Volume 13, Issue 33: January 2021

cdcbaa
Central District Consumer Bankruptcy Attorney Association

President's Message
by Hale Andrew Antico

Happy new year! I am honored to enter my second year as president of this esteemed organization. The cdcbaa remains steadfast in its commitment to provide up-to-date legal education, best practices, and a community for those who strive to help debtors in our district.

Bankruptcy filings of all chapters in the Central District of California during 2020 were down almost 30% from 2019, to 27,886. This provided time and opportunity for our organization to update its infrastructure, and focus on how we accomplish our goals.

While local and state government stay-at-home Covid-19 pandemic-related orders provided challenges to our mission, the leadership of *cdcbaa* was up to the task and

Continued on Page 2

The Small Business Reorganization Task Force
By: Roksana D. Moradi-Brovia & Tamar Terzian

Congress passed the Small Business Reorganization Act - Subchapter V of Chapter 11 in 2019 and it became effective date February 19, 2020 ("SBRA"). The purpose of SBRA is to "streamline the bankruptcy process by which small businesses debtors can reorganize and rehabilitate their financial affairs." Report of Committee on the Judiciary, House of Representatives, Report 116-171, 116th Cong., 1st Sess., on Small Business Reorganization Act of 2019.

In late 2019, Chief Bankruptcy Judge Maureen A. Tighe created the Small Business Reorganization Task Force ("Task Force") to provide community outreach to financially distressed small businesses with respect to the benefits of a Chapter 11 reorganization under the newly enacted SBRA and to explore the obstacles small businesses face in seeking bankruptcy relief in the United States Bankruptcy Court for the Central District of California (the "Central District"). The Central District contains over 400,000 small businesses within its geographic boundaries and small business cases constitute most of the Court's Chapter 11 docket; these businesses are critical to the economic health of our seven-county district.

The participants of the Task Force include a diverse group of Chapter 11 bankruptcy attorneys and insolvency professionals, a Subchapter V Trustee, as well as members from the Office of the United States Trustee, the U.S. Small Business Administration, the California Department of Industrial Relations, the United States Attorney's Office, several sitting judges and cdcbaa's very own Board Members, Tamar Terzian and Roksana D. Moradi-Brovia (*cdcbaa* President for 2018 and 2019).

During the course of 2020, the Task Force worked to create a Small Business Reorganization Task Force Final Report (the "Report") with the hope that insolvency professionals in the community will use these materials to educate businesses in financial distress. The Report was published in December of 2020, and can be found on the Court's website at: https://www.cacb.uscourts.gov/sites/cacb/files/documents/publications/SBRTF%20Report.pdf.

The Task Force initially met in person at the beginning of 2020 and then, much like the rest of the World, shifted

Continued on Page 2

President's Message
Continued From Page 1

quickly adapted from in-person MCLE programs to provide online-only Zoom webinars. Thanks to the efforts of our program committee chairs Roksana Moradi-Brovia and M. Jonathan Hayes and our amazing volunteer panelists, we held eight two-hour MCLE programs, including programs covering the CARES Act and SBRA just after their implementation.

Similarly, many thanks to website committee chair Marcus Tiggs. Due to his stalwart efforts, *cdcbaa* was able to migrate to a new listserv platform. There were a couple of curveballs, but we again adapted and adjusted, and the result is far better than what we left behind. This new platform enables us to provide the ability to mentor, instruct, teach, and answer and support one another in a community of legal professionals focused on helping people.

The *cdcbaa* and our membership stepped up and wrote letters in a campaign to our governor urging him to sign AB 1885 for a long-overdue increase to the California homestead exemption, which he did sign, taking effect this month. This will help many of our clients and neighbors stay in their homes during this health and economic crisis, and beyond.

I give my thanks to our entire board of directors - a team that helps serve *cdcbaa*'s members as you help your clients. Daniela Romero edited this newsletter and will be working on publishing at least one more this year. If you have an idea for an article or want to brief a case, please contact Daniela.

The year ahead looks to be rewarding. In January 2021, Professor Hayes is leading our 15th Annual Ninth Circuit Review program with Judge Neil Bason and BAP Judge William Lafferty, who will discuss and dissect the most important cases in the past year from the Supreme Court, appellate cases in the Ninth Circuit, District Court, and bankruptcy court cases.

