For more information, visit www.utcle.com.
September 25, 2008	Advanced Bankruptcy Seminar for Paralegals & Legal Secretaries/Assistants Seminar (see page 5 for more information).
October 23-24, 2008	Farm, Ranch and Agri-Business Bankruptcy Institute Seminar (see page 5 for more information).

LOCAL EVENTS

Dallas

The Dallas Bar Association Bankruptcy and Commercial Law Section normally meets the first Wednesday of each month at the Belo Mansion. Social begins at 5 p.m. with program beginning at 5:30 p.m.

The Honorable John C. Ford, American Inn of Court, announces The William J. Rochelle, Jr. Course: "The Practice of Corporate Bankruptcy Reorganization Law," September 16-December 16, 2008. For more information, contact Charles Hendricks at chuckh@chfirm.com.

The DFW Association of Young Bankruptcy Lawyers is hosting its Second Annual Casino Fundraising Event benefiting the Dallas Network of the National Association of Urban Debate Leagues on October 23, 2008 at 6:00 p.m. The event will be held at the South Side on Lamar, 1409 South Lamar, Dallas, Texas 75215. Valet parking will be complimentary. Please RSVP by October 13th to Delia Friend at (214) 740-8476 or dfriend@lockelord.com.

Fort Worth - Tarrant County

Bankruptcy Section - monthly CLE luncheon meetings on the third Monday of each month to its members. Contact - Lynda Lankford at (817) 877-8855 or llankford@forsheyprostok.com. Meetings are normally held at the Ft. Worth Petroleum Club.

San Antonio

The San Antonio Bankruptcy Bar Association meets on the 4th Tuesday of every month at the San Antonio Country Club. Social begins at 5 p.m. with program beginning at 5:30 p.m. Participants receive 1 hour CLE credit.

A Brown Bag lunch with Judge Clark, Judge King, the Bankruptcy Clerk, and members of the Bankruptcy Bar is held quarterly at the Adrian Spears Judicial Training Center.

TROOP MOVEMENT

No troop movement???
everyone staying put???
Let us know if you have changed jobs or locations!

TWENTY-FOURTH ANNUAL

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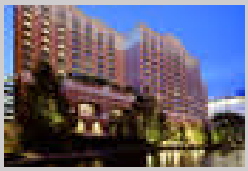
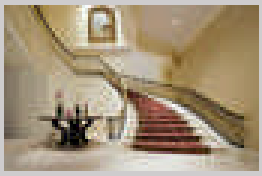
San Antonio, Texas



Thursday, September 25, 2008
The Westin Riverwalk
420 West Market Street
San Antonio, Texas 78205



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By phone: Martie Kantor (850-521-5031)
By email: martie_kantor@flnb.uscourts.gov

SECOND ANNUAL CASINO FUNDRAISING EVENT

October 23, 2008 at 6:00 p.m.

benefiting the Dallas Network of the National Association of Urban Debate Leagues

1409 South Lamar
Dallas, Texas 75215
(South Side on Lamar)

Please RSVP by October 13th

Delia Friend at (214) 740-8476 or
dfriend@lockelord.com

Case law Update

In re Repine, No. 06-20807, 2008 WL 2801898 (5th Cir. July 22, 2008).

By Russell R. Zimmerer (rzimmere@smu.edu), Judicial Extern to the Honorable Harlin D. Hale, U.S. Bankruptcy Judge

JURISDICTION

What is the scope of available remedies for violation of the automatic stay under 11 U.S.C. § 362(k)

In an important bankruptcy case for lawyers, the Fifth Circuit, in *In re Repine*, held that the automatic stay applied to a judgment creditor's actions in attempting to collect her attorney's fees during the pendency of the bankruptcy case. Further, the court found the attorney's actions were a willful violation of the automatic stay, which properly resulted in damages being awarded under 11 U.S.C. § 362(k).

