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Happy Days: Perhaps Gone for Good on Television

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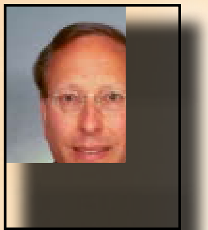
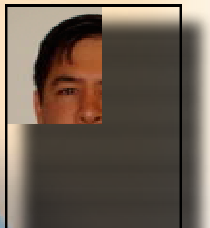


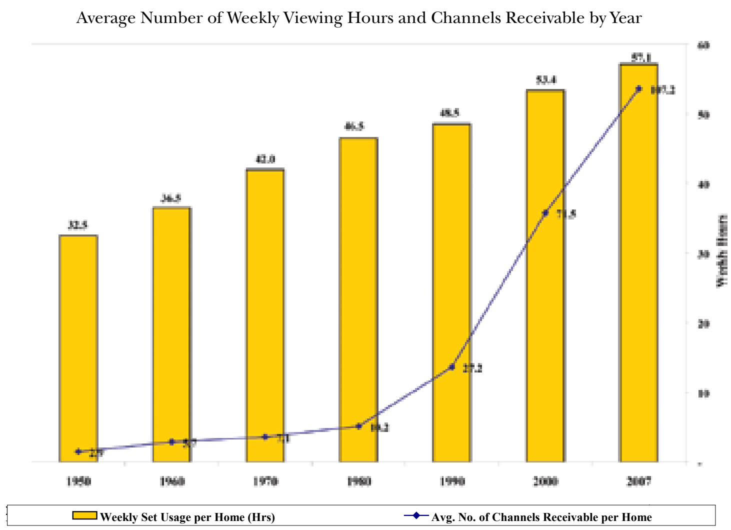
Roger Scadron



Matt Thompson

In this issue:

When the Fonz and Richie Cunningham were primetime stars, local TV station owners and network executives effectively controlled the viewing options of Americans. Just as viewers were largely limited in their choices to watching the three major networks, advertisers were also limited in their choices to reach the viewing public. The traditional television model created an effective symbiosis for broadcasters and advertisers: limited choice on both sides meant that advertisers were confident in the reach of their commercials, and TV broadcasters were assured of advertising revenues.



It is likely impossible to return to the happy days of network television dominance. But as students of media we need to understand the forces affecting broadcast television so that we can develop operational, strategic and financial responses that will help companies prosper in this quickly evolving market.

This article (the first in a series on broadcasting) gets underneath the forces that are driving change in the industry to suggest how broadcasters can manage the changes that confront them. The casual reader intuitively recognizes many of the forces currently combining to shape the industry today. We will focus on the impact of changes in three of the most important areas:

- ✓ Technology-enabled user options, i.e. ad skipping, time shifting, and digital substitution
- ✓ Recession based changes in balance of traditional and new media ad revenues
- ✓ Increasingly high leverage on balance sheets of most media companies

But, the devil is in the details when analyzing these issues. There is significant nuance to the forces that are confounding the industry.

Technology-enabled user options, i.e. ad skipping, time shifting and digital substitution

Technology-enabled user options, i.e. ad skipping, time shifting and digital substitution, are fragmenting viewerships, taking viewers away from networks and hurting CPM rates (cost of advertising per thousand viewers)—Or are they?

The Internet is not the first challenge to network television, and its disruptive effect on viewing habits is not the first time television audiences have become fragmented. The chart above shows the increase in the number of channels and hours viewed since the early days of television. In 1950 the average

Happy Days Continues on **p. 16**

In This Issue

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AIRA extends special thanks to these **AIRA Journal** contributors:

Peter Stenger - Editor
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Jack Williams - Scholar in Residence
Forrest Lewis - Section Editor
Miles Stover - Section Editor
Stacey Schacter - Section Editor
Jennifer Ginzinger - General Editor

Letter from the President

Grant T. Stein
Alston & Bird LLP

I would like to thank the entire Planning Committee, and Mark Bloom, Mark Duedall, and Maggie Smith, the Co-Chairs of the AIRA's 25th Annual Bankruptcy & Restructuring Conference held in Orlando this past June. The programs were both fresh and excellent. The highest compliment I can pay is to acknowledge that I have already used written materials from this year's conference in practice.

The special recognition and honors awarded to the founders of the AIRA during the 25th Annual Conference was a very special moment in the history of the organization. Their comments during our Annual Dinner reminded us of the very simple foundation of our organization, how we have grown, and what we have become under the leadership of our long time Executive Director, Grant Newton. We should not take for granted what we do, and the important role the AIRA and its members serve in our business community.

* * * *

The economic crisis we have all dealt with directly for the past year, at both a personal and professional level, has taken a tremendous toll. I do not need to recite the direct and indirect impact it has had on every one. The harder question to assess, and the one that is continuously asked, is whether the decline has bottomed out and thus whether we are on an upward swing. Recent profits reports, improvement in stock values, news of stabilization in the housing market, and anecdotal experience where investment and lending activity appear to be on an upswing, are all geared toward a more positive outlook for the economy. But, depending on where you live, or your business, the turnaround may not be *in prospect in a reasonable time*. Based on news reports, Michigan, California, and Florida are in more dire financial straits than the rest of the country. Many believe that certain industries such as commercial real estate are still in the early stages of their downturn.

The point of the foregoing is that there does not appear any near term likelihood of a drop off in the need for the services of insolvency and restructuring professionals. Our goal at the AIRA is to continue to provide the best educational programs available to assist you in expanding and refining the scope of your skills. Our Annual Restructuring Conference, Regional Programs such as the Annual Plan of Reorganization Conference in New York, Annual Breakfast Seminar at the NCBJ, VALCON, Web Casts, and the CIRA and CDBV classes, are all calculated to provide you with high quality, current, exposure to new ideas and developments with a view toward practical application in the real world. It is what has always been our focus and we are pleased to have been able to continue to meet the high standard you expect from us. We look forward to working with you in the months and years ahead.

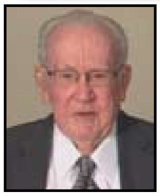
Grant T. Stein

Grant Stein is a partner in Alston & Bird's Bankruptcy, Reorganization and Workouts Group. His diverse practice includes the representation of debtors, secured and unsecured creditors, creditors' committees, and fiduciaries in complex and difficult out-of-court workouts, debt restructurings, bankruptcy cases, and financial transactions throughout the United States and internationally. He also regularly represents officers, directors, and other parties in bankruptcy litigation of all kinds. His restructuring experience includes manufacturing, real estate, wholesale, retail, distribution companies, health care, communications, technology and intellectual property issues.

Mr. Stein is a Fellow of the American College of Bankruptcy and is identified as a top practitioner in Chambers USA: America's Leading Lawyers for Business, The Best Lawyers in America and Super Lawyers magazine. He serves as a director and president-elect of the Association of Insolvency and Restructuring Advisors (AIRA). He also is a director and president-elect for the Southeastern Bankruptcy Law Institute. He recently served as a Member of the executive committee of Emory University's Board of Visitors. He has written numerous articles on bankruptcy and workout issues and regularly lectures around the country. Mr. Stein served as law clerk to The Honorable W. Homer Drake, the senior judge of the United States Bankruptcy Court for the Northern District of Georgia, following his graduation, with honors, from the University of Georgia School of Law in 1981. He received his B.B.A., with high honors, from Emory University in 1978.

Executive Director's Column

Grant W. Newton, CIRA
AIRA



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A leader in the conception and establishment of the AIRA (AIA), Homer Bonhiver passed away on August 25 at the age of 91. Active and involved until his five week struggle with cancer, Homer, a CPA, spent over 30 years working in the bankruptcy restructuring and forensic accounting field. He served as receivers, trustees and expert in numerous bankruptcy and reorganization cases. Homer was appointed as the receiver in American Allied Insurance Company that went out of business in 1965 leaving thousands of claims unpaid. Homer worked on the case for a dozen years and saw that all legitimate claim holders were paid in full. Former U.S. district judge Miles Lord noted that "Bonhiver was sharp, dedicated, relentless and 'terribly trustworthy.'" (Tim Harlow, of Minneapolis, St. Paul, Start Tribune, September 2, 2005)

Born in Kansas, Homer earned undergraduate and MBA degrees from Northwestern University. He was a key member of the YMCA and played the flugelhorn in concert band and the herald trumpet in the marching band. He was the author of a book entitled "The Expanded Role of the Accountant under the 1978 Bankruptcy Code" and other articles.

Homer was unable to attend AIRA's 25th annual conference in Orlando in June where the Founding Directors of AIRA were honored. However, Homer with the assistance of AIRA member Jack Almquist, recorded a message that was presented at the conference. It was an honor for me to have the opportunity to know and work with Homer Bonhiver. His vision and determination helped lead to the formation of National Association of Accountants in Insolvency which preceded AIA (later renamed AIRA).

AIRA Reception and Breakfast at the National Bankruptcy Judges' Conference

The opening reception at the NCBJ Conference will be hosted again this year by AIRA with ten firms serving as sponsors for the reception. Last year's reception was outstanding and we are looking forward to another enjoyable evening. Those of you will be attending the Judges' conference should not miss the opening reception from 5:30 till 7:30, October 17th in the Concorde Ballroom A, B & C.

Grant Stein, (Alston & Bird) AIRA's president, will chair a session entitled AIRA Reception at the Judges Conference, Tuesday morning from 7:00 AM to 8:45 AM (Concorde A) entitled "Turning Out the Lights When the Party Is Over". Panel members are Cecily Dumas (Friedman Dumas & Springwater), Todd Neilson, CIRA (LECG),

Kevin Regan, CIRA (FTI Consulting) and A.R. Williams, CPA (Hudson Capital Partners). You may register for the breakfast through the NCBJ's website or if you are already registered for the NCBJ conference you may call AIRA's office.

Dann Hauser Joins AIRA as Director of Marketing and Public Relations

I am pleased to announce that Dann Hauser is joining AIRA. Dann is an experienced marketing professional with more than 22 years in the strategic development and implementation of targeted programs and branding campaigns. He has the demonstrated ability to distinguish and define opportunities and critical issues in preparing business tactics for new and existing product campaigns, and proven experience in designing effective marketing plans with full media integration. Dann has directed and managed all functions in marketing including strategy, product development, creative and production, media, research, campaign reporting, budget planning, event planning and other general marketing responsibilities.

