

THE ATLANTA BANKRUPTCY LAWYER

A Publication of the Bankruptcy Section of the Atlanta Bar Association

Winter 2008

BOARD

Chair

Henry F. Sewell, Jr.
McKenna Long & Aldridge LLP

Vice Chair

Jason H. Watson
Alston + Bird LLP

Secretary

Tamara Ogier
Ellenberg, Ogier, Rothschild & Rosenfeld, P.C.

Treasurer

Brad Alexander Baldwin
Burr & Forman LLP

Immediate Past Chair

Shayna M. Steinfield
Steinfeld & Steinfield, P.C.

Members at Large

Paul M. Baisier
Seyfarth Shaw LLP

Jennifer Meyerowitz
Alston + Bird LLP

Amy Quackenboss
Hunton & Williams

John Thomson, Jr.
Womble Carlyle Sandridge & Rice PLLC

Nancy J. Whaley
Standing Chapter 13 Trustee

EDITORS

J. Hayden Kepner, Jr.
Arnall Golden Gregory LLP

David A. Geiger
McKenna Long & Aldridge LLP

The David Pollard Award

Each year, the Board of Directors of the Atlanta Bar Association Bankruptcy Section (the "Board") bestows the David Pollard Award to "a person who is a member of the Atlanta Bar who best exemplifies the highest standards of professionalism and ethics in the bankruptcy practice." The Pollard Award is given annually at the Bankruptcy Section installation luncheon, which this year will be held in May, 2008.

The Board is currently soliciting nominations for this award. Nominations are due by March 15, 2008. If you wish to submit a name for consideration, please send your submission to Jason Watson at jason.watson@alston.com. Submissions should include the nominee's name, a short statement setting forth the specific reasons that the nominee should be considered for the award, and, if possible, a suggested presenter should the nominee be selected for the award. Thank you in advance for your participation in the nominating process.

Past recipients of the David Pollard Award

2007 Al Lurey
2006 Honorable Joyce Bihary
2005 Ezra H. Cohen
2004 C. David Butler
2003 Morton Levine
2002 Honorable Stacey W. Cotton
2001 Robert E. Hicks
2000 Paul W. Bonapfel
1999 David G. Epstein
1998 R. Neal Batson
1997 Honorable A. David Kahn
1996 Morris W. Macey
1995 W. Terence Walsh
1994 Honorable Homer Drake

Interview with Donald F. Walton

By David A. Geiger

David A. Geiger was recently elected partner with McKenna Long & Aldridge LLP. He practices in the areas of business bankruptcy and commercial litigation.

Donald F. Walton is the United States Trustee for Region 21, and until January of this year was the Acting Principal Deputy Director of the Executive Office for the U.S. Trustee Program ("Program"). Mr. Walton joined the Program in August 1987 as an Assistant U.S. Trustee to open the Program's Atlanta office. During his twenty (20) years with the Program, he has served in various capacities including Acting U.S. Trustee for Regions 3 and 21, opening new offices, and acting as general counsel for the Program. I recently sat down with Mr. Walton so attorneys from Region 21 could obtain an insider's perspective on current issues as identified by the Program.

What drew you to apply to be the United States Trustee for Region 21?

Walton: Region 21, and Atlanta in particular, is a very exciting place to practice bankruptcy law. There are eight (8) offices in Georgia, Florida and Puerto Rico, and a larger caseload than any other U.S. Trustee region. Atlanta is the largest office in the region and consistently has one of the largest Chapter 11 caseloads nationally. We have about 110 employees in the region, and I'm looking forward to working again with old friends and meeting the many new employees in the region. The strong bench and bar in Atlanta are among the best in the country and make it easy to administer cases in the Northern District of Georgia.

What are the main effects you have seen resulting from BAPCPA?

Walton: On the consumer

side in Atlanta, the caseload has bounced back much more quickly than in other regions. I think this is due in large part to the aggressive nature of the capable debtors' bar which became comfortable with the new law quicker than attorneys in other regions. Of course, we are only two years into BAPCPA, so everyone is still learning a lot. From the Program's perspective, we are still vetting what constitutes abuse under the new standards for current monthly income. There is no circuit law on this topic yet, so we will continue to work through these issues until we receive guidance from the appellate courts. We are still trying to work through and focus on the implementation of the means test, in determining when to bring actions under Section 707(b)(2) and (b)(3) and Section 727. Our office

The Bankruptcy Section wishes to thank its sponsors for their continuing support:



tries to be very active in policing abuse by lawyers and petition preparers who prey on debtors. Nationally, the Program is very focused on preventing creditor fraud, and in particular creditors, such as mortgage lenders, who make inappropriate charges on proofs of claim. Of course, it is not the U.S. Trustee's role to object to proofs of claim, but we do monitor for systemic abuse of the claims system by creditors attempting to collect for fraudulent charges. In that respect, our goal is to get rid of the small number of bad actors who abuse and commit fraud within the system.