Appellant Patsy Young ("Young") represented Elizabeth Pollard-Repine ("Pollard") in connection with a child support enforcement action against Appellee Ronald Eugene Repine ("Repine"), in which Young accumulated attorney's fees in the amount of $2,027 in her successful prosecution of Repine. The Family Court ordered Repine to pay this amount to Young in a money judgment. Later, on July 1, 2003, Repine filed for bankruptcy under Chapter 13 through his bankruptcy attorney ("Mills"). Mills specifically informed Young that Repine's filing of a Chapter 13 bankruptcy petition automatically stayed all actions against Repine, including Pollard's child support judgment and Young's corresponding judgment for attorney's fees. At this time, Young was also warned that any effort to collect her attorney's fees from Repine would violate the stay.

Notwithstanding the automatic stay imposed by the bankruptcy petition, Pollard and Repine negotiated a deal for the settling the child support enforcement action. On September 11, the Bankruptcy Court entered an agreed order ("Order") to lift the stay to allow Pollard to exercise her state court rights and enforce the child support action. This Order was specific to Pollard, and did not lift the stay as to any other party. On September 23, Young violated the stay when she threatened Repine regarding payment of her attorney's fees. The Bankruptcy Court, on September 25, ordered Young to appear and show cause why she should not be held in contempt for violation of the stay – despite being personally served, Young failed to appear and a warrant was issued for her arrest. Upon her arrest, the Bankruptcy Court admonished Young for her efforts to collect fees in violation of the stay, and subsequently released her. Nevertheless, Young continued her collection efforts.

(Continued on page 9)

In re Mixon - In Deed and Thought: Elements of the § 523(a)(1)(C) Exception to Discharge

By Rebekah J. Bailey (rjbailey@smu.edu), second year law student, SMU Dedman School of Law, Extern to the Honorable Harlin D. Hale, U.S. Bankruptcy Judge

A recent opinion from Bankruptcy Judge Barbara Houser, *In re Mixon*, illustrates the kind and degree of debtor behavior which falls under the exception to the presumption of discharge for tax obligations. The decision effectively provides a roadmap of action not to take while negotiating with the IRS. In her opinion, Judge Houser determined that the Debtor's tax liabilities were excepted from discharge under 11 U.S.C. § 523(a)(1)(C) and found that their conduct distinguished them from the "honest but unfortunate debtor" for whom the discharge is intended.

FACTS

In September 2005, Kevin and Jamie Mixon ("the Mixons") voluntarily filed their "no asset" bankruptcy petition under Chapter 7. After the Court entered an order discharging the debtors, the IRS filed an adversary complaint in September 2007. The IRS contended that the Mixons owed $656,376.21 in non-dischargeable debt including accrued statutory interest. During the years in question, Kevin Mixon owned and operated Color Quest, Inc., and was required to make estimated tax payments. The Mixons reported their adjusted gross income ("AGI") to the IRS to be nearly $1.6 million for the years 1998-2001. For each of the years in question, the Mixons never paid either withholding or estimated taxes. Further, the Mixons sought at least one (and sometimes two) filing extensions for each year in question. While the Mixons eventually paid their 1998 taxes, they did not make payments towards the penalties or interest owed as a result of their failure to make estimated tax payments and their failure to pay the taxes when due. From 1999-2001, the Mixons totally avoided paying their taxes, penalties and interest resulting in a federal income tax debt that then totaled in excess of $500,000. Although not all of the years from 1998-2008 were at issue, the facts importantly show that the Mixons made only two voluntary income tax payments during that period.

(Continued on page 8)

A Message From the Chair

(Continued from page 1)

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(Continued on page 8)

Northern District of Texas Releases En Banc Opinion on Early Completion of Chapter 11 Plan

(Continued from page 1)

Trustee. The Debtor continued to make his regular monthly payments. After 21 months, he had paid $49,260 into the plan and the Trustee filed a notice of completion of payments. The Debtor then filed a motion for entry of discharge, which the Trustee opposed.

The Court found that the case did not turn on the definition of "applicable commitment period" under Section 1325(b). Instead, the Court found that the result was dictated by Section 1328(a).