Continued on Page 10

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The Small Business Reorganization Task Force
Continued from Page 1

over to virtual meetings due to the COVID-19 pandemic. As Judge Tighe states in her introductory message within the Report, "[t]he pandemic not only caused significant and immediate economic impact on small businesses in the Central District—forcing many to shut their doors to the public almost overnight—but it also roiled economies around the World. These unprecedented developments galvanized the Task Force's resolve to implement the SBRA's streamlined reorganization procedures in the Central District and make this new law work for as many debtors and creditors as possible."

The Task Force, at Judge Tighe's direction, analyzed a number of issues facing financially distressed small businesses including, but not limited to:

- Examination of small business access to bankruptcy;
- How to increase outreach and access for underserved communities to ensure that businesses know how to appropriately access bankruptcy resources;
- How to get the best return for both debtors and creditors without running up expensive litigation costs.

To that end, the Task Force created three main subcommittees to collect data, analyze, create educational materials, and make related recommendations related to financially distressed small businesses in the community.

The Outreach and Education Subcommittee was tasked with raising public awareness of, and providing educational resources regarding, different forms of bankruptcy and non-bankruptcy relief, with a focus on small business insolvency. The Subcommittee prepared an educational Powerpoint program tailored for small businesses in financial distress. The Presentation provides access to centralized information on reorganization options to a wide variety of diverse small business owners; options under the Bankruptcy Code, out of court workouts and compares and contrasts a typical Chapter 11 case with a Subchapter V small business case under SBRA. The Subcommittee then developed contacts within diverse constituencies within the Central District and circulated its educational materials to those community contacts and representatives (via various chambers of commerce and other agencies), including communities in which English is not the predominant language. The Subcommittee has already made several presentations to local bar organizations and various chambers of commerce to educate small business owners of the various options.

The Rules and Forms Subcommittee reviewed and analyzed the SBRA, Coronavirus Aid, Relief and Economic Security Act (CARES Act), the Interim Federal Rules of Bankruptcy Procedure and the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy. The Subcommittee examined these acts and rules along with information from every federal judicial district within the United States and subsequently drafted new and proposed amended local rules and forms

Continued on Page 10

cdcbaa Programs
Upcoming Calendar

January 23, 2021
15th Annual Review of 9th Circuit Decisions
on Bankruptcy in 2020

SPEAKERS:
Hon. Neil W. Bason
U.S. Bankruptcy Court - Central District of California

Hon. William Lafferty
U.S. Bankruptcy Court - Northern District of California

Prof. M. Jonathan Hayes | Resnik Hayes Moradi LLP

Program: 11:00am-1:00pm
2 Hours of MCLE Credit Provided

February 11, 2021
Zoom Brown Bag Lunch,
"The New 2021 COVID-19 Bankruptcy Statutes"

February 20
"One Year into SBRA; Meet the
Subchapter V Trustees"

Doug Flahaut (LA), Caroline Djang (RV),
Susan Seflin (SFV), Rob Goe (OC) and
Greg Jones (LA) | moderated by Todd Turoci

March 20
"Evidence"

Hon. Barry Russell
U.S. Bankruptcy Court, Los Angeles Division

Prof. M. Jonathan Hayes | Resnik Hayes Moradi LLP

April 17
TBD

May 8
"Lien Stripping 101"
Hon. Wayne Johnson
U.S. Bankruptcy Court, Riverside Division

"Family Law and BK Crossover"

Hon. Mark Wallace
U.S. Bankruptcy Court, Santa Ana Division

Hon. Wayne Johnson
U.S. Bankruptcy Court, Riverside Division

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To Help Mitigate the Spread of COVID-19, this CLE Program will ONLY be available as a WEBINAR via Zoom at
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11:00am-1:00pm
2 Hours of MCLE Credit Provided

Brace & Beyond: Joint Tenancy & Transmutation
by Cathy Moran

For Californians, the CA Supreme Court's decision in Brace this summer upended our understanding of joint tenancy and community property.

For decades, we "knew" that a property couldn't be both joint tenancy and community property. Siberell. And for those of us in the 9th Circuit, we "knew" that when married folks acquired property with title taken as joint tenants, the property was characterized as the separate property of each spouse when either spouse filed bankruptcy. Summers.

Then, *Brace* tells us that a married couple taking title to real property as joint tenants is not sufficient, without something more, to transmute the property into the separate property of each spouse despite the clear expression of joint tenancy in the deed. Take a closer look at *Brace* from my colleague Wayne Silver.