Dann started Carpe DM, a marketing consultancy, in 1999, providing full service marketing expertise and project consulting to Fortune 1000 companies (including Harry & David), direct marketing corporations, non-profit organizations and start-up businesses. Dann directed the overall branding and strategic development, production and implementation for all advertising, Internet, marketing and public relations efforts.

Prior to starting Carpe DM, Dann served as Director of Marketing for Musician's Friend, the direct marketing subsidiary of Guitar Center. He directed catalog circulation, creative and Internet departments for customer acquisition, and new markets development. He also served as Vice President for itBeat.com, a start-up online business for business.

Dann earned a Bachelor's degree in Journalism from the University of Wisconsin - Madison and a Master's degree in Marketing from Webster University.

Dann was instrumental as Director of Catalog Marketing for the American Medical Association where he expanded the AMA's catalog marketing efforts — launching four new print catalog titles and the AMA's first Online Catalog site. He was responsible for directing the creative and print production for 10 professional catalogs annually, with a combined circulation of over 6 million books. Dann also managed the circulation and database mining strategies for the physician, medical professional, student and consumer markets, in the U.S. and several international countries.

Grant

AIRA Scholar in Residence

Professor Jack F. Williams, CIRA, CDBV
Georgia State University

BANKRUPTCY RETAKES

Alternatives to Business Bankruptcy Relief

Businesses confronting financial distress have several options available to them in attempting to work out their debt or manage their assets. These options include assignments for the benefit of creditors and receiverships. Each option has advantages and disadvantages. An attorney must be aware of these advantages and disadvantages in order to design a custom approach on behalf of a company seeking to chart the waters of financial distress. Creditor attorneys must also be aware of these procedures to ensure full protection of his or her client's interests.

The Assignment for the Benefit of Creditors ("ABC") is a transfer of legal and equitable title to all of the debtor's property to a trustee (an "assignee") with authority to liquidate the debtor's affairs and distribute proceeds equitably to creditors.[1] Functionally, an ABC appears to look similar to a chapter 7 bankruptcy case governed, however, by state, as opposed to federal, law, wherein the debtor generally assigns all of its property to an assignee for the benefit of its creditors. The consequence of the ABC is to place the property out of the reach of the debtor's creditors by direct enforcement action.

The ABC is a creature of state law. Thus, one must confront a mix of state laws to determine the scope, rights, and obligations associated with the use of ABC. These statutes are designed to effectuate the intent of ABCs, that is, the authority on the part of the debtor to make a general assignment of its assets to an assignee for the benefit of its creditors.[2]

The ABC is initiated by the issuance of a deed of assignment executed by the debtor/assignor to a named assignee/trustee. The deed transfers all of the debtor's assets to an assignee. Partial assignments are not authorized. Typically, the deed of assignment will include a list or inventory of assets transferred and a list of all creditors and their respective claims

Upon the assignment and acceptance of the general assignment of assets, the assignee is required to provide public notice of the assignment to all listed creditors. As of the assignment, title to all property transferred vests in the assignee. The assignee has the power to transfer such assets, to sue on behalf of the estate, to collect accounts, and to settle and compromise all claims and disputes. In some jurisdictions, sales of property must be confirmed by a court.

The assignee generally has the authority to employ legal counsel and other relevant professional persons. In certain limited situations, usually with court approval, an assignee may also seek to operate the business for a limited time.

As a representative of the creditors, the assignee must act in their best interests and is subject to the panoply of fiduciary duties that regularly exist in this field. Furthermore, as the creditor's representative, an assignee may seek to enforce state fraudulent transfer law to rescind pre-assignment transfers as either actual or constructively fraudulent and, in some jurisdictions, seek to recover preferences, although the later power is controversial and far from settled.

Generally, an assignee must file a final accounting to close the case. At that time, an assignee will begin distributions to the creditors. Moreover, an assignee may seek permission to pay its professionals. An assignee is typically paid a commission based on a percentage of assets administered.

State law provides the distributional scheme in an ABC. First, secured creditors receive a return of their collateral or the value of their collateral. Second, administrative expenses are generally paid, including the expenses incurred in administering the estate. Third, various priority claims are paid, including taxes, wages, and other jurisdiction-specific claims. Finally, general unsecured claims are paid to the extent any proceeds from the monetization of assets remain.

The ABC provides many benefits. Among these are the following:

- Far less costly procedure than bankruptcy
- Greater flexibility than bankruptcy
- Expedited procedure
- Power to conduct investigations, examine, and depose witnesses
- Limited power to operate the business post-assignment

The ABC does present several limitations and disadvantages, especially when compared to a bankruptcy law alternative. These include the following:

- Assignee may not sell property free and clear of liens
- Preference power does not exist in most states and is controversial in those states that do recognize it
- No recognition of equitable subordination
- Limited territorial jurisdiction
- No discharge
- Limited or no immunity to assignee

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1 The Law Governing Liquidation, Garrard Glenn, Baker Voorhis (1935).
2 For an excellent source on ABCs, see Geoffrey L. Berman, *General Assignments for the Benefit of Creditors* (American Bankruptcy Institute 2006).

In addition to the ABC, jurisdictions also recognize the state court receivership. The state court receivership is governed by state law and generally requires the commencement of a civil action. Pursuant to the civil action, a state trial court orders the appointment of a receiver to take control of all the property of the defendant (debtor). The property is then considered *in custodio legis*. Thus, the property is no longer subject to direct enforcement action by the creditors.

The federal or state court receivership is an ancient remedy. Receiverships can be created based on the authority of many federal and state laws. Moreover, the general concept of an "equity receiver," *i.e.*, a party with full authority to operate the company during litigation, is an equitable remedy that exists in federal (and many states') common law, without the existence of a specific authorizing statute. As a result of this multiplicity of authority, both the blessing and the bane of receiverships is that they possess great flexibility. In large measure, they operate based solely on the authority granted by the court order that authorizes the receiver. Thus, it is critical to ensure that such an order is sufficiently broad and comprehensive to ensure that the receiver is granted the powers necessary to fully control the entity's assets and litigation. Such an order can, for instance, impose a stay on litigation that parallels the scope of the automatic stay in bankruptcy.

Essentially, a receiver is an individual appointed by the court with such powers as the court deems appropriate to take control of property of the defendant, usually to identify, marshal and preserve the property, manage it, and frequently liquidate the property. Thus, a receiver can be appointed to take over the operation of a legitimate business that was being used to perpetrate a fraud or to locate assets stolen from the victims of a Ponzi scheme.

The receivership generally is commenced with the secured lender filing a complaint with the applicable state court as the plaintiff, setting forth the reason for the receivership, what it hopes to accomplish in the receivership, who it would like to have appointed as receiver, and how the receivership will operate mechanically. The receiver is appointed by and periodically reports to the judge and carries out the plan, most likely the disposition of assets.

If the disposition has not previously been approved, once the proceeds from the sale of assets have been collected, the receiver seeks the judge's approval for the distribution. The receivership is then wound down.

The receivership possesses many advantages, including the following:

- Receivers have essentially the same authority as bankruptcy trustees to bring actions to avoid fraudulent transfers
- Receivers have tended to fare better than bankruptcy trustees in avoiding application of the *in pari delicto* defense when suing on behalf of the corporation.
- Receivers may enjoy immunity for actions within the scope of the receivership
- Authority is flexible and may be tailored to the needs of the actual civil action
- Receivership property is protected while in custodia legis
- Receiver may displace incompetent or fraudulent management
- Receiver may operate the business with greater flexibility
- Receivership generally results in lower professional and administrative costs and therefore a higher amount of proceeds to be paid to the creditors as a whole.
- Because the receivership process generally is quicker than bankruptcy, a troubled company is less likely to fail because of cash shortages, fatigue, or the rigors of bankruptcy.
- Assets may be sold free and clear of liens

The receivership does have several important limitations. These include the following:

- No preference power
- Limited jurisdiction
- No automatic stay
- Advisory opinion or guidance may not be permitted
- No discharge

Thus, in addition to the various bankruptcy alternatives discussed in prior chapters in the book, the practitioner must be cognizant of the increasing popularity of alternative procedures. Based on our collective knowledge we are confident in sharing one basic fact of bankruptcy life – one size does not fit all. There is sufficient variety in facts and circumstances to necessitate a careful, deliberate, and fresh look at each business distress ontext, ensuring that simple culture or habit does not drive counsel to a particular option when the facts and circumstances suggest another. ■

Use of Summary Evidence in Bankruptcy Proceedings

John T. Dorsey
Young, Conaway, Stargatt & Taylor, LLP

Believe it or not, the Federal Rules of Evidence actually do apply in bankruptcy courts. At times it may appear that they do not because of the nature of the business being done in those courts, and because the trier of fact is a judge rather than a jury. The nature of bankruptcy proceedings often requires that the parties to disputes move quickly. With little time for fulsome discovery or lengthy evidentiary hearings, even experienced litigators will often check the rules of evidence at the door, trusting that the judge will be more than capable of sorting out the good evidence from the bad. Indeed, even the judges themselves will often simply allow the evidence in explaining that they know what is and what is not admissible, and what evidence deserves weight and what does not. However, it is equally clear that bankruptcy judges will apply the rules of evidence when appropriate and necessary to ensure that the parties before them receive a fair hearing. Knowing the rules of evidence, therefore, can often create a great advantage over a party that thinks the judge will simply allow in whatever evidence is put before the court. Indeed, ignoring the rules can result in unexpected consequences for the party that believes the rules do not apply in bankruptcy court.