The Court stated:

> "Much of the focus of the Parties and the Amici in their briefs and at oral argument was on the question of whether the 'applicable commitment period' provided for in section 1325(b) of the Code, in Debtor's case 60 months, serves as a temporal requirement for the duration of a chapter 13 case or is simply a multiplier to be used to determine a minimum amount a debtor's plan must provide for unsecured creditors. A number of courts have struggled with this question arriving at diverse conclusions. . . . In the case at bar, however, we are not required to reach or decide that issue. Rather, the Motion poses the easier question of whether Debtor is entitled to a discharge under section 1328(a) of the Code.
>
> * * *
>
> "We must apply section 1328(a) in accordance with its plain meaning
>
> . . . .
>
> "Section 1328(a)'s meaning is, in fact, plain and unambiguous. If the debtor has completed all payments under the plan, 'the Court *shall* grant the debtor a discharge. . . . ' (citation omitted). The use of the word 'shall' in section 1328(a) means that granting the relief is mandatory if the preconditions specified in the section are met."

Memorandum Opinion, pp. 4-5.

Having arrived at its conclusion in just five pages, the Court devoted the remainder of its opinion to replying to the Trustee's argument that deceptive debtors could use this language to slide a payment under the Trustee's door in the dead of night in order to avoid disclosing changed circumstances which would justify a modification.

The Court had two responses to this argument. First, the Court pointed out that the *Marrama* decision meant that "a debtor's fraudulent conduct may be addressed to prevent as well as undo a result achieved through the ordinary operation of the Code . . . " However, the Court noted that "this case is not one where money was slipped under the Trustee's door in aid of a scheme to avoid a potential plan modification." Instead, the Debtor had done exactly what was contemplated under the plan. The Debtor's Plan required the Debtor to pay a sum exceeding his monthly payments. As a result, it was clear that the Plan contemplated sale of assets. Additionally, at the time of the sale of the Debtor's property, it was

(Continued on page 11)

A Message From the Chair

(Continued from page 7)

who have committed to the continued success of the Section. In addition, we are 2,100+ lawyers strong and are consistently we are recognized as trendsetters and an example of "how to do it right" for other sections of the Bar. Our projects serve not only the members of the Bar, but also, significantly, provide important outreach to the community at large.

Our *MoneyWise* program (www.savewisely.com), one of our huge success stories, is being expanded to serve not only high school students, but also adult populations and is being translated into Spanish to serve other traditionally under-served populations. Our Section-sponsored Elliott Cup competition, named in honor of the late, widely esteemed Joseph Elliott, has made Texas and Fifth Circuit competitors at the national Duberstein Bankruptcy moot court competition the teams to beat. In addition, our law clerk training program assists new clerks navigate the new world of bankruptcy law as it intersects with jurisprudential "sausage making." Clearly, this program helps to acclimate the new clerks, assists the Bench and consequently, the Bar. Importantly, we have expanded our reach among our fellow restructuring professionals with our Non-Lawyer Membership Initiative, through which we are devising opportunities to welcome non-lawyer financial advisory and restructuring professionals to join us and engage in our Section-supported activities. Finally, planning is already well underway for our bi-annual statewide Bench-Bar Conference (consistently a smashing success!), which will occur in June 2009. Not only do we anticipate this conference to be well-received, it will also be a little different, so stay tuned for details!! These are but a few of our highlighted Section activities which make us all proud of the important work we do.

But with all of this being said, we couldn't succeed to the degree we have without your help. We welcome your input and your participation. No matter if you are a new lawyer who has just joined our ranks, or a lawyer with more than a few years of experience under your belt, we want your ideas, your participation and your elbow grease. If you have an interest or willingness to get more involved in one or more of our projects or activities, or simply see a need that we are not yet meeting, feel free to contact me or any of the other members of the leadership team mentioned above. After all, this is YOUR Section and our successes are only a barometer of our collective ability to meet your needs and the needs of our community. Please join us in this important work!

Berry

In re Mixon

(Continued from page 6)

Additionally, the Mixons late-filed their returns for the years 2002-2008. Since the Mixons were at all relevant times aware of their duty to file tax returns and the deadlines for doing so, inadvertence or unawareness were not viable defenses.