So, where does that leave the hundreds of thousands of married couples who, to the extent they thought about it at close of escrow, believed they each held a separate property joint tenancy interest in the property.

The consequences of community property

While it's easy to think about community property as an issue only in the dissolution of a marriage, the characterization of property drives issues of tax, probate, and, the focus here, debtor-creditor rights in and out of bankruptcy.

Two statutes, one federal and one state, lie at the heart of the issue . California Family Code § 910 makes community property liable for debts incurred by either spouse before or during marriage. Separate property, such as we thought joint tenancies were, is liable only for the debts of the spouse who holds the property (and perhaps, for debts related to the necessities of life provided to the other spouse.)

The federal statute involved, Bankruptcy Code § 541, brings all of the community property into the bankruptcy estate even when only one spouse files bankruptcy. Property of the estate gets administered for the benefit of creditors with claims on the community, even when only one spouse files bankruptcy.

So, treating joint tenancy property held by spouses as community property doubles the fraction of the property exposed to one spouse's debts, and exposes all of a joint tenancy property to inclusion in a bankruptcy estate.

Why the form of title fails as a transmutation

Up until Brace, cases held that the act of taking title to real property during marriage as joint tenants was sufficient to overcome the presumption of Family Code § 910. Even when the down payment and the debt service all came from

Continued on Page 6

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Lawyers are People Too: An Interview with Marcus G. Tiggs

By M. Jonathan Hayes

Jon: Marcus, you were born in Los Angeles?

Marcus: Yep, near Leimert Park, in the Baldwin Hills area.

Jon: Tell me about your family and growing up.

Marcus: My Dad was a career navy guy and a contractor after he retired. Mom was a homemaker, born in France. My parents were easy going, and taught me to be responsible, that was a core thing. And to them education was extremely important, especially to Mom.

Jon: Where did you go to school?

Marcus: My first three years were at St. Gregory's, after that was nine years at Le Lycée Français de Los Angeles.

Jon: Really? I'm not familiar with that school.

Marcus: It's a French-language prep school, accredited by the French Ministry of Education, preschool through high school, on Overland Ave in West LA plus many other campuses now. Classes were conducted in French; I used to speak French fluently, now not so much. Jody Foster was the Valedictorian of my class! She was really smart then too (laughing). But no football team for sure. I was a competitive figure skater, mostly at the Culver City Ice Rink but not much other sports beyond that.

Jon: You're kidding. I spent a huge part of my early adult life at the Culver City Ice Rink, coaching youth hockey and watching my little brother and oldest son play.

Marcus: Yeah, it was really sad to see the place get razed several years ago.

Jon: Where did you go to college after that?

Marcus: I went to Pepperdine University in Malibu, gorgeous campus of course. I took science classes the first year thinking I that would go to medical school, but I figured out pretty quickly that studying that hard was not part of my basic makeup. So, I switched to French and Broadcasting. I lived on campus my first year as was required but got an apartment in Westwood after that. For one thing the school was strict about no alcohol, so most of us moved off campus as soon as possible (laughing).

Jon: Did you go straight into law school after that?

Marcus: No, because I was in Army ROTC at Pepperdine, cross enrolled through UCLA. I had an active duty commitment and did my three years of active duty in the Army after graduating, stationed in Germany and at Ft. Sill, Oklahoma. The remainder of my military career was in the Army National Guard, retiring as Lieutenant Colonel

Jon: Whoa! How was that?

Marcus: It had its ups and downs but overall a good experience. I was a Field Artillery officer. After a lot of training, deploying a year in Iraq and later in my career 10 months in Afghanistan and later 9 months in Kosovo. For

Continued on Page 5

Lawyers are People Too: An Interview with Marcus G. Tiggs

Continued from Page 4

the most part, I served in Field Artillery batteries, staff and as a battalion commander. As Field Artillery targets can be miles away, for me there was limited close quarter fighting, but it was dangerous and scarry at times for sure. Just leaving the wire going from point A and reaching point B in tack, yourself and subordinates, could be a challenge.

Jon: What were your takeaways or how would you describe that experience?