One rule that is often overlooked is Federal Rule of Evidence (FRE) 1006 governing the use of summaries. FRE 1006 states that: "The contents of voluminous writings, recordings or photographs which cannot be conveniently examined in court may be presented in the form of a chart, summary or calculation." Knowingly or not, financial advisors rely on this rule often when testifying in bankruptcy proceedings. Clearly, when discussing the financial condition of a debtor, a financial advisor cannot possibly refer to every book and record entry that was reviewed prior to testifying. In addition, it is often convenient to have a chart or written summary of those book and record entries for the court to review and follow as the advisor lays out the debtor's financial condition. Although, to be clear, a summary does not have to be a written document, but can also be presented through the testimony of the witness. That seems simple enough. But, there are additional requirements under FRE 1006 that can create havoc if not followed. Specifically, FRE 1006 states that: "The originals, or duplicates, [of the underlying documents] shall be made available for examination or copying, or both, by the other parties at reasonable time and place."

Failing to provide the underlying information upon which the summary is based to the other parties can result in the entire summary being excluded.[1] A recent example of this occurred in a case in which special counsel to a committee of unsecured creditors objected to the proposed fees to be paid to the debtor's financial advisor. In an effort to prove that its fees were within market, the financial advisor prepared a chart summarizing every chapter 11 case with liabilities over $100 million filed since January 2008, and the fees paid to the financial consultants in each of those cases. Counsel for the financial advisor provided a copy of the summary to the committee's counsel less than 24 hours before the scheduled hearing on the retention, but did not provide copies of, or identify the underlying documents upon which the summary was based.

At the hearing the following day, the committee objected to the use of the chart and the testimony of the financial consultant regarding the summary on grounds that the underlying information had not been provided as required by FRE 1006. The court agreed that the failure to provide the underlying information created a problem for the financial advisor. The debtor's counsel, desiring to resolve the issue that day, and believing that the financial consultant's summary was accurate, proposed allowing the advisor to testify about the summary that day, and then leave the record open to allow the committee to review the underlying documents and ask for additional cross if they thought it was necessary. The judge refused, and told the debtor that it either had to go forward that day without the summary, or continue the hearing until the underlying documents could be produced. The debtor chose the latter course. It took the financial advisor much longer to produce the materials than expected, and, as it turned out, much of the information in the summary chart was inaccurate. The financial advisor, the debtor and the committee subsequently agreed to a revised fee structure at lower rates and the continued hearing never occurred.

Failing to provide the underlying documents upon which a summary is based is not the only potential trap under FRE 1006. For example, if a summary is based upon inadmissible evidence, the summary is likewise not admissible. In United States v. Pelullo, the Third Circuit Court of Appeals recognized that it is "well established that summary evidence is admissible under Rule 1006 only if the underlying materials upon which the summary is based are admissible."[2] Thus, where the summary is based upon documents that are inadmissible hearsay, for example, the summary is not admissible either.[3] Moreover, while it is not necessary to introduce all of the underlying documents upon which the summary is based into evidence, the party seeking to use a summary must take steps to establish that the documents are admissible. Failing to do so can also result in the summary being excluded.[4]

The same holds true if the summary is based upon out-of-court interviews with persons who are not testifying at the hearing.[5] The Pelullo court recognized that where a

1 *See, e.g.,* Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614 (9th Cir. 1993); Hackett v. Housing Auth., 750 F.2d 1308 (5th Cir. 1985).

2 964 F2d. 193, 204 (3d Cir. 1992).

3 Id.

4 *See, e.g.,* SEC v. Hughes Capital Corp., 124 F.3d 449 (3d Cir. 1997)

5 Pelullo, 964 F.2d at 204.

proponent of a summary bases the summary, even in part, upon the inadmissible hearsay statements of third-parties, the proposed witness is rightly excluded from testifying regarding the summary.[6] In Pelullo, a federal agent was going to summarize his investigation into allegations that the defendant had not actually used certain vendors in connection with a building project, but still indicated on the defendant's company's books and records that the vendors had, in fact, done work and had been paid.[7] The court stated: "It would be difficult to imagine a clearer example of hearsay than if [the agent] had testified at trial that he had a conversation with a vendor who told him that he or she did not work on the… project."[8]

The requirement that a summary be based upon otherwise admissible evidence could present a problem for a financial advisor whose summary testimony is based, in whole or in part, upon the records of an entity other than the debtor. For example, if a financial advisor bases the summary on the debtor's financial institution's records, rather than the debtor's own financial records, a court could find that the underlying documents constitute hearsay and, therefore, find that the summary is inadmissible.[9] In order to avoid this problem, the proponent of the summary must ensure that either the other parties to the dispute agree that the underlying documents can be admitted into evidence, or ensure that the documents are otherwise admissible.

In addition, relying upon interviews with the debtor's employees or other third parties, such as vendors or bankers, as the basis for a summary could also result in exclusion on hearsay grounds.[10] FRE 801 defines hearsay as a statement, other than one made by the person testifying, "offered in evidence to prove the truth of the matter asserted." Generally, if one is presenting a summary of other evidence, the summary is being offered to prove the truth of the underlying statements. Therefore, unless one can establish that the underlying statements fall under one of the exceptions to the hearsay rule, the summary will not be allowed into evidence.

As a way to avoid this troublesome issue with otherwise inadmissible evidence, one might try to argue that the financial advisor is testifying as an expert, and, therefore, allowed to rely upon otherwise inadmissible evidence to establish the opinion being offered. That argument would fail, however, if the otherwise inadmissible evidence relied upon by the expert is needed to prove a fact in issue. FRE 703 allows an expert to rely on inadmissible evidence in reaching an opinion and states: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." That does not mean, however, that the underlying facts or data upon which the expert relies are also admitted into evidence for substantive purposes.[11]

So, how might this arise in a bankruptcy proceeding? Let's say that a trustee wants to pursue an action against a former insider of the debtor who received multiple transfers through a series of complex transactions in the one year period before the petition date pursuant to 11 U.S.C. § 547. The financial advisor is called as an expert witness to testify regarding the various transfers. In presenting the testimony, the advisor uses a summary of the various transactions compiled from numerous sources, including documents subpoenaed from the debtor's and the insider's former financial institutions. Based upon these facts, the advisor opines that the transfers did indeed originate from the debtor and ultimately ended up in the former insider's bank accounts. The trustee, however, does not undertake to establish the authenticity of any of the underlying third-party documents; and does not call anyone from the financial institutions to testify that the documents came from their files and were kept in the ordinary course of business. While the underlying documents might be admissible to show the basis for the advisor's opinion, they cannot be admitted to show that the transactions actually occurred. Thus, the trustee will have failed to meet the necessary burden of proof establishing that the transfers to the insider were in fact made during the relevant period.

The bottom line is that one cannot simply rely on a belief that a bankruptcy court will accept any and all evidence. Become familiar with the rules, and be prepared to meet the potential pitfalls. ■

John T. Dorsey is a partner with the law firm of Young, Conaway, Stargatt & Taylor, LLP in Wilmington, Delaware. His practice centers mainly on bankruptcy and commercial litigation matters. The views expressed in this article are his, and do not necessarily reflect the views of the firm.

6 Id.
7 Id.
8 Id.
9 Id. at 199-203.
10 Id. at 204-205.

11 *See, e.g.,* United States v. 0.59 Acers of Land, 109 F.3d 1493, 1496 (9th Cir. 1997) (requiring use of a limiting instruction to the jury that evidence can only be used to evaluate the basis for the expert's opinion, but not for substantive evidence relating to the underlying case); In re Lake Estates Commodities, Inc. 271 BR 575, 587 (N.D. Ill. 2002) ("[I] nadmissible evidence relied upon by the expert is not somehow transmogrified into admissible evidence simply because an expert relies on it.").

Taxation Cases

Forrest Lewis
Plante & Moran PLLC

WAVE OF DEFAULTS FOCUSES ATTENTION ON FORMS 1099-C AND 1099-A

The current credit crisis has brought a lot of attention to the humble 1099 forms related to discharge of indebtedness. This article presents an overview on the requirements to file Form 1099-C for cancellation of indebtedness and Form 1099-A for forfeiture or abandonment of property securing debt. The two forms have similar purposes, to allow the IRS to "document match" any taxable income from discharge or sale-type transactions to the debtor's tax return, primarily in individual tax returns. Most conveyances of property in full or partial satisfaction of a debt are treated as taxable sales. Technically, a discharge of debt can be a form of taxable income known as cancellation of debt income (COD). Some transactions can involve both a taxable conveyance of collateral property and a discharge of debt for loan principal in excess of the value of the collateral. Filings of these forms are required under Internal Revenue Code Section 6050J and 6050P. (There are some favorable exceptions in which the COD is not taxable but discussion of those is beyond the scope of this article.)

How filed: like all 1099 forms, one copy goes to the debtor and one copy goes to the IRS. The debtor copy is to be issued no later than January 31 following a calendar year. However, it is very common that forms are issued as the year goes on whenever a triggering transaction takes place.

Information reported on either form: name, address and tax identification of the debtor, amount of debt involved, date of discharge, fair market value of property transferred, etc.

When form applies: Form 1099-A was originally intended to report discharges of debt involving foreclosure, forfeiture, quit claim, repossession, abandonment or other conveyance of property (collateral) securing the debt back to the lender. Form 1099-C was originally aimed at transactions only involving discharge of debt and no collateral conveyance. However, there now is a lot of overlap as 1099-C also provides a box for "Fair Market Value of Property". In fact, for transactions involving a conveyance of property and a debt discharge, the instructions recommend that only Form 1099-C be used. (For more on transactions involving both a taxable sale and a debt discharge, see the related article in this column in the June-July 2007 issue

Who must file Form 1099-C on discharge of debt:

- Any financial institution, credit union, or their subsidiaries subject to regulatory supervision
- Any organization that carries on a significant business of the lending of money
- Federal agencies plus the FDIC

When a debt is discharged for Form 1099-C purposes: The IRS regulations require reporting when there is an "identifiable event" which includes:

(1) a bankruptcy discharge under title 11 of the U.S. Code as long as the debt was incurred in a business or investment, (so consumer debt does not have to be reported on 1099-C);

(2) cancellation or extinguishment of indebtedness in a receivership, foreclosure, or similar proceeding in federal or state court;

(3) expiration of the statute of limitations for collection of an indebtedness or expiration of the statutory period for filing a claim or commencing a deficiency judgment proceeding;

(4) election of foreclosure remedies by a creditor that statutorily bars the creditor's right to pursue collection of the indebtedness;

(5) cancellation or extinguishment of indebtedness pursuant to a probate or similar proceeding;

(6) an agreement between the lender and a debtor that discharges the indebtedness at less than full consideration;

(7) a decision by the creditor, or application of a defined policy of the creditor, to discontinue collection activity and discharge the debt; and

(8) expiration of 36 months with no payments by the debtor (the rebuttable presumption-more on this later, as the rules have been changed recently)

Other rules on Form 1099-C: For indebtedness of $10,000 or more with more than one debtor, information reporting is required for each debtor discharged from the indebtedness. For indebtedness of less than $10,000 with multiple debtors, reporting is required only with respect to the primary, or first-named, debtor. Only one information return must be filed if the entity responsible for reporting knows or has reason to know that the debtors are husband and wife who lived at the same address when the indebtedness was incurred and if the entity has no reason to know that those circumstances have changed. The amount to be reported with regard to each debtor is the total amount of indebtedness discharged. In such cases where there are multiple debtors, a presumption arises that the debtors are jointly and severally liable for the indebtedness. However, the release by the creditor of one debtor does not require reporting as long as at least one debtor remains liable. You are not required to file Form 1099-C for a guarantor or surety. A guarantor is not a debtor for purposes of filing Form 1099-C even if demand for payment is made to the guarantor.