After the IRS filed three different liens against the Mixons for their unpaid taxes during the 1998-2001 period, the Mixons gave the IRS an offer in compromise ("OIC") to settle the debt. On the basis of "Doubt as to Collectability," the Mixons stated that they had insufficient assets to pay the full $500,000 debt owed and therefore offered to pay $165,000. In support of the OIC, the Mixons gave the IRS an IRS 433-A Collection Information Statement for Wage Earners and Self-Employed Individuals ("Form 433-A"). Signed under penalty of perjury, the Form 433-A contained information about the Mixons' income, assets, and liabilities. However, just a month after filing the OIC and Form 433-A, Kevin Mixon provided materially different information regarding his income, assets, and liabilities on a personal financial statement to Pavillion Bank for the purpose of buying a car. The statements differed materially as to cash, ownership of vehicles, and total net worth. Judge Houser found that the Mixons were clearly "lying to either the IRS or Pavillion Bank and have continually painted differing pictures of their financial condition to the IRS, Pavillion Bank and the Court." The Mixons also purchased an acre of land one month after filing their OIC. While they did not make a cash down payment, they did obligate themselves to pay $279.00 per month for the land. Lastly, the Mixons undervalued the land by $33,000 and failed to disclose it on any other Form 433-A submitted to the IRS. The IRS accordingly rejected the OIC since the Mixons had sufficient assets to pay their debt in full.

Further, Kevin Mixon used a credit card and a corporate checking account in the name of his father's company (David Mixon & Associates) for expenses that were not disclosed to the IRS on the OIC. David Mixon permitted his son, Kevin, to use the card as long as Kevin paid his "share" of the American Express bill directly to American Express. This arrangement permitted Kevin to hide income from the IRS. For instance, in 2001 Kevin Mixon incurred and paid over $140,000 on the American Express card. In 2002 when the Mixons submitted their OIC claiming that their expenditures were greater than their $10,000 monthly income, the record showed that Kevin incurred and paid $87,000 on the card. Further, Kevin Mixon was incurring and paying charges during the months preceding filing the case despite that fact that he testified at his 341 meeting that he had no income. The court held "the compelling and inescapable inference from this evidence is that Kevin Mixon was incurring charges" in order to hide income from the IRS.

The Mixons also used their Color Quest corporate account to pay their personal expenses. On the date that the OIC was signed, Color Quest had over $247,000 in its corporate checking account

(Continued on page 11)

Kane v. National Union Fire Ins. Co.

Court for the Eastern District of Louisiana, relying entirely on the Fifth Circuit's decision in *Superior Crewboats*, granted the Defendants' motion for summary judgment and dismissed Trustee's motion to pursue the claim as moot. On appeal, the Fifth Circuit reversed and remanded the case, holding that judicial estoppel did not bar the personal injury claim and the district court abused its discretion by concluding, as a matter of law, that *Superior Crewboats* controlled the outcome of the case.

In finding that the district court abused its discretion, the Fifth Circuit panel first analyzed the applicable Bankruptcy Code (the "Code") provisions. Pursuant to § 521(1) of the Code, Debtors had a duty to disclose all pending and potential claims. If the Debtors fail to disclose a claim in their bankruptcy schedules, and the Trustee later discovers the asset, the Trustee may reopen the case in order to administer the undisclosed asset on behalf of the creditors. 11 U.S.C. § 350(b). Almost all of a debtor's assets, including causes of action, vest in the bankruptcy estate at the time of the filing of the bankruptcy petition, and therefore the trustee, as the representative of the bankruptcy estate, is the real party in interest in any pending action. 11 U.S.C. §§ 3.23, 541(a)(1). All of a debtors rights in the asset are extinguished upon the inclusion of the asset in the estate; however, if the trustee abandons the asset, control of the property reverts to the debtor. 11 U.S.C. § 554.

In distinguishing *Kane* from *Superior Crewboats*, the panel focused on the formal abandonment of the claim by the trustee in its prior decision.[1] In *Superior Crewboats*, the claim reverted to debtors, pursuant to § 554 of the Code, "who then stood to collect a windfall from their failure to schedule the asset at the expense of their creditors." *Kane*, 2008 WL 2721157, at *4. By contrast, the Debtors in *Kane* did not stand to benefit directly, because upon the closing of a bankruptcy case, if an asset is not administered in the bankruptcy proceedings, the asset remains part of the bankruptcy estate and does not revert back to the debtors. 11 U.S.C. § 554(d). Thus, the claim remained part of the estate and the Trustee, as the real party in interest, may reopen the case to pursue the claim for the benefit of the estate's creditors. The Court found that barring the Debtors' claim by judicial estoppel would actually harm the creditors, and would only benefit the Debtors in the event of a surplus after payment of all debts and fees.