Marcus: I would start off with, I have come to appreciate the preciousness of life and making the best of challenging situations while focusing on a doable solution. Each deployment was different based upon the situation on the ground and where I deployed. There are a few common themes I will share with you. First, there are times I experienced things I would not have wished on my worst enemy; Second, most combat vets will agree that every day is like a Tuesday, nothing to look forward to other than doing your job, staying alive and dealing with the higher command. The weird thing about deploying multiple times is that it does not become easier and one soldier's experience can be dynamically different than another, even if you are deployed in the same place and time. Finally, the love and appreciation for my wife and family for holding down the home front while I was away and dealing with their own internal fears while only showing me their strength---not wanting me to worry.

Jon: Then you decided to go to law school?

Marcus: Yes, I thought that law school seemed like a decent profession, sounded kind of cool. I applied to some of the major law schools but my failure to study hard in college kind of caught up with me. I went to the University of West Los Angeles Law School. It was close to home for one thing. I was in the National Guard and worked with another guy putting up billboards. It paid a decent amount and gave me free time to study.

Jon: Any fond memories of law school?

Marcus: Well, I enjoyed Constitutional Law and Criminal Procedure. I have great memories of Prof. Gert Hirschberg, my Professor in Torts. The school has a great philosophy, giving people a chance to become an attorney, people who wouldn't otherwise get the chance, working adults especially. I'm a good example. I passed the bar exam my first try and believe that I have a had a good career, thanks in part to UWLA.

Jon: Did you take any bankruptcy classes?

Marcus: No (laughing). Bankruptcy was not on my radar when I got out of law school. I had this idea that I would be an entertainment attorney, sounded cool of course, and that obviously didn't happen. When I graduated, I responded to an ad I saw in the Daily Journal for a position at the consumer bankruptcy firm, Slate & Leoni. I stayed there for ten years before I decided it was time to move on. Hugh Slate had retired, and Leon Bayer and Jeff Wishman left Slate & Leoni and started their own office. I've been really happy working with Leon and Jeff for the past 17 years now.

Jon: Have you enjoyed the bankruptcy business?

Marcus: Definitely. I'll tell you, I'm not sure I would still be practicing law if I had gone into some other area. Law is serious stress, right? The beauty of bankruptcy is it is so diverse and interesting. There is the administrative component, some litigation, appeals. Bankruptcy intersects with many other areas of law. And I think we really get to help people. For the most part opposing counsel in bankruptcy cases are pretty decent people, our judges are great.

Jon: Would you recommend becoming an attorney?

Marcus: Actually no. In fact, I probably wouldn't do it again if I got a do-over. It's an attack first, then attack again business, lifestyle in the trenches, so much hand-to-hand combat so to speak. I will say that we have helped a lot of people, changed people's lives through the use of bankruptcy. But there are other professions with less stress, I think at least. I guess the grass is always greener on the other side.

Jon: Do you have any advice for young attorneys?

Marcus: Balance your work and personal lives. Be careful to decide quickly what area you want to work in because once you develop your expertise, it's kind of difficult to change after that. You really have to enjoy the area of law you are in or forget it. Choose your specialty carefully. If you're in the bankruptcy arena, join the cdcbaa, and study, study, study.

Jon: You teach Bankruptcy at UWLA?

Marcus: Yes, and the experience has been extremely rewarding. I get a kick out of seeing former students in court and them reminding me that they took my class. That's giving back, it's important to give back.

Jon: What does Marcus Tiggs do on weekends?

Marcus: I've taken up golf. I thought it would be relaxing – ha! I try to be active in the community. I ran for political office in Culver City a couple of times which was an experience. I have also been taking Spanish classes, trying to learn to speak Spanish. My wife of 30 years is from Colombia. I have a daydream of moving to Colombia when I retire.

Brace & Beyond: Joint Tenancy & Transmutation

Continued from Page 3

community funds, the form of title as joint tenants effectively transmuted those funds into the separate property of the spouses, shared equally.

A wrinkle in the characterization analysis appeared in the 2014 California Supreme Court's decision In re Marriage of Valli. Husband there had purchased a life insurance policy and denominated his wife as the sole named owner. In the subsequent dissolution, husband claimed the policy to be community. The Supreme Court held his act of taking title in his wife's name was insufficient to transmute the insurance policy into the wife's separate property, even though he was the disadvantaged spouse in the transaction.

The question after Valli was whether the transmutation requirements of Family Code 852 would apply outside of the dissolution setting , when a bankruptcy trustee succeeded to the assets of one spouse when that spouse filed bankruptcy alone.