Recent changes to the 36 month nonpayment presumption: in the recent credit crisis, federal agencies involved in lending or managing receivables and organizations that carry on a significant business of lending money have been swamped with defaults creating significant backlogs. IRS recently implemented a temporary regulation which restricts the 36 month nonpayment presumption to financial institutions, credit unions and their subsidiaries until November 7, 2011. Thus, a bank would still generally be subject to reporting as discharged a loan on which no payment had been received for 36 months but a federal agency would not while the temporary regulation is in effect.

Who must file Form 1099-A on Acquisition or Abandonment of Secured Property: this form has a much wider scope, any organization which loans money in connection with a trade or business must file the form upon forfeiture, foreclosure, quit claim, repossession, abandonment or other conveyance of collateral. The IRS regulations give examples involving auto dealers who sell some cars on time and oil investment promoters (strangely enough) who sell oil well interests on time. (However, there is a major exception which says that no reporting is required for transfers of tangible personal property unless the buyer uses it in a trade or business. Thus, default and repossession of the vehicle under the typical consumer auto loan would not be reportable. It seems the auto dealer example was not a good choice by the IRS regulation writers.)

Penalties: there is a $50 per return penalty for failure to file under IRC 6721.

Debtor Reporting Requirements: debtors who exclude amounts from gross income or reduce tax attributes under Section 108 are required to attach Form 982 (Reduction of Tax Attributes Due to Discharge of Indebtedness and §1082 Basis Adjustment) to their returns. (However, don't be surprised if the IRS fails to read the Form 982 on the debtor's return and still issues a document matching notice. Further correspondence will be required to resolve the issue in those cases.)

Conclusion: this has been a high level overview of the requirements to file federal information reporting returns when there is discharge of debt or collateral forfeiture that meets the regulatory definitions. In view of the great number of loans in default at this time, correct reporting is a very pressing issue. ■

FEDERAL REPORTS DETAIL PROBLEMS IN IRS HANDLING LIENS AND BANKRUPTCY CASES

Two recently released audits of the IRS' handling of lien filings and processing of taxpayer bankruptcy cases reflected a number of deficiencies which are probably familiar to practitioners. The audits were conducted by the office of the Treasury Inspector General for Tax Administration (TIGTA). Fortunately, the IRS accepted most of TIGTA's recommendations for improvements in the areas cited. Time will tell how much progress they achieve.

In audit report 2009-30-089 on the IRS procedure for filing liens and notifying the taxpayer and taxpayer's representative of the filing, TIGTA found the following:

- While the IRS did a great job in mailing the notice of lien to the taxpayer within 5 days as required by law, it could do much better on copying the taxpayer's representative (usually attorney or CPA) with the notice of lien. In a relatively small sample, TIGTA found that the IRS failed to notify taxpayer representatives 30% of the time despite the fact that the IRS has a centralized, electronic file of the powers of attorney the taxpayer's representatives have filed with the IRS. In some cases, the Revenue Officer filing the lien has a manual copy of the power of attorney, but has not posted that to the system.

While centralization of the bankruptcy tax return filing function in Philadelphia in the Centralized Insolvency Operation (CIO) in recent years has resulted in improvement of government efficiency and taxpayer service, in audit report 2009-30-036 on the IRS procedure for handling bankruptcy cases, TIGTA found the following:

- Apparently, IRS employees are filing liens in cases where the taxpayer is in bankruptcy despite the automatic stay. "Centralized Insolvency Operation function could take better advantage of reports generated from IRS automated systems to identify and resolve potential stay violations. During our audit, we identified cases in which taxpayers' rights were violated because the IRS filed liens on 29 taxpayers' accounts while the taxpayers were in bankruptcy. Based on our statistical sample results, we estimated that 495 lien stay violations occurred between October 2005 and December 2007".

- The IRS is not properly posting a "bankruptcy freeze" code to their files when a taxpayer goes into bankruptcy, so they do not have a clear picture of which cases are in bankruptcy. "The IRS process for ensuring that taxpayers' rights and the Government's interest are protected during bankruptcy proceedings relies heavily upon its automated systems and the information within these systems. Bankruptcy cases are controlled and processed by the IRS on the Automated Insolvency System. The Automated Insolvency System interfaces with the IRS Master File…Within the Master File, the IRS records various bankruptcy actions, such as new filings, payments, and discharges, through designated status and transaction codes. Consequently, recording the status and transaction codes in each taxpayer's Master File account accurately and in a timely manner is critical for preventing violations of the Bankruptcy Code automatic stay provision and resuming collection actions upon the discharge or dismissal of a bankruptcy case in a timely manner." TIGTA estimated there were 27,000 instances of failure to post "bankruptcy freeze" codes in the period they studied.

- TIGTA also implied that the IRS' procedures for closing cases after discharge or dismissal are lax.

These glimpses into how the IRS works are interesting and every once in a while helpful to the practitioner to know. ■

NET OPERATING LOSSES: 3, 5 AND 10 YEAR CARRYBACKS

AVAILABLE IN SOME CASES

Troubled companies often have tax net operating losses available for carryback to generate refunds. Most of you are familiar with the current two year carryback regime of IRC Section 172, but in some cases a loss can be carried back up to five years and in one narrow case, a ten year carryback is available. The longer the carryback period, the more likely the company will be able to get a refund. This article will focus on the simple case of a regular (C) corporation where there is no change of ownership to possibly trigger loss limitations under IRC 382, no net operating loss reduction under IRC 108, ignoring alternative minimum tax, etc.

TWO YEAR CARRYBACK

All taxpayers are entitled to a two year net operating loss carryback (it was three years before 1997) under IRC 172(b)(1)(A) as well as a carryforward of unused losses for up to 20 years. Example 1: Corporation A realized taxable income as follows: 2005 $20 million, 2006 $18 million, 2007 ($12) million loss. Corporation A is entitled to carry the $12 million loss back to 2005 which should generate a refund of approximately $4.2 million (35% x $12 million).

CERTAIN DISASTER AND FARMING LOSSES

Certain losses of small businesses and individuals in Presidentially declared disaster areas are eligible for a three year carryback. For this purpose, a small business has gross receipts under $5 million per year. Farming losses are eligible for a five year carryback.

THREE TO FIVE YEAR ELECTIVE CARRYBACK UNDER ARRA

Eligible small businesses , generally under $15 million in gross receipts, that have an "applicable 2008 NOL" can elect to use a carryback period of three, four or five years for such losses IRC 172(b)(1)(H)(i), as amended by the American Recovery and Reinvestment Tax Act of 2009. An "applicable 2008 NOL" is a taxpayer's NOL for any tax year ending in 2008. Eligible small businesses that have a fiscal tax year can also elect to treat an NOL for any tax year beginning in 2008, instead of any tax year ending in 2008, as an applicable 2008 NOL.

Election guidance and procedures have been provided by the IRS in Rev. Proc. 2009-19 and IRS News Release 2009-26. Some taxpayers had already filed tax returns assuming the usual two year limitation but in some cases IRS permits amendment of those returns and election of the extended carryback periods.

Example 2: Corporation B is a calendar-year small business with a 2008 NOL that is eligible for the extended carryback period. B had income in 2004 through 2007, a loss in 2003 that was carried back and used in its entirety, and no carryovers. B would elect a four-year carryback in this instance since a carryback cannot be used in the fifth preceding year, 2003. Thus, it would carry the NOL back to each of the four tax years preceding the tax year of the loss, that is to 2004, 2005, 2006 and 2007, until it is fully utilized.

Example 3: Corporation X is an eligible small business that has a fiscal year that ends on September 30th. It has suffered losses for the past 18 months and the losses are expected to continue for at least another year. X's applicable 2008 NOL is its NOL for the tax year that began on October 1, 2007, and ended on September 30, 2008. In the alternative, it could elect to treat its NOL for the tax year that began on October 1, 2008, and will end on September 30, 2009, as its applicable 2008 NOL depending on which period will create the greatest refund.

An eligible small business is defined as a corporation or partnership that meets a $15 million gross receipts test for the tax year in which the loss arose (or a sole proprietorship that would meet such test if the proprietorship were a corporation). The $15 million gross receipts test is based on the gross receipts test in IRC 448(c), with $15 million substituted for $5 million in that test.

The $15 million gross receipts test would be met for any tax year if the average annual gross receipts for the business for the three-taxable-year period ending with the loss tax year does not exceed $15 million. The last year of the three-year test period is the loss year (Section 2.06 of Rev. Proc. 2009-19; IRS News Release 2009-26, Question 5).

TEN YEAR CARRYBACK

A very liberal 10 year carryback is currently allowed under IRC 172 for certain product liability losses and certain federal and state statutory liabilities. (Before 1998, the scope of tort losses eligible for the 10 year carryback was much greater but that has been narrowed by the Congress).

For this purpose, product liability losses include any amount allowable as a deduction under Code Sec. 162 or Code Sec. 165 which is attributable to:

(1) product liability; or

(2) expenses incurred in the investigation or settlement of, or opposition to, claims against a taxpayer on account of product liability.