Alternatively, Defendants argued that regardless of the judicial estoppel issue, Trustee's motion to substitute as the real party in interest should be denied under Rule 17(a) of the Federal Rules of Civil Procedure. The Court found the argument unpersuasive, but because Defendants failed to raise this issue in the district court, the Court directed the district court to address the issue on remand.

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[1] Additionally, the panel distinguished *Kane* from *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999) on separate grounds. *See Kane v. Nat. Union Fire Ins. Co.*, No. 07-30611, 2008 WL 2721157, at *5-6 (5th Cir. July 14, 2008).

In re Repine

(Continued from page 6)

On January 2004, Repine then filed this action against Young pursuant to 11 U.S.C. § 362(h), seeking damages and attorney's fees, for Young's willful violation of the automatic stay. Following trial, the Bankruptcy Court ruled in favor of Repine, awarding $27,280 in actual damages; $5,000 in punitive damages; and $33,720 in attorney's fees. The District Court affirmed, and Young appealed to the Fifth Circuit.

On appeal, Young raised five arguments: (1) Young contends that the automatic stay did not apply to her actions; (2) Young contends that her actions did not cause any damage to Repine; (3) Young contends that there is no evidence to support an award of damages; (4) Young contends that emotional damages are not actual damages and therefore cannot be recovered; and (5) Young contends that Repine was not entitled to attorney's fees.

Addressing the arguments in order, the Court found Young's actions violated the stay, following the test laid out in *In re Chestnut,* 422 F.3d 298, 302 (5th Cir. 2005), and affirmed the District Court's findings. The Court held that the range of remedies available for an automatic stay violation can include attorney's fees, actual and punitive damages, including lost wages. Further regarding damages, the Court found that there was no "clear error" in the Bankruptcy Court's determination of damages, and as such affirmation was appropriate. To recover punitive damages, however, "egregious conduct" must be shown on the violator's part. Here, agreeing with the Bankruptcy Court, the Court found Young's conduct egregious, and again affirmed that part of the damage award.

Turning to the issue of damages for emotional injury, the Court held that in some cases emotional injury damages can be recovered for a willful stay violation if the debtor can set forth, at a minimum, "specific information" concerning the damages caused. In this context, the Court noted that the debtor is required to set forth "specific information" concerning the damages caused by his emotional distress rather than relying only on "generalized assertions." In the case at bar, this was a burden Repine could not show, and the Court vacated the corresponding damage award.

Finally, in upholding the Bankruptcy Court's award of attorney fees to Repine as proper, the Court adopted the position taken by the lower courts in the Fifth Circuit, and held that it is proper to award attorney's fees that were incurred in prosecuting a § 362(k) claim. *See Mitchell v. BankIllinois,* 316 B.R. 891, 901-04 (S.D. Tex. 2004); *see also In re Still,* 117 B.R. 251, 254-55 (Bankr. E.D. Tex. 1990).

Accordingly, the Court vacated the award for emotional injury damages and affirmed the District Court order affirming the Bankruptcy Court in all other respects.

Editor's Note: For space consideration, the legal citations have been omitted. A complete copy of this article, with references may be found at http://www.texasbar.com/bankruptcy/ or upon request to Clay Hufft at chufft@velaw.com.