To be effective, a transmutation, under Family Code § 852 requires:

- a writing
- containing an express declaration
- made by the spouse whose interest in the property is adversely affected Family Code § 852(a)

Brace applied the holding of Valli to the non-dissolution setting of debtor-creditors rights in bankruptcy and found the presumption of community property trumped the form of title, which lacked all of the elements of a transmutation.

Addressing the defective transmutation

All of this brings us to the 2020 California Court of Appeals case of Safarian v. Govgassian, decided a few months before Brace. Like most challenging cases, the facts are a bit convoluted.

Pared down, husband and wife filed a fraud action against multiple defendants. While that action was pending, husband filed for divorce and the spouses entered into a marital property agreement that characterized any recovery in the fraud action as the separate property of each spouse. Thereafter, the fraud action resulted in a judgment before husband filed bankruptcy.

The bankruptcy trustee settled with the judgment debtors and thereafter, the wife commenced collection action against the judgment debtors.

In proceedings in state court to bar collection, judgment debtors claimed that the judgment was community property and thus the settlement with the bankruptcy trustee precluded wife's collection efforts. The marital property agreement, they argued, did not comply with Family Code 852's requirements. Wife claimed that she held one half of the judgment as her separate property pursuant to the marital property agreement in the dissolution.
The trial court found the marital property agreement was vague and unenforceable.

The appeals court disagreed. A transmutation agreement, such as the marital property agreement, that doesn't meet the statutory requirements of Section 852 is voidable, not void. Further, since the judgment debtors were not parties to the marital property agreement, they do not have standing to rely on § 852 to invalidate the agreement. The matter was remanded for further proceedings analyzing the marital property agreement under ordinary contract principles.

The questions that remain

Which brings us to the myriad of California properties currently held by married folks in joint tenancy. Are those deeds, accepted by the spouses at close of escrow pursuant to written escrow instructions, defective transmutations?

If so, there may be a way to preserve the characterization of property expressed by the form of title without executing a transmutation agreement now, that is subject to fraudulent transfer challenge. See Fam. C. § 851.

The Safarian court grounded its standing decision on California CCP § 367 which provides that "...California law does not give a party personal standing to assert rights or interests belonging solely to others." Only the parties have the power to avoid the provisions of a contract; the parties can also ratify the contract, extinguishing the power of avoidance, citing the Restatement of Contracts 2nd.
Safarian suggests that a judgment creditor attempting to levy on joint tenancy real property of a married couple might, as a stranger to the transaction by which title was acquired, be precluded from challenging the characterization of the property as separate property.

The logic of Safarianalso suggests that a written ratification of the couple's intention to hold the property in joint tenancy as their separate property might confirm the previous understanding of joint tenancies between spouses.

One glaring question after Safarian is whether a bankruptcy trustee in the case of one spouse acquires the debtor's right to void a defective transmutation, as in Brace? Query what happens in a Chapter 11, where the debtor acts as a debtor in possession, with the rights of a trustee?

Brace, having upset the apple cart as to property characterization, sets us up for an extended period of developing law as to spousal property currently held in joint tenancy.

My thanks to Wayne Silver who pointed me to the Safarian case and provided highly useful comments on my drafts.

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The *cdcbaa* strives to provide quality continuing legal education and events. The following sponsorship opportunities are available:

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Practice Tips from Hon. Meredith Jury (Ret.)

Question from old bankruptcy lawyer:

Judge Jury, I'm pretty sure that declarations are a source of constant heartburn for judges. But I'm never sure myself of the best strategy in drafting a good declaration. I try hard to limit the declaration to just the facts ma'm[1], but sometimes the declaration looks skimpy and doesn't tell much of a story. Do you have a recommendation on this? Inquiring minds want to know.

Response from Judge Jury:

Only a bankruptcy lawyer could have asked the question the way it is phrased, but from 40 years ago the bk practitioners have used declarations totally improperly, even good firms continue the wayward practice.

A declaration is supposed to be admissible evidence. The same rules of evidence make it admissible as if the declarant was testifying orally. The purpose of a declaration is to present to the court facts within the personal knowledge of the declarant, for which a foundation can be laid and which do not contain hearsay or some other objectionable material. Somehow that concept has often gotten lost in the use of declarations in bankruptcy proceedings. It is not acceptable to take a motion or other pleading, which contains argument, opinions, conclusions, quotes from documents, and other materials and tack a "penalty of perjury" onto it and call it a declaration. Yet that is done over and over and for years in the bankruptcy courts. It is always wrong and the practice should be eliminated. The purpose of the declaration is not to tell "the whole story" of the motion or argument you wish to make to the court. That is what the motion or pleading does. The declaration is evidence in support of the motion and nothing more.