A product liability loss means a loss by any taxpayer liable for damages that arise from physical injury or emotional harm to individuals or from damage to, or loss of the use of, property on account of any defect in any product that is manufactured, leased, or sold by the taxpayer, but only if such injury, harm or damage arises after the taxpayer has completed installation or terminated operations with respect to, and has relinquished possession of, such product.

For purposes of the 10-year carryback of product liability losses, the U.S. Supreme Court in United Dominion Industries, Inc., has ruled that the amount of an affiliated group's product liability loss (PLL) is to be calculated on a consolidated, single-entity basis, not by determining PLLs separately for each company. This can allow a much more favorable carryback to the consolidated taxable income of the group.

A deduction for losses under federal or state law liabilities may be taken into account in computing a 10 year carryback only if the liability arose under a law requiring:

(1) the reclamation of land;

(2) the decommissioning of a nuclear power plant or any of the plant's units;

(3) the dismantlement of an offshore drilling platform;

(4) the remediation of environmental contamination; or

(5) the payment of workmen's compensation.

Conclusion: the available periods for tax loss carrybacks are greater than the commonly known two year loss carryback in some cases. Businesses incurring losses should carefully consider their opportunities to obtain refunds of previously paid taxes.

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Bankruptcy Cases

Baxter Dunaway

Ninth Circuit

Does the bankruptcy court have the power, under its inherent authority, to disbar or suspend an attorney, provided the attorney is accorded due process?

Addressing an issue of apparent first impression, the Ninth Circuit held that the bankruptcy court has the power, under its inherent authority, to disbar or suspend an attorney, provided the attorney is accorded due process. *In re Lehtinen,* 564 F.3d 1052, Bankr. L. Rep. P 81,474, 09 Cal. Daily Op. Serv. 5113, 2009 Daily Journal D.A.R. 6043 (9th Cir. Apr 28, 2009) (NO. 05-17421).

The bankruptcy court issued a second order to show cause ["OSC"] "why ... [Chapter 13 attorney Price] should not be sanctioned pursuant to this court's inherent sanction power ... for bad faith conduct," and "why he should not be suspended or disbarred from practice in this court" (hereinafter "Second OSC"). The Second OSC identified four instances of alleged misconduct: (1) Price's failure to attend and to inform debtor of her confirmation hearing; (2) the pressuring of debtor to list her house for sale with his brokerage firm; (3) the lender's condition of retaining Price as the broker for the loan transaction; and (4) his letter to debtor falsely informing her that her bankruptcy case had been dismissed and that a foreclosure sale was imminent. The Second OSC also stated that "the facts point to a clear conflict of interest between Mr. Price acting as the debtor's lawyer, soliciting the debtor to use his services as a real estate broker, and serving as a loan broker." Moreover, it described the evidence required regarding the sanctionable conduct. 564 F.3d 1052, 1056-7. On October 22, 2004, it ordered Price to disgorge the balance of the $1,500 fee and suspended him from practicing before the bankruptcy court of the Northern District of California for three months. It concluded that Price violated several parts of the California Rules of Professional Conduct and the California Business & Professions Code. The Bankruptcy Appellate Panel (BAP),., 332 B.R. 404, vacated in part and remanded, and attorney appealed. Although the Bankruptcy Court did not explicitly state that attorney's conduct was performed in "bad faith" or was "willful," the Court of Appeals held that it impliedly did so by finding that his "conduct in this case was outrageously improper, unprofessional and unethical under any reading of California's ethical standards for attorneys," . The Ninth Circuit Court of Appeals affirmed. 564 F.3d 1052, 1055.

The Court explained that bankruptcy courts generally have the power to sanction attorneys pursuant to (1) their civil contempt authority under 11 U.S.C. § 105(a); and (2) their inherent sanction authority. The bankruptcy court sanctioned Price under its "inherent sanction powers.". In *Chambers v. NASCO, Inc.,* the Supreme Court held that the inherent power of a federal court permits it, *inter alia,*"to control admission to its bar and to discipline attorneys who appear before it." 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.),* the Ninth Circuit held that bankruptcy courts also "have the inherent power to sanction that *Chambers* recognized exists within Article III courts In re Rainbow,." 77 F.3d 278, 284 (9th Cir.1996). A bankruptcy court's inherent power allows it to sanction "bad faith" or "willful misconduct," even in the absence of express statutory authority to do so. It also "allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics." *Fink v. Gomez,* 239 F.3d 989, 992-93 (9th Cir.2001). The inherent sanction authority differs from the statutory civil contempt authority in at least two ways. First, with the inherent power, a bankruptcy court may sanction a "broad range" of conduct, unlike the "[c]ivil contempt authority[, which only] allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction)." Second, unlike the civil contempt authority, "[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct." *Id.* (citing *Fink,* 239 F.3d at 992-93). "[B]ad faith or willful misconduct consists of something more egregious than mere negligence or recklessness." *Id.* (citing *Fink,* 239 F.3d at 993-94).

Research References: Bankruptcy Service, L. Ed. §§ 12:928-12:934 ; Norton Bankr. L. & Prac. 3d § 172:28; Norton Bankr. L. & Prac. 3d 11 U.S.C. § 105 Bankruptcy Law Manual 5d § 2A:42.

Ninth Circuit

Does assignee of original creditor's claim have standing to seek nondischargeability ruling, even though assignee did not rely on the misrepresentation?

The Ninth Circuit held that an assignee of the original creditor's claim against a debtor may seek a nondischargeability ruling, even though the assignee was not the party who relied on the debtor's misrepresentations. In re Boyajian, 564 F.3d 1088, 51 Bankr.Ct.Dec. 160, Bankr. L. Rep. P 81,480, 09 Cal. Daily Op. Serv. 5332, 2009 Daily Journal D.A.R. 6355 (9th Cir.(Cal.) May 01, 2009) (NO. BAP 07-55713, CC-06-01086-DKMO, CC-06-01085-DKMO, BAP 07-55716).

New Falls brought an adversary proceeding in bankruptcy court seeking a declaration that a default judgment owed by Boyajians is non-dischargeable under 11 U.S.C. § 523(a)(2)(B). The judgment against the Boyajians was based on a claim that they had failed to satisfy their obligations under a lease agreement. New Falls contended that the personal financial statements submitted by the Boyajians in order to obtain the lease were materially false, and that discharge was therefore unavailable. Although the judgment was entered in favor of New Falls's predecessor-in-interest, New Falls alleges that it was assigned all rights to the judgment, including the right to non-dischargeability under § 523(a)(2)(B).

The bankruptcy court held that because New Falls had not itself relied on the Boyajians' financial statements, its claim of non-dischargeability under § 523(a)(2)(B) failed as a matter of law. The Bankruptcy Appellate Panel of the Ninth

Circuit ("the BAP") reversed, holding that New Falls stood in the shoes of its predecessor and could state a claim to non-dischargeability under § 523(a)(2)(B) based upon its predecessor's reliance. The Court of Appeals affirmed the judgment of the BAP.

Section 523(a)(2)(B) provides that a debt will not be discharged in bankruptcy proceedings if the debt was obtained through:

> use of a statement in writing-
>
> (I) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) *on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied;* and
> (v) that the debtor caused to be made or published with intent to deceive (emphasis added)

The question is whether the assignee of a debt must itself have relied on the materially false statement, or whether it is enough that the original creditor did so. The Court reasoned that the clear import of this language is that a debt is non-dischargeable to the extent that it is "obtained by ... use of a statement in writing" made with the intent to deceive the creditor. Read as a whole, this language does not provide that a debt is non-dischargeable only if the assignee creditor reasonably relied on the materially false statement. The most natural reading of the word "is" in subsection (iii) is simply that the debt is non-dischargeable if, at the time the money is obtained by the debtor, he or she used a materially false written statement that was intended to deceive. Second, Congress was undoubtedly aware that under general principles of assignment law an assignee steps into the shoes of the assignor. Had Congress wished for assigned debts to be treated differently under § 523(a)(2)(B), it would have done more than rely on the word "is" in subsection (iii). In the absence of such specific language, the Court believed that Congress intended that the general law of assignment remain applicable. That is, assuming New Falls was indeed the recipient of a general assignment of the original judgment, it can stand in the shoes of its assignor and pursue a non-dischargeability action under § 523(a)(2)(B). 564 F.3d 1088, 1091.

Research references: Dunaway, 2 L. Distressed Real Est. § 28A:81 to 28A:100, Part E. Bankruptcy Law Chapter 28A. Bankruptcy—Liquidation Under Chapter 7 or 11 § 28A:81. Discharge of debts—Exceptions to discharge under Chapters 7, 11, 12 or 13: Code § 523.

Second Circuit

Does Chapter 13 trustee have standing to object to debtor's motion to reclassify secured creditor's claim from secured to unsecured?

The Court of Appeals held that a Chapter trustee has standing to object to debtor's motion to reclassify secured creditor's claim from secured to unsecured. In re Overbaugh, 559 F.3d 125, Bankr. L. Rep. P 81,438 (2nd Cir.(N.Y.) Mar 11, 2009) (NO. 08-2355-BK).

Chapter 13 debtors appealed from judgment of the United States District Court, affirming order of the United States Bankruptcy Court, which denied their motion to reclassify a secured creditor's claim from secured to unsecured. The Court of Appeals, addressing an issue of first impression in the Circuit, held that the trustee had standing to object to debtor's motion to reclassify secured creditor's claim from secured to unsecured.

Affirmed.

Specifically, plaintiffs claimed that "[t]he documents attached to the Proof of Claim do not evidence a properly perfected security interest in the 2003 Kawasaki ATV that is alleged to secure creditor Household's claim" because "it is not clear whether Household would even have [a] purchase money security interest in the collateral." Accordingly, plaintiffs argued that "Household's entire claim must be reclassified as unsecured in this case" *Id.* at 559 F.3d 125, 126. On the question of standing, plaintiffs challenged the Trustee's standing to oppose reclassification on the ground that the Trustee's role is to protect unsecured creditors, not secured creditors. Plaintiffs further argued that, because the Trustee lacked standing, Household was the only party that could object to the reclassification motion.