How is your office handling the implementation of the new means test?

Walton: It is important to note that not every failure to comply with the new rules is an abuse that should be prosecuted. In some cases people have made honest mistakes, and in others unique circumstances must be taken into account. The Program is continuing to work to use its limited resources wisely, and only prosecute those cases that are appropriate.

What Chapter 11 issues is the Program facing after the BAPCPA changes?

Walton: We are very active in the review of KERP's (Key Employee Retention Programs). Essentially, we try to make sure that the proposed KERP plans comply with the new statute. We are also focusing efforts on making sure that sales of mortgages and similar assets, where consumers are involved, comply with Section 363(o), so that the assets subject to these sales are not sold free and clear of consumers' claims. Finally, the Program has had an increased focus nationally on requesting the appointment of examiners and trustees, especially in situations involving potential fraud, abuse or gross mismanagement. Interestingly, in the Northern District of Georgia more trustees are appointed than on average nationally.

What can members of the Bar do to help the U.S. Trustee's office?

Walton: Communicate early and often. In consumer cases, we

would like the debtors' lawyers to communicate better with our office, especially where there are unique circumstances occurring in a debtor's life that are not apparent from the face of the filings in the case. It is our office's obligation to review the filings, and file a motion to dismiss if presumptive abuse exists. However, we can, and do, decline to file abuse motions in facially presumptive cases where special circumstances exist, which happens about 25% of the time. Many times, however, debtors' counsel fails to communicate with our office to let us know of these unique circumstances, and we file a motion, only to have to dismiss it later. We would much prefer to have the lawyers let us know of the unique factors up front so we don't waste our time and resources, and the debtors' lawyers don't waste their time and resources fighting the motion, where it is not necessary. Also, if our office requests information, it's very helpful when the lawyers respond quickly because the U.S. Trustee has short deadlines to review the files and file presumptive abuse motions. We

don't want to file these motions and then dismiss them if it can be avoided through effective communication.

Along these lines, it would help our office tremendously if the debtors' lawyers would make sure to complete the debtors' schedules properly the first time around. This is far more efficient and cheaper for everyone involved.

As for Chapter 11's, it is very helpful when a debtor's counsel communicates with our office in advance of filing the case, to let us know that the case is coming and to identify the major issues. This advance notice can start a dialogue with our office that will lead to greater efficiency in the case, to the benefit of all involved. The trial attorneys in the Atlanta office of the Program are approachable, and want to hear from the lawyers in the cases about the major issues so that we can give answers and communicate that on the front end.

The Reaffirmation Project

An Exciting New Pro Bono Opportunity for Bankruptcy Practitioners

The Reaffirmation Project has been developed by the Bankruptcy Section of the Atlanta Bar Association, in collaboration with the Atlanta Legal Aid Society and financially supported by a grant from the American College of Bankruptcy. It provides free legal counsel to unrepresented debtors seeking to enter into reaffirmation agreements. The goal of this project is to enable *pro se* debtors to make informed decisions about reaffirmation.

We are soliciting interested lawyers from the Bankruptcy Section to participate in a training session and to provide

on-site counseling to *pro se* debtors prior to hearings in the Atlanta, Rome, Newnan and Gainesville divisions. The scope of the volunteer's role will be limited strictly to advice given on that day based on information provided by the debtor and will not involve any other matters or any further counseling.

Since the introduction of this initiative to the Atlanta Division, we have had four successful counseling sessions reaching out to over fifty debtors. Many of these debtors decided to reaffirm debt and have a better understanding of

the nature of this obligation. Several decided not to reaffirm agreements, while others have negotiated different terms with their creditors and a few have redeemed property. In addition, with the assistance of the Office of the United States Trustee and the panel trustees, we have distributed information regarding reaffirmation agreements to dozens of debtors. The Reaffirmation Project is making a difference and providing much-needed advice to *pro se* debtors.

A training session will take place on March 12, 2008 from 6:00 p.m. until 7:30 p.m. at

Kilpatrick Stockton LLP, 1100 Peachtree Street, Suite 2800, Atlanta, Georgia 30309. Dinner and beverages will be provided.

Please contact Alison Elko via e-mail at aelko@kilpatrickstockton.com if you are interested in participating in The Reaffirmation Project and/or would like to register for the training session. Thank you for your service and support of this initiative. We look forward to working with you.

Notice of Revised Chapter 11 Quarterly Fee Schedule

Pursuant to Section 213 of Title II, Division B, Consolidated Appropriations Act, 2008, (P.L. 110-161), the Chapter 11 Quarterly Fee Schedule established by 28 U.S.C. §1930(a)(6) is amended effective January 1, 2008. The chart displays the revised quarterly fee schedule for calendar quarters beginning January 1, 2008.