1 Citing Jack Webb in virtually every Dragnet show he did over 10 years or more.

Program Summaries

By Gary R. Wallace

***cdcbaa* PROGRAM SUMMARY 9-12-20**

***cdcbaa* Holds Seventh Meeting and MCLE Program of 2020: "Claim and Issue Preclusion: A Primer"**

On September 12, 2020, the *cdcbaa* held its seventh members meeting and MCLE program of the year. To help mitigate the spread of COVID-19, the meeting and program were conducted as a live webinar via Zoom video. The program topic was "Claim and Issue Preclusion: A Primer." The distinguished panel featured the Honorable Meredith Jury (Ret.), the Honorable Laura Taylor, Bankruptcy Judge for the Southern District of California and 9th Circuit Bankruptcy Appellate Panel, and M. Jonathan Hayes of Resnik Hayes Moradi LLP. The panel explained that the terms res judicata and collateral estoppel have been replaced by claim preclusion and issue preclusion, respectively. Issue preclusion arises most commonly in bankruptcy litigation to except a debt from discharge. The five elements of an issue preclusion claim are (1) identical issues (2) that were actually litigated (3) necessarily decided (4) on the merits with finality and (5) against the party (or one in privity therewith) as to whom the preclusion is sought. Claim preclusion, as applied in bankruptcy cases, is frequently applied in claims litigation and exemption disputes. The elements of claim preclusion are (1) the same cause of action, (2) the same parties and (3) a final judgment on the merits.

Claim preclusion extends to any claim that is found to be within the scope of the cause of action that was decided. If the claim or issue was decided under California law, there is an additional element for each type of preclusion, namely, that its application would not be fundamentally unfair. See Lopez v. Emergency Service Restoration, Inc. (In re Lopez), 367 B.R. 99 (9th Cir. BAP Mar. 2007) ("In California, issue preclusion is not applied automatically or rigidly, and courts are permitted to decline to give issue preclusive effect to prior judgments in deference of countervailing considerations of fairness.").

The panel also explained the distinctions between preclusion and other similar doctrines such as full faith and credit, law of the case, Rooker-Feldman, and judicial estoppel. Specific instances involving preclusion were also addressed, such in the context of confirmed reorganization plans and nondischargeability actions (both § 523 and § 727). The panel also noted that issue preclusion may be afforded to arbitration awards even if they have not been confirmed as judgments. See Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817 (9th Cir. BAP, 2006).

A helpful handout, which included summaries of relevant cases, was also provided to all participants. The program was once again well-attended and well-received.

The next *cdcbaa* members meeting and Zoom MCLE program is scheduled for October 10, 2020. We will present on two topics: **"Confessions of Judgment - UCC1 and Section 522 Interplay"** and **"Bankruptcy Criminal Fraud, BPPs and Hijacked Cases."** Our speakers will include Hon. Julia Brand | U.S. Bankruptcy Court - Central District of California, Los Angeles Division; Stella Havkin | Havkin & Shrago; Tamar Terzian | Brutzkus Gubner; Jolene Tanner|Assistant U.S. Attorney (IRS); and Ron Maroko|Trial Attorney, Office of the U.S. Trustee.

***cdcbaa* PROGRAM SUMMARY 10-10-20**

***cdcbaa* Holds Eighth Meeting and MCLE Program of 2020: "Confessions of Judgment – UCC-1 and Section 522 Interplay" and "Bankruptcy Criminal Fraud, BPPs and Hijacked Cases "**

On October 10, 2020, the *cdcbaa* held its eighth and final members meeting and MCLE program of the year. To help mitigate the spread of COVID-19, the meeting and program were conducted as a live webinar via Zoom video. Two program topics were presented: **"Confessions of Judgment – UCC-1 and Section 522 Interplay" and "Bankruptcy Criminal Fraud, BPPs and Hijacked Cases."** The distinguished panels featured the Hon. Julia Brand of the United States Bankruptcy Court for the Central District of California (Los Angeles Division) as well as Stella Havkin, Esq. of Havkin & Shrago, Tamar Terzian, Esq. of Brutzkus Gubner, Jolene Tanner, Assistant U.S. Attorney (IRS), and Ron Maroko, Trial Attorney with the Office of the U.S. Trustee.