The bankruptcy judge denied plaintiffs' motion to reclassify Household's secured claim. Beginning with the question of whether a trustee has standing to object to the reclassification of a claim, Chief Judge Littlefield reasoned that "[w]hile the Trustee represents the interest of unsecured creditors, she also has a duty to all creditors that claims are disbursed properly by her office. A trustee has the duty to account for all property of the bankruptcy estate and to disburse payments to creditors under the debtor's plan. *See* 11 U.S.C. §§ 704, 1302(b). In order to properly disburse all claims, a trustee must assure that claims are properly entered as secured, priority, or unsecured. *See id.* § 1302(b)(3). To that end[,] the Trustee needs to have a level of comfort that the secured claims she pays are, in fact, secured." He then observed that Rule 3007 of the Federal Rules of Bankruptcy Procedure requires that an objection to the allowance of a claim be filed in writing, and that a copy of the objection with notice of a hearing regarding the objection be sent to the claimant, the debtor, and the Trustee. From these requirements, Chief Judge Littlefield concluded that, "[i]f the Trustee had no standing to oppose or support an objection[,] ... service upon the Trustee would not be necessary." *Id.* at 559 F.3d 125, 128. Accordingly, he concluded that a trustee does have standing to object to the reclassification of a claim.

In reaching this result, the Court joined two other circuits that have concluded, when considering similar challenges to the authority of a Chapter 13 trustee, that "the primary purpose of the Chapter 13 trustee is not just to serve the interests of the unsecured creditors, but rather, to serve the interests of all creditors." *In re Andrews,* 49 F.3d 1404, 1407 (9th Cir.1995) (citing *In re Maddox,* 15 F.3d 1347, 1355 (5th Cir.1994) ("[T]he [C]hapter 13 trustee serves the interests of all creditors ....")). *Id.* at 559 F.3d 125, 129-30.

Research references: Dunaway, 2. 3 L. Distressed Real Est. § 30:30 , Chapter 30. Bankruptcy: Chapter 13 Adjustment of Debts by Individuals V. Chapter

13 Trustee § 30:30. Generally ; 2 L. Distressed Real Est. § 28:14. Trustee—Trustee under Chapters 12 and 13; 2 L. Distressed Real Est. § 28:56. Chapter 13 adjustment of debts by individuals—Trustee.

Seventh Circuit

Did Bankruptcy Court commit error in dismissing case pursuant to § 1112 where debtor clearly would be unable to pay enormous tax obligations that were required to be paid in full within six years pursuant to § 1129(a)(9)(C)?

Bankruptcy court did not error in dismissing case pursuant to § 1112 where debtor clearly would be unable to pay enormous tax obligations that were required to be paid in full within six years pursuant to § 1129(a)(9)(C). *In re Bartle*, 560 F.3d 724 (7th Cir. 2009).

United States moved to dismiss debtor's Chapter 11 case on grounds that his debts dwarfed his financial resources and he realistically could not effectuate reorganization. Following withdrawal of the reference, the United States District Court granted government's motion and subsequently denied debtor's motion to alter or amend dismissal order. Debtor appealed. The Court of Appeals, held that even if debtor was erroneously deprived of adequate opportunity to respond to government's motion, error did not affect his substantial rights and thus did not warrant reversal. Affirmed

Research references: 2 L. Distressed Real Est. § 29:62 , Part E. Bankruptcy Law Chapter 29. Bankruptcy—Reorganization Under Chapter 11, XIV. Confirmation § 29:62. Requirements for confirmation.

Fourth Circuit

Can a mortgage on a personal property mobile home residence be modified in a Chapter 13 Bankruptcy?

The Court of Appeals held that a mortgage on a personal property mobile home residence can not be modified in a Chapter 13 Bankruptcy. *In re Ennis,* 558 F.3d 343 (4th Cir.(Va.) Feb 25, 2009) (NO. 07-2134)..

Debtors signed a promissory note, security agreement, and disclosure statement with the lender to finance a mobile home. The security agreement stated that the mobile home was personal property and further provided that debtors would not change its character as personal property. The lender perfected the security interest by noting its lien on the certificate of title for a vehicle that had been issued by the state vehicle licensing authorities. Debtors rented a lot in a mobile home park, put the mobile home there, and lived in it as their principal residence. The state taxed the mobile home as personal property. When debtors filed for Chapter 13, their Chapter 13 plan proposed to strip down the loan on the mobile home to the value of the mobile home.

The anti-modification clause in § 1322(b)(2) of the Bankruptcy Code prevents a Chapter 13 debtor from bifurcating a secured claim into secured and unsecured portions if the claim is "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). The issue in this appeal is whether the definition (added in 2005) of "debtor's principal residence," which includes a mobile home that is not "attached to real property," *id.* § 101(13A), alters the real property requirement of the anti-modification clause 11 U.S.C. § 1322(b)(2). The Court of Appeals holds that the § 101(13A) definition leaves the real property requirement of 11 U.S.C. § 1322(b)(2) untouched. The bankruptcy court's determination to the contrary is reversed.

Research references: Dunaway, 3 L. Distressed Real Est. § 30:127, XXII. Treatment of Mortgages in Chapter 13 § 30:127. "Strip down" and other issues for home mortgages—Curing home mortgages/mortgage secured only by debtor's residence—Applicability of Section 1322(b)(2) to mobile homes.

First Circuit B.A.P.

Does chapter 13 bar balloon payments on secured claims?

The Debtor filed a chapter 13 petition. Thereafter, he filed an amended plan that proposed, among other things, to bifurcate the mortgage on a multi-family dwelling and pay the entire claim through the plan. The plan proposed to bifurcate the Wells Fargo secured claim on a multi-family dwelling into a secured claim equal to $375,000.00, the value of the property, and an unsecured claim for $149,542.67, the balance of the Wells Fargo claim. The plan also provided that the interest rate on the secured claim would be fixed at 10% and that the Wells Fargo secured claim would be paid in full over the 60-month term of the plan. The plan provided that Debtor would make monthly payments of $4,029.77 to satisfy the secured claim, but the plan described these payments as distributions, rather than as periodic payments, to be made at such times as the trustee deemed administratively convenient. This monthly payment could only satisfy the modified secured claim in 15 years. Thus the plan acknowledged that a balloon payment was required at the end of the plan period and proposed a refinancing of the mortgage to complete payment of the modified secured claim.

Under BAPCPA amendments, § 1325(a)(5)(B)(iii)(I) now provides that if property to be distributed pursuant to § 1325(a)(5)(B) is in the form of periodic payments, such payments shall be in equal monthly amounts. Because the Bankruptcy Appellate Panel concluded that the Debtor's plan provided for "periodic payments" and that 11 U.S.C. § 1325(a)(5)(B)(iii)(I) prohibits balloon payments on secured claims where the creditor has not accepted the plan and the debtor has not surrendered the property, the court affirmed the Order Sustaining Objection to Debtor's Plan. *In re Hamilton,* 401 B.R. 539, Bankr. L. Rep. P 81,443 (1st Cir.BAP (Mass.) Mar 06, 2009).

Research References: Bankruptcy Service, L. Ed. §§ 50:402, ; Norton Bankr. L. & Prac. 3d §§ 149:9, 149:10, 151:12; Norton Bankr. L. & Prac. 3d 11 U.S.C. § 1325 Bankruptcy Law Manual 5d § 13:39.

Tenth Circuit

Did the bankruptcy court abuse its discretion to deny, for economic reasons, an application for employment of national counsel in addition to local counsel?

The Tenth Circuit affirms the broad discretion of the bankruptcy court to deny an application for employment of counsel for economic reasons. In re

Southwest Food Distributors, LLC, 561 F.3d 1106, 51 Bankr.Ct.Dec. 115, Bankr. L. Rep. P 81,455 (10th Cir.(Okla.) Mar 31, 2009) (NO. 08-5160).

In bankruptcy proceeding, official committee of unsecured creditors moved to retain one national law firm as its lead counsel, which in turn selected another firm to act as local counsel. The United States District Court adopted the report and recommendation of magistrate judge, which recommended affirming the bankruptcy court's rejection for economic reasons of retention of national law firm, but acceptance of retention of local law firm. Committee appealed. The Court of Appeals held that bankruptcy court adequately and carefully examined necessity of national firm's appointment.

Affirmed.

Appellee F & M Bank & Trust Company ("F & M"), a secured creditor of the Debtor, filed an objection to both applications. Among other things, F & M objected to the Committee's proposed retention of " 'national' counsel at rates twice the rates of highly competent local, state or regional counsel." F & M's Objection to Application to Retain Bell Boyd at 1, Appellant's App. at 189. F & M went on to argue that "Gable Gotwals is a regional firm that could more than adequately represent the Committee. National counsel Bell Boyd's rates are not competitive with the rates of Gable Gotwals or other local firms in this market," and that "retaining Bell Boyd will require the bankruptcy estate to incur significant expenses for travel time that could be avoided if a regional firm were retained." In its objection to the retention of Gable & Gotwals, F & M stated that "Gable Gotwals is a regional firm that can more than adequately represent the Committee in this case. F & M Bank therefore objects to the Application to Employ Gable Gotwals only in so far as Gable Gotwals would be local counsel supporting Bell Boyd as lead counsel." F & M's Objection to Application to Retain Gable Gotwals at 1-2, Appellant's App. at 197-98. Id. 561 F.3d 1106, 1108.

The Court noted that although the Code vests in the bankruptcy trustee the immediate power to select candidates for employment by the bankruptcy estate, it gives broad discretion to the bankruptcy court over the appointment of professionals to work on behalf of the trustee and the estate, in part by empowering the court to approve candidates so selected. If the bankruptcy court lacked such discretion, it would simply be a rubber stamp for the selections of counsel or other professionals by participants in bankruptcy proceedings. The purpose of the rule requiring court approval of employment is to enable the court to control administrative expenses. Id. 561 F.3d 1106 at 1112.

The Court concluded that there is no evidence that this Chapter 11 case is complex or difficult or national in scope and no compelling evidence was presented that counsel in this locale lacks the necessary expertise that this case requires or is not available to capably represent the Official Committee of Unsecured Creditors. Id. 561 F.3d 1106, 1110.