All other quarterly fee related procedures remain unchanged. The fee is due on the last day of

the calendar month following the calendar quarter for which the fee is owed, starting with the quarter in which the case commenced, and continuing until and including the quarter in which the case is dismissed, converted to another chapter of the Bankruptcy Code, or closed by the court. Interest will be charged on unpaid quarterly fees, pursuant to 31 U.S.C. 3717.

The mailing address for quarterly fee payments is:

U.S. Trustee Payment Center
Post Office Box 70937
Charlotte, NC 28272-0937

The address above also appears on the instructions and payment form included with the monthly quarterly fee statement.

Please address any questions concerning this change to your local Office of the U.S. Trustee.

Disbursement Range	Quarterly Fee
\$0 to \$14,999.99	\$325
\$15,000 to \$74,999.99	\$650
\$75,000 to \$149,999.99	\$975
\$150,000 to \$224,999.99	\$1,625
\$225,000 to \$299,999.99	\$1,950
\$300,000 to \$999,999.99	\$4,875
\$1,000,000 to \$1,999,999.99	\$6,500
\$2,000,000 to \$2,999,999.99	\$9,750
\$3,000,000 to \$4,999,999.99	\$10,400
\$5,000,000 to \$14,999,999.99	\$13,000
\$15,000,000 to \$29,999,999.99	\$20,000
\$30,000,000 or more	\$30,000

What are Ordinary Business Terms for Preferences in the 11th Circuit?

By J. Hayden Kepner, Jr.

Hayden Kepner is a partner with Arnall Golden Gregory LLP. His practice focuses on commercial bankruptcy and related litigation.

As every bankruptcy lawyer knows (or should know), BAPCPA expanded the ordinary course of business defense so that a preference defendant can now defeat a preference action if the defendant is able to prove (1) that the payment at issue was made in the ordinary course of business between the debtor and the defendant or (2) that the payment was made "according to ordinary business terms." 11 U.S.C. s 547(c)(2)(C).

The "ordinary business terms" defense is often referred to as the objective test in that it is assumed to refer to an objective standard within an industry in making and receiving payments on outstanding business obligations. But what exactly does the phrase "ordinary business terms" mean in the 11th Circuit?

There have been no 11th Circuit decisions found defining that phrase since BAPCPA was enacted in 2005, yet there are two earlier decisions under the pre-BAPCPA Bankruptcy Code that appear to give slightly different interpretations to what

constitutes "ordinary business terms." See *Miller v. Mining (A.W. & Assoc., Inc.)*, 136 F.3d 1439 (11th Cir. 1998) and *Barett Dodge Chrysler Plymouth, Inc. V. David W. Cranshaw (In re Issac Leaseco, Inc.)*, 389 F.3d 1205 (11th Cir. 2004).

In *A.W. & Associates*, the 11th Circuit appeared to give a broad interpretation of what constituted "ordinary business terms." In that case, the court held that the phrase "refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope [of that exception.]" 136 F.3d at 1442-3 (citing *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032-33 (7th Cir. 1993) (emphasis in original).

Based on this interpretation, a creditor/defendant could presumably argue that if at least some creditors in the general industry in question

even occasionally gave very generous payment terms (say, 120 days), then any challenged payments made within those terms could be considered to fall within this "broad range" of ordinary business terms defense. Clearly this would give very expansive protection to the creditor/defendant in a preference action.

In the later decision of *Issac Leaseco*, however, the 11th Circuit seemed to narrow its interpretation of "ordinary business terms." In that case, the court held that bankruptcy courts should consider "whether some time limits were *standard* within the industry" in that some range of payment dates would be considered "normal." 389 F.3d 1205 (citing *Advo-Sys. Inc. v. Maxway Corp.*, 37 F.3d 1044 (4th Cir. 1994) (emphasis added). Thus, under *Issac Leaseco*, it would seem that the burden on the creditor/defendant would be to show that the payments at issue fell within a specific industry standard, rather than some broad range of potentially acceptable terms. *Accord Johnston Indus., Inc.*

v. CB&T Bank (In re Johnston Indus., Inc.), 357 B.R. 907 (Bankr. M.D. Ga. 2006).

So how does a creditor/defendant prove what constitutes "ordinary business terms" in order to assert this defense in a preference action? Although the 11th Circuit has not expressly considered how "ordinary business terms" must be proven under BAPCPA, pre-BAPCPA decisions seem to indicate that bankruptcy courts will require more than the mere testimony of an officer of a defendant as to his "general sense of what was going on in the industry" in order to prove that a particular payment was made in accordance with "ordinary business terms." *In re Globe Holdings, Inc.*, 366 B.R. 186 (Bankr. N.D. Al. 2007). See also *Feltman v. City Nat'l Bank (In re Sophisticated Comm., Inc.)*, 369 B.R. 689 (Bank. S.D. Fla. 2007) (rejecting as insufficient testimony of bank's employee to establish ordinary business terms).