MCAs and Confessions of Judgment

The panel discussion on confessions of judgment looked at the disturbing trend of so-called merchant cash advances ("MCAs") to financially distressed small businesses. MCAs are structured differently from conventional loans primarily to circumvent stringent loan regulation and usury laws. MCA agreements purport to purchase some portion of the borrower's future accounts receivables. Borrower costs and interest rates are built-in to the amount of accounts receivables required for satisfaction of the "purchase." Typically, the lender is given access to the borrower's bank account, and both a security agreement and personal guaranty is required as well. Finally, the lender in such a transaction will require a confession of judgment that is signed and notarized, but in a blank amount.

The confession of judgment is particularly troublesome for the borrower because it permits the lender to obtain, almost immediately upon default, a final, binding an enforceable court judgment without the need for a complaint, service of process, an opportunity to defend or for a trial or default prove-up. California law affords some protection to the borrower who is waiving these significant due process rights by requiring that an independent attorney for the borrower certify that s/he has advised the borrower to sign the confession of judgment. However, other states, such as New York, do not have such a requirement. Not surprisingly, many MCA agreements contain New York law provisions. Only recently has New York limited the propriety of filing a confession of judgment to businesses that do business there.

Because of their prevalence and the devastating effects that they have on borrowers, MCAs are frequently the subject of litigation in all chapters of bankruptcy cases. Disputes concerning whether the borrower/debtor's pledged accounts receivables are property of the estate are common. Preference and

Continued on Page 9

Program Summaries (cont.)

By Gary R. Wallace

avoidance actions under sections 547, 548 and 550, as well as objections regarding the secured nature of the claim, are also common. The secured status of the accounts can also be the subject of cash collateral motions. Sometimes, the lender will file a section 523(a)(2) action alleging false statements and fraud, especially if the claim is found to be unsecured. So, borrowers should never assume that they are free from liability for any false statements on MCA applications simply because they believe that the MCA will might be later held unenforceable or that the creditor's status might be subordinated in bankruptcy.

Bankruptcy Fraud

The panel discussion on bankruptcy criminal fraud centered around several important sections of Title 18 of the United States Code. Each of these provisions make it a crime, punishable by fines and even possible imprisonment for certain types of intentional misconduct in a bankruptcy case. Notably, they apply to attorneys and bankruptcy preparers (see, especially, section 156) as well as both debtors and creditors. Section 152 concerns concealment of assets, false oaths and claims, and bribery. Section 153 concerns embezzlement of assets from a debtor's estate. Section 157 pertains specifically to a "scheme or artifice" to commit bankruptcy fraud. Section 3284 addresses concealment of a bankrupt's assets. Section 1519 concerns the destruction, alteration or falsification of records.

A helpful handout, which included copies of cases and code sections, was also provided to all participants. The program was once again well-attended and well-received.

The next *cdcbaa* members meeting and Zoom MCLE program is tentatively scheduled for January 23, 2021. The topic will be the ever-popular annual Ninth Circuit Review of bankruptcy decisions.

JANUARY 2021

SUPREME COURT RULING: THE MERE RETENTION OF ESTATE PROPERTY DOES NOT VIOLATE SECTION 362(a)(3)

On January 14, 2021, the United States Supreme Court issued its ruling in *City of Chicago v. Fulton et al.*, No. 19-357.

Held: The mere retention of estate property after the filing of a bankruptcy petition does not violate 11 U.S.C. section 362(a)(3). That section prohibits only affirmative acts that disturb the status quo. The ruling was unanimous, 8-0, with Justice Barrett abstaining and Justice Sotomayor writing a concurring opinion.

Facts: The City of Chicago impounded respondents' vehicles for failure to pay fines for motor vehicle infractions. The respondents filed Chapter 13 petitions and requested that the City return their vehicles. The City refused and, in each case, a bankruptcy court held that such refusal violated the automatic stay. The Court of Appeals for the Seventh Circuit affirmed all these judgments in a consolidated opinion. That opinion found that the refusal to return the vehicles constituted an act "to exercise control over" the respondents' vehicles. The Supreme Court reversed and remanded this decision.