Research references: 2 L. Distressed Real Est. § 28A:54, Chapter 28A. Bankruptcy—Liquidation Under Chapter 7 or 11, § 28A:54. Compensation of trustees and professionals.

First Circuit

Does § 522(g) permit a debtor to exempt homestead that debtor fraudulently transferred and then voluntarily reconveyed prepetition even though the retransfer came about through the efforts of a creditor?

First Circuit holds that § 522(g) permits a debtor to exempt homestead that debtor fraudulently transferred and then voluntarily reconveyed prepetition even though the retransfer came about through the efforts of a creditor. In re Hill, 562 F.3d 29, Bankr. L. Rep. P 81,454 (1st Cir. Apr 01, 2009) (NO. 08-9006).

Creditor objected to Chapter 7 debtor's claimed exemptions and also filed adversary complaint seeking, inter alia, denial of debtor's discharge. The United States Bankruptcy Court, denied debtor's discharge, capped debtor's potential homestead exemption, and sustained creditor's objection to debtor's claim of homestead exemption. Debtor appealed. The Bankruptcy Appellate Panel (BAP), upheld the denial of discharge, but ruled in favor of debtor as to the homestead exemption. Creditor appealed. Addressing an issue of apparent first impression at the circuit court level, the Court of Appeals, held that section 11 U.S.C. § 522(g) of the Bankruptcy Code restricting a debtor's ability to exempt property recovered by the trustee does not authorize denial of a debtor's homestead exemption with respect to residential property that had been fraudulently transferred and then voluntarily reconveyed prepetition in response to the efforts of a creditor; abrogating *In re Carpenter*, 56 B.R. 704 (Bankr.D.R.I. 1986).

There is no legislative history that illuminates the purpose of section 522(g).[1] The statute section 522(g) provides in pertinent part that, notwithstanding certain enumerated provisions of the Bankruptcy Code:

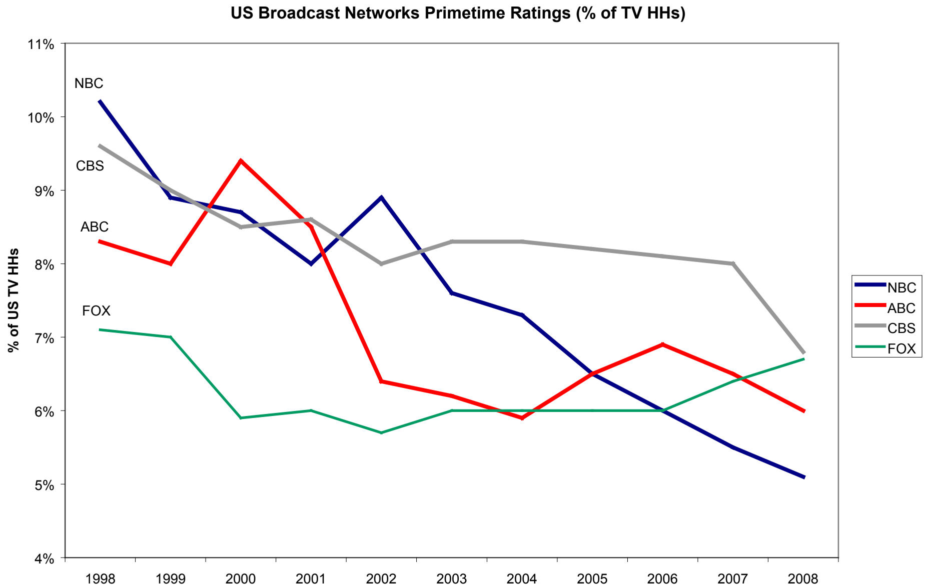
> the debtor may exempt under subsection (b) of this section property that *the trustee recovers* under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if-
>
> (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and (B) the debtor did not conceal such property ... (emphasis added)

With respect to the exemption itself, the BAP held, and the Court of Appeals affirmed, that the plain language of section 522(g) limited its applicability to "property that *the trustee* recovers." (emphasis supplied). Because the Property had been reconveyed as a result of an action by a creditor, not an action by a trustee, the statute did not pertain.[2]

Research references: Dunaway, 3 L. Distressed Real Est. § 30:61 Law of Distressed Real Estate XIV. Avoiding Powers of Trustee or Debtor § 30:61. Debtor—Section 522(h): Debtor's avoiding liens using trustee's avoiding power.

1 562 F.3d 29, 34.
2 562 F.3d 29, 32.

Happy Days *continued from* **p. 1**



Source: Nielsen Media Research, 2009

television carried 2.9 channels and was watched for 32.5 hours per week. In 2007 the average television set carried 107 channels and was watched 57 hours per week. Therefore, while television continued to occupy the overwhelming amount of viewers' time through 2007, the proliferation of channels that came with increased cable penetration began fragmenting viewership when cable began offering programming choices beyond those offered by the Big 3 networks.

The chart above shows the ratings decline at the three legacy national networks since 1998 with the proliferation of cable and, more recently, Internet options.

Even though the proliferation of cable has caused viewership to become fragmented over an increasing number of stations, aggregate television viewership numbers still favor the ubiquitous reach of traditional broadcast television over its newest rival—the Internet.

The table below from eMarketer and Nielsen provides very interesting data about television and internet viewing. It shows that TV watching in the home is still the medium of choice, representing the biggest block of consumer video-watching time – 151 hours / 3 minutes per month (approximately 37 hours / 46 minutes per week).

During the last year, Internet viewing and video watching on the Internet did not grow significantly, nor did the amount of time spent watching TV in the home. Hours spent using the Internet changed minimally during 4Q2008, and experienced only a one hour increase over that of the prior year: TV home viewing and Internet video viewing each grew at the almost the same rate (4%) during 2008. Perhaps most noteworthy, time-shifting grew by 44 minutes (about 11%) to 7 hours / 11 minutes per month in the last quarter of 4Q08 and grew approximately 33% over the last year.

What are recent data telling us about time-shifting, ad-skipping and viewer fragmentation? The answer is still not clear. We need data that are not seasonally impacted and that cover a longer period of time. But the possibility exists, based on the data above, that TV watching, Internet usage, and time-shifting may be reaching an equilibrium that will slow future disruptive impact, thought by many to be so pervasive. Online viewing and TiVo have certainly had a negative impact on time spent watching TV and ads, but we need to consider if the impact is increasing or has reached a plateau...

Time Spent Watching TV, Online Video and Mobile Video in the US
Q4 2007 and Q3-Q4 2008

(Hours:Minutes)	Q42007	Q32008	Q42008
Watching TV in the Home	145:49	140:48	151:03
Watching Timeshifted TV	5:24	6:27	7:11
Using the Internet	26:08	27:18	27:04
Watching Video on Internet		2:31	2:53
Mobile Subscribers watching video on mobile phone		3:37	3:42

Source: eMarketer, 2009

Recession based changes in balance of traditional and new media ad revenues

The current economic recession may be changing the balance between traditional and new media. Since the launch of over-the-air television more than 60 years ago, TV advertising revenue has experienced declines in only a handful of years. But television has never previously seen as sharp a decline in ad revenue as it is experiencing today. In fact, the current economic environment is the worst for advertising-driven media since the 1930's.

According to Wachovia Securities, television spot ad revenue could be down by as much as 10% in 2009. Even the best performers will struggle to provide more content with less ad revenue. The current economic downturn has affected both local and national advertisers, and some of TV's biggest traditional advertisers - auto, retail and financial services companies - have been hit particularly hard. In this environment both online and traditional media are facing extraordinary conditions.

Online advertisers are being forced to find "cheaper" viral means of targeting demographic groups ever more precisely, they are being forced to refine their message and be more efficient with their ad budgets. In the midst of a recession the challenge facing online advertisers is to demonstrate in measurable ways the effectiveness of their focused demographic reach to generate sales. The argument for them is that advertising effectiveness is not just a function of viewer numbers but of measurable results from hyper-targeted demographic focus.

The challenge for traditional TV, however, is to remain relevant in a world where viewers are wresting control of their own viewing schedules, evading advertising and seeking alternative ways to watch their favorite programs. Some argue that traditional TV will become less attractive, and there may not be a flight back to the tried-and-true traditional broadcast models.

In the current slowdown there is considerable debate whether online video providers will suffer disproportionately versus traditional media in an environment of economic weakness. Many potentially viable online video sites are struggling. They need capital, and without it some may ultimately shut their virtual doors. As we write this article, for example, Joost is for sale as are many others. In a more optimistic time, many smaller, alternative online sites would have had better access to venture capital to keep them operating and growing. Today, their futures remain a question mark. Consider the following:

- Will the stronger, first-to-market sites such as Hulu and YouTube take an even greater share of video viewership; and capture an outsized share of advertising revenue?
- Do the independent sites have the financial strength to sustain themselves, let alone grow, by improving their offering and reach, if Internet advertising spending is cut?
- Will the possible diminution of alternative sites slow viewer fragmentation?

Increasingly high leverage on balance sheets of most media companies

Combine decreasing CPMs and recession-related revenue declines with highly leveraged balance sheets of many broadcasters, and you are sure to get covenant breaches and difficulties in meeting debt service. Many companies took advantage of the borrower-friendly debt markets to finance acquisitions and expansion. Today this strategy has left them struggling. Many are close to violating covenants (if they have covenants), or are otherwise facing debt service problems. Huge amounts of precious cash are being drained out of these heretofore high free cash flow generating companies to cover interest expense rather than to pay for new programming.

Prior common wisdom about acceptable leverage for broadcasters is now out the window. Current leverage well in excess of the traditional maximum of seven times total debt was in part driven by a frenzy of acquisitions and leveraged buyouts by the private equity community. Several TV broadcasters also took advantage of accommodating capital markets and increased leverage to fund acquisitions or retire high-yield bonds.

These sophisticated players made their capital structure bets based on the assumption that the advertising market would continue to experience normal business cycles, and that capital markets and M&A activity would continue to provide refinancing or strategic alternatives. Unfortunately, many of those bets proved to be incorrect. Even before the deterioration in the advertising market many believed that leverage in excess of seven times would have been hard to service with even slight revenue misses. As a result, the average bid for senior secured debt of TV Broadcasters currently hovers between 40% – 50% of par value.