does apply to pre-confirmation transfers. The appellate court first considered holdings in the Third and Fourth Circuit that the § 1146 (a) exemption does not apply to such transfers. Both of these courts held that the plain language of the statutory phrase "under a plan confirmed" means "authorized by," and therefore a transfer could not be authorized by such a plan without a confirmed plan already in existence. The Eleventh Circuit also considered a decision out of the Second Circuit, which held that the phrase "under a plan" refers to a transfer that is necessary to the consummation of a confirmed Chapter 11 plan. The court found that this was the better reasoned approach, since it looks not to the timing of the transfer, but to the necessity of the transfer to the consummation of a confirmed plan of reorganization. The court provided four reasons for its holding. First, the court found that the plain language of the statute is ambiguous, supporting two different readings—one supporting tax exemption, and the other rejecting such exemptions. Second, the court noted that Congress could have placed a temporal restriction in the statute had it wanted to, but it did not. Third, the court held that the Bankruptcy Code should be liberally construed, and although grants of tax exemptions should be narrowly construed, they should not be abrogated through too narrow an application. Lastly, the court held that temporal restrictions on the statute ignore the practical realities of Chapter 11 cases, which may necessitate a pre-confirmation sale as a condition precedent to the parties' willingness to proceed with confirmation of a plan. Based on these reasons, the court concluded that the tax exemption under § 1146(a) applies to all pre-confirmation transfers that are necessary to the consummation of a confirmed plan of reorganization, but the Court noted that there must be some nexus between the pre-confirmation sale and the confirmed plan.

Despite district and appellate court decisions accepting Piccadilly's interpretation of the Code, the Supreme Court reversed the Eleventh Circuit's decision and remanded the case for further proceedings. Writing for the Court, Justice Thomas explained that the decision was appropriate based on the "most natural reading of §1146(a)'s text, the provision's placement within the Code, and applicable substantive canons." The Court's ruling renders stamp-tax exemptions applicable only when the transfers are made pursuant to a confirmed Chapter 11 plan.

The Supreme Court rejected Piccadilly's interpretation that 1146(a) simply required the transfer to be "in accordance with" a plan confirmed under 1129 and that no temporal requirements were imposed. The Court held that such an interpretation "places greater strain on the statutory text than the simpler construction advanced by Florida and adopted by the Third and Fourth Circuits." Florida's proffered interpretation is that the exemption applies only to transfers made after the plan is confirmed because "confirmed" is a past participle that indicates "past or completed action."

Justice Thomas acknowledged that both Piccadilly and Florida offered credible interpretations of 1146(a); however, the Court determined that Florida's interpretation was "the better one." The Court went on to state that even if it were to accept Piccadilly's arguments, such arguments would only establish that the language was ambiguous at most. And, the Court found no grounds for resolving any ambiguity in Piccadilly's favor. Instead, the Court found Florida's arguments regarding the statute's placement in the Code and other substantive canons to indicate that such ambiguity should be resolved in Florida's favor. For example, the Court gave credence to Florida's argument that the tax exemption's placement in the "POSTCONFIRMATION MATTERS" section of the bankruptcy code indicated that the exemption should be interpreted as applying only to post-confirmation transfers. In addition, the Court held as decisive the canon of statutory construction that courts should not recognize an exemption from state taxation that Congress has not clearly expressed. So, even assuming the phrase "under a plan confirmed" is ambiguous as Piccadilly asserts, the ambiguity must be construed against interfering with a state's authority to tax.

The Court also noted the additional benefit provided by the clear rule proposed by Florida. The Eleventh Circuit's reading requires that there be "some nexus between the pre-confirmation transfer and the confirmed plan." However, no such requirement is imposed under Florida's construction, which provides a "simple, bright-line rule instead of the complex, after-the-fact inquiry Piccadilly envisions." Based on the natural reading of the text of 1146(a), its placement within the Bankruptcy Code, the substantive canons proposed by Florida, and the applicational advantages of a bright-line rule, the Court held that the stamp tax exemption under § 1146(a) cannot be read to extend to pre-confirmation transfers.

FUTURE IMPACT

The *Piccadilly* decision has obvious immediate impact on pending liquidating Chapter 11 cases. As a result of the Supreme Court's ruling, now the debtor will be unable to obtain a stamp tax waiver in the context of a § 363 sale.

The case may have other implications, too. The Court certainly acknowledged, as did the district, that cases providing for the sale of substantially all amounts of the estate are common and, incidentally, allowed.

More important for future cases may be the "natural" method of Code interpretation. This approach may affect the future of the provisions of BAPCPA, which are, in places, less than clear.