The pre-BAPCPA standard established by the 11th Circuit

is also consistent with the only published decision to date from a Bankruptcy Court considering the post-BAPCPA standard. *In re National Gas Distrib., LLC*, 346 B.R. 394 (Bankr. E.D.N.C. 2006). In that case, the bankruptcy court rejected the argument of a bank/defendant that a payment made to it by a debtor in the natural gas distribution business was in

the ordinary course of business for banks, and thus would fall within the “ordinary business terms” defense. Instead, the court held that it must consider the industry standards of both the creditor and the debtor (as well as business practices in general) in determining whether a payment was made within ordinary business terms. *Id.* at 404. Thus, the fact that

certain payment terms might be acceptable in the particular industry of a defendant would not necessarily determine whether a payment made by a debtor in a different industry was made pursuant to “ordinary business terms.”

It is impossible to determine at this point exactly where courts in the 11th Circuit will

set the bar for the “ordinary business terms” defense under BAPCPA. It is clear, however, that a defendant seeking to succeed in asserting that a payment it received was within “ordinary business terms” should retain a qualified expert who can opine on the generally accepted payment terms within the industries of both the debtor and the defendant.

11th Circuit: Income Taxes Nondischargeable Where Debtor Engaged In Affirmative Acts To Evade Or Avoid

By Scott B. Riddle

Scott Riddle has his own law firm and focuses primarily on representing small to medium-sized businesses and individuals in the areas of bankruptcy and commercial litigation. He also edits the excellent Georgia Bankruptcy Blog (www.georgiabankruptcyblog.com). This article first appeared on his blog and is used with permission.

In re Zimmerman, No. 06-15151, 2008 WL 161423 (11th Cir. Jan. 18, 2008). The background facts are summarized by the Court as follows:

Zimmerman filed an adversary proceeding in his 2004 bankruptcy proceeding seeking a determination that his federal income tax liabilities for the years 1977 through 1979 would be dischargeable in the 2004 bankruptcy proceedings. ... For two of the tax years at issue, Zimmerman failed to file timely his returns; for one year he filed timely but claimed — incorrectly — that no tax was due. The 1977 through 1979 tax liabilities that Zimmerman seeks to discharge arose when the IRS disallowed tax shelter deductions claimed on those returns.

In 1996, Zimmerman petitioned for bankruptcy protection under Chapter 7 ... At that time, no outstanding tax liability was listed for tax years 1977 - 1979, and no such liability had been assessed. Upon completion of an audit in 1997, IRS disallowance of tax shelter deductions claimed by Zimmerman on his 1977, 1978 and 1979 returns resulted in a significant understatement of income.

Debtor filed his present bankruptcy case in 2004, along with an adversary proceeding challenging the dischargeability of the taxes. The court rejected the debtor’s argument that no tax was due because it was discharged in his earlier bankruptcy case.

As an initial matter, we note that Zimmerman — in the complaint he filed to determine dischargeability — acknowledged that the 1977 through 1979 taxes were owed. Also, Zimmerman stipulated to entry of the bankruptcy court’s pretrial order: an order which stated that he owed the taxes resulting from the Assessment. So, we reject

Zimmerman’s attempt to challenge the underlying tax liability with his claim that the 1996 bankruptcy proceeding discharged the tax liability resulting from the Assessment in 1997.

The court noted that “mere nonpayment of taxes, without more, does not render a tax debt nondischargeable; but affirmative acts constituting a willful attempt to evade or defeat the collection of taxes will result in nondischargeability under section 523(a)(1) (C).” That standard is met where (1) the debtor had a duty under the law, (2) the debtor knew he had that duty, and (3) the debtor voluntarily and intentionally violated that duty.

The bankruptcy court’s findings of fact chronicle Zimmerman’s (1) repeated failures to file timely tax returns; (2) repeated instances in which returns were only secured through collection; (3) multiple petitions for bankruptcy protection (some of which failed to include schedules of assets); (4) enjoyment of significant income and assets which could have paid delinquent taxes but instead were used to finance the lifestyle of Zimmerman and Patricia Montifinese, Zimmerman’s longtime girlfriend; (5) repeated intra-family asset transfers and asset transfers to Montifinese; and, more specifically, (6) asset transfers in close temporal proximity to government tax collection attempts. The bankruptcy court concluded that the tax liability from the Assessment should be excepted from discharge because Zimmerman engaged in substantial abuse of the bankruptcy system, attempted to hide assets from creditors, and willfully attempted to defeat or evade his tax obligations.

The court found no error in the lower court rulings finding the tax debts nondischargeable.

Coming soon: Wireless Internet Access in the Attorney Lounges; Details to Follow...