Conclusions:

While we may never recapture the simple times of Happy Days, the industry has various ways to prosper in the years ahead. The threats represented by digital substitution are more profound than the competitive pressures of cable, and more serious than television broadcasting has ever seen before. Broadcasters are experiencing rate card erosion as the recession and technology-enabled ad-skipping technologies hit the industry hard. One demographic group may already be out of the reach of broadcasters forever: Highly attractive young consumers, particularly males, who have been shifting their viewing away from traditional TV networks, and who are demanding a range of more targeted, edgier programming anytime and anywhere. And broadcasters are, in general, hamstrung to respond by high financial leverage.

Broadcasters are not without options. This article has focused on problems besetting the industry only to provide a backdrop for proposing strategies to allow broadcasters to prosper amid these challenges.

Without minimizing the challenges facing any advertising-driven media business today, we believe that a new equilibrium will eventually take hold from this current market upheaval. Migration from broadcast television is still in flux (at least for the moment) and broadcasters have the opportunity to adopt strategies to combat the proliferation of new video delivery systems and ad-skipping technologies that have so changed the over–the–air broadcast world.

Despite the recession and the impact of disruptive technologies, broadcasters can improve short-term performance while they better sell the value proposition of TV to advertisers. In the coming months we will develop various revenue enhancement strategies that broadcasters can employ to drive revenue increases. The themes that we will develop include the following strategies.

1. ***Television can be a B2C business for the first time.*** Online viewing also creates a new world of direct customer relationships between content providers and viewers heretofore unknown to broadcasters. By definition, in the traditional one-to-many broadcast model a station will not develop an individual relationship with its viewers. But in a one-to-one, anytime/anywhere distribution world where you download your favorite weekly TV programs, local news or kid's soccer game to watch on your laptop, there is an opportunity for video content providers to cultivate individual viewer relationships. Customer relationship management for broadcasters historically has meant a focus on the advertisers but in the new media world it can mean a focus on individual viewers – a new concept we call "viewer relationship management".

2. ***Acquisitions may be well priced.*** For those who can afford them, targeted acquisitions are more

affordable than ever. Given the difficult financing environment, there should be promising, yet under-capitalized, new media start-ups that will be looking for financial solutions. Broadcasters on their own or with the help of private equity (don't count on increased leverage) may be able to acquire online properties at attractive valuations, and use them as platforms for their own online initiatives.

3. ***Integrated cross-media programming can create new content opportunities.***. Many viewers are simultaneously watching TV while chatting on instant messenger, playing online casual games, and viewing Facebook profiles. While such multi-tasking is in some ways fragmenting the viewership of ads, it is also creating opportunities to integrate viewership onto new platforms. IM, gaming and Facebook all represent opportunities to generate incremental advertising and subscription revenue integrated with TV programming. In addition, sponsorships and local content can be targeted and leveraged.

4. ***Digital partnerships can be developed.*** Local TV Broadcasters and other local media providers can partner together to find ways to share resources and create more compelling content as well as leverage each other's distribution. TV and newspapers, for example could work together to provide co-coverage of news stories or events, driving audiences to partners' websites, papers or newscasts while at the same time sharing costs.

5. ***Sales forces can be re-trained and re-energized to create new revenue streams.*** With the development of viable websites, broadcaster sales forces need to learn new selling techniques to provide robust cross-selling that does not cannibalize traditional television-based ads. Many advertisers are looking for any way to boost the impact of their ad dollars, and the packaging of online and TV broadcast spots can be used effectively to enhance revenue.

6. ***Retransmission revenue*** represents opportunities for significant additional revenue for many TV broadcasters. Many already have begun to obtain retransmission revenue from the DBS and Cable MSOs for providing their local programming – news and weather in particular.

Prospering in the midst of disruptive change is not easy. In coming articles FTI will suggest how broadcasters can do so. ■

Liz Chang, Roger Scadron, and Matt Thomspon are all part of FTI Consulting's dedicated Communications, Media & Entertainment practice.

Opinions expressed are those of the authors

Liz Chang, Managing Director, most recently was a Managing Director with Deutsche Bank's Leveraged Finance and prior to that in the Media Group. While at Deutsche Bank she had a particular focus on Radio and Television Broadcasting. Over the last 12 years she has participated in almost every major debt and equity issuance in the sector. She has a BA from Bryn Mawr College and an MBA from the Wharton School.

Roger Scadron, Managing Director has been with FTI Consulting and its predecessor firm for more than 10 years. He specializes in financial restructuring, financial / operational assessments, and corporate finance for communications, media and entertainment companies. He has a BA from UCLA and an MBA from the Wharton School.

Matt Thompson, Director, was previously a Director in Corporate Development at SONY Pictures Television International. He has been with FTI and its predecessor firm for almost five years. Using his strong knowledge of company financial operations, he specializes in financial and operational assessments of companies in the communications, media and entertainment industries. He has a BS from Pomona College and an MBA from Stanford University.

AIRA's 25th Annual
Bankruptcy & Restructuring Conference
Orlando, Florida















CIRA Award Winners

Each year the individuals with the highest average scores from the three CIRA courses are recognized for their achievement and given a commemorative medal. Below are the recipients of the Kroll Zolfo Cooper/Randy Waits CIRA Awards.

Gold – Dominic Santos

Dominic received a BS in Business Administration from the University of Southern California in 1999, where he graduated cum laude with a dual emphasis in Financial Analysis and International Finance. He is currently a Managing Director with FTI Consulting in Los Angeles, California and has been with them since 2002. Prior to joining FTI, in 1999 he joined PricewaterhouseCoopers' Business Restructuring Practice.

Dominic and his wife live in Irvine, California where he enjoys wine tasting, mountain biking and snowboarding. He loves spending time with his family and friends and also enjoys international travel.

Bronze – Richard Van Es

Rick is the President/Owner of his firm, Van Es Consulting LLC in Osceola, IN. Rick has a BBA in Accounting and an MBA in Management, both from Notre Dame.

Rick and his wife, Mary, feel blessed to be parents to their son and daughter. Their son, Colin, is a junior at Seton Hall University studying biochemistry. During the summer, Colin competes in golf tournaments. Their daughter, Haley, is a senior in high school, and also plays competitive golf on her high school team and competes nationally. Any spare time Rick and Mary have after enjoying their children's activities, is spent playing golf and attending concerts. Rick actually began his college studies with a music scholarship and has performed with several well known jazz bands.

Silver – Scott Bouchner

Unfortunately Scott was not able to attend the presentation. He had a prior commitment in New York City.

In 1990, Scott received his MBA in Finance/Marketing from Columbia Business School and prior to that received a BA in English Literature from The George Washington University.

Scott joined Berkowitz Dick Pollack & Brant in Miami, Florida, in 1999. He is the Director of Forensic & Business Valuation Services. Prior to joining Berkowitz Dick Pollack & Brant, he was a Manager with PricewaterhouseCoopers in Miami.

Certificates of Distinguished Performance Awards

Steven Agran – could not attend. Steve is a Consulting Manager with Morris Anderson & Associates in New York, NY. He graduated from the University of Michigan with a BBA in Finance/Accounting and received an MBA in Corporate Strategy from Fuqua School of Business.

Sean Allen – Received a BS degree in Business Administration from University of Colorado in 2003. He is currently pursuing his Masters in Accounting at Rutgers School of Business. Sean was an Analyst with Newbury Capital Partners in New York in 2007. Prior to that, he was a General Securities Principal with Ethos Securities Corporation in New York.

Gary Lampert – Gary is the Owner of Gary R. Lampert CPA in Roslyn Heights, New York. In 1980 he received a B.B.A. in Accounting from Pace University. Gary also holds an M.S. degree in Taxation from Long Island University.

Byron Litsey – Byron works for DLC, Inc., in Costa Mesa, California. He received a BS degree from the University of Kentucky, and an MS degree in Accountancy from San Diego State University. Byron is a member of the California Society of CPAs.

Pamela Talbot – Pam is a Senior Manager for KPMG LLP in San Diego, California. Prior to joining KPMG, Pam was with PricewaterhouseCoopers. She holds a Bachelor of Commerce degree in Accounting from the McGill University in Montreal, Quebec, and has a Master of Tax degree from the American University in Washington, DC.

Robert Medlin Receives Manny Katten Award

Robert Medlin Receives 2009 Manny Katten Award

Co-chairman of AIRA's first annual conference in Chicago, Manny Katten was a founding director and continued as an active leader of AIRA until his untimely death. In 1999, the Board passed a resolution to endow the Manny Katten Award, presented annually to an individual demonstrating exceptional leadership, dedication and service to the bankruptcy, insolvency and restructuring field. This year's award was presented to J. Robert Medlin, senior managing director in FTI's Corporate Finance practice. Based in Dallas, Mr. Medlin has more than 32 years' experience in interim management, corporate finance, mergers and acquisition consulting; business regeneration, turnaround consulting and crisis management; restructuring and bankruptcy consulting; litigation support and investigative accounting services; and financial, accounting and tax consulting.

Mr. Medlin holds a B.B.A. in accounting from the University of Georgia, and is a CPA, CIRA and CTP. He is a member of AICPA, Alabama Society of CPAs and Texas Society of CPAs, and serves on the board of directors of the American Bankruptcy Institute.

In introducing Mr. Medlin at the annual conference, Grant Newton noted he met first met him in a CIRA Part 1 course. Medlin's idea was to see if he liked the course, and if so, have others in his firm enroll. PWC soon held the lead in numbers of CIRAs and held that lead from 1998 on; FTI now has over 70. He served on the Board of AIRA from 1997 to 2008 and his strong support for AIRA continues. He has served as speaker or moderator for many AIRA programs, including the opening panel at AIRA's 25 Annual Conference and session moderator for the China Conference.

AIRA Honors Founding Directors

In celebration of its 25th anniversay, AIRA's founding directors were honored with commemorative medals at the conference in Orlando. The original board consisted of the following individuals (with firm and location in1984):

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