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In re Mixon

(Continued from page 8)

which was being used in part to pay the Mixons' personal living expenses. For instance, in 2002 expenses for 24 Hour Fitness, dry cleaning, and a vacation were all incurred and paid the month that the Mixons swore under penalty of perjury that their monthly income was $10,000 per month and they were unable to pay more than $1,100 towards their tax liability. While Kevin Mixon testified that he would quit using business accounts for personal expenses, the court found this testimony to be false and that Kevin lacked credibility because he used his new corporation, Lone Star Graphics, to fund personal expenses in 2006. The court held that the Mixons willfully attempted to evade or defeat their taxes by using their corporate checking accounts to "prevent the IRS from levying on the accounts and collecting their income tax debt."

Since both the conduct and mental state elements of the § 523 (a)(1)(C) test were met, Judge Houser ruled in the IRS' favor. The preponderance of the evidence showed that the Debtors willfully "attempted to evade or defeat their 1998-2001" tax liabilities thereby excepting those liabilities from discharge. In looking at the totality of circumstances to determine if the exception to discharge applies, the conduct element can be satisfied by acts of commission or culpable acts of omission. Non-payment of tax liabilities, chronic late-filing of returns, maintaining a lavish lifestyle while concurrently failing to pay taxes, and placing assets in the names of others are all factors that have established the conduct element. Judge Houser found that four instances of the Mixons' behavior established the element in this case: 1) complete failure to pay any tax liabilities for 1999-2001 despite their high AGI; 2) ownership of at least 7 vehicles, an RV, a trailer, and a boat with combined monthly payments of $9,000 per month while offering to pay the IRS only $1,100 per month in the OIC; 3) use of an American Express card in the name of his father's company allowing Kevin to hide income from the IRS; 4) use of a corporate account to pay their personal expenses allowing them to hide assets from the IRS.

Like the conduct element, the mental state element is determined in light of the totality of the circumstances where all inferences to be drawn about the debtor's state of mind come from his conduct. The mental element is satisfied where a debtor (1) has a duty under the law to pay the debt; (2) knew of the duty; and (3) voluntarily and intentionally violated that uty. Notably, fraudulent intent is not a requirement to prove the mental state element. While nonpayment of taxes alone is insufficient to prove the element, "failure to pay a known tax is relevant evidence for the court to consider." Additionally, a debtor may not use the presence of an OIC to negate the mental element. Judge Houser found that the Mixons were aware of their duty to pay their tax liability and that much of the same evidence used to prove the conduct element evidenced willful evasion of the taxes owed. In addition, the court held that the following behavior of the Mixons proved the mental element: 1) acquisition and enjoyment of expensive assets while not facing their tax liability; 2) offering far less money on the OIC than they were able to pay; 3) expenditure of money they could have used to pay their tax liability; 4) enjoyment of assets held in the name of family members and friends to reduce collection sources for the IRS.

CONCLUSION

This case illustrates that where a debtor's deeds and thoughts evidence a willful attempt to evade or defeat his tax liability, the discharge exception under 11 U.S.C. § 523(a)(1)(C) applies. Further, the decision provides guidance to debtors on how they should behave shortly before a bankruptcy case is filed. Perhaps debtors' counsel uses Judge Houser's opinion to show his or her clients the consequences of dishonest conduct. As in most bankruptcy matters, honesty, consistency, and transparency underlie obtaining and maintaining a discharge.

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Northern District of Texas Releases En Banc Opinion on Early Completion of Chapter 11 Plan

(Continued from page 7)

clear that this pre-payment would result in the plan being paid off early. However, the Trustee did not seek to modify the plan.

Finally, the Court noted that the better procedure would be to formally request a modification of the plan to pay it off early. "The safe procedure for prepayment by a debtor under a plan is to seek approval of a plan modification under section 1329(a). If that is done, the Trustee, creditors and the court will have confidence that the prepayment is undertaken in good faith and not in anticipation of a windfall or other change in the debtor's circumstances that might otherwise bring about proposal of a Trustee's or unsecured creditor's modification to the debtor's plan." Memorandum Opinion, p. 9.

Thus, the lesson of *McCarthy* is that a discharge must be granted once the payments are completed, even under BAPCPA. However, that right is balanced by the ability of the Trustee to seek a modification or to oppose discharge based upon fraud.

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