Ruling: The Court determined that, under Section 362(a)(3) of the Bankruptcy Code, the filing of a bankruptcy petition operates as a "stay" of "any act" to exercise control" over the property of the estate. The most natural reading of these terms is that only affirmative acts that would disturb the status quo are prohibited. The Court found that the respondents' alternative reading, which they argued prohibited the mere retention of estate property, would create two serious problems. First, such a reading would render section 542's central command – that an entity in possession of certain estate property "shall deliver to the trustee…such property" – largely superfluous because that section is the provision governing the turnover of estate property. Second, the respondents' proposed reading of section 362 would create a conflict because section 542 carves out exceptions to turnover that are not contained in section 362.

The Court acknowledged a possible ambiguity in the phrase "any act …to exercise control," noting that, an omission can qualify as an "act" in certain contexts. But it observed that the provision required both an act and the exercise of control such that something more than the mere retention is required. Moreover, the Court found that any ambiguity is resolved by the more express language of section 542, which would become superfluous if the proposed more expansive reading of section 362 were accepted. The Court found critical the fact that section 542 contains exceptions to the turnover obligation, where transfers made in good faith without notice or knowledge of the bankruptcy petition, for good faith transfers to satisfy certain life insurance obligations, and for property "of inconsequential value or benefit to the estate."

It is noteworthy that the Court refused to consider the obvious resulting question that flows from its ruling, namely how does section 542's turnover requirement operate when the exceptions do not apply? The Court stated that the answer to this question was unnecessary to its ruling. However, this issue did not escape Justice Sotomayor's notice. In her concurring opinion, she noted that "[r]egardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly comports with…the principal purpose of the Bankruptcy Code [which is] to grant a 'fresh start' to debtors." Justice Sotomayor observed further that, especially in Chapter 13 cases, debtors ordinarily need a car to maintain employment so that they can meet the financial obligations of their reorganization plan. Because a turnover proceeding usually requires a separate lawsuit which can proceed slowly, reliance upon section 542 litigation may be inadequate to protect a debtor unless the bankruptcy courts permit such matters to be heard by motion or a standing order exists requiring turnover, as some courts do.

We hope you will join us.

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President's Message
Continued From Page 2

In February 2021, we plan on having two programs: one will be discussing Subchapter V cases one year after implementation. The other will have Chapter 13 Trustee Kathy Dockery's Lead Counsel Aki Koyama, along with *cdcbaa* board member and tireless treasurer Jeff Hagen, discussing the changes to the bankruptcy statutes in the Consolidated Appropriations Act of 2021, signed into law on December 27, 2020.

Later this year, we have also scheduled a webinar on evidence and bankruptcy law with Judge Barry Russell, who literally wrote the book on the subject. In addition, we have slated two bankruptcy crossover programs: family law and an estate planning program.

While these programs will all be streamed online as webinars, it is our goal to also meet and present in person at Southwestern Law School again if/when it's allowable, prudent, and safe.

If you haven't renewed yet, please join or renew your *cdcbaa* membership. You'll be part of a robust community, and despite the pandemic, we're not slowing down, but picking up speed and our membership is expected to grow. So whether filings drop again in 2021, stay steady, or we get the much anticipated surge, the *cdcbaa* is poised to help, educate, support and advocate for the consumer law professionals who assist the debtors who need it most.

Hale Andrew Antico is President of the cdcbaa*, and has practiced bankruptcy law in Palmdale and Santa Clarita for over 15 years.*

The Small Business Reorganization Task Force
Continued from Page 2

designed to implement the SBRA and Interim Federal Rules. The rules and forms proposals were submitted to the Rules Committee for the Central District.

The Systemic Issues Subcommittee focused on modes of streamlining the administration of SBRA bankruptcy cases within the Central District and improving upon competent advocacy, education, cost efficiency, dispute resolution and consensus-building. The work of this Subcommittee resulted in the Task Force obtained funding for mediation training for the newly empaneled trustees who are appointed in SBRA cases even before the Report was published.

Public awareness of these important issues is paramount, and the members of the insolvency bar and others are encouraged to use and widely share the Report and presentation. The members of the Task Force are listed at page 2 of the Report and are available to assist in presentations.

Get Ready for NextGen CM/ECF

The Federal Judiciary is transitioning its Case Management/Electronic Case Files (CM/ECF) system to a Next Generation of CM/ECF ("NextGen"). NextGen CM/ECF provides a new logon module (a Central Sign-on) that allows electronic filers to access from PACER any NextGen court in which they are allowed to file.

As of January 2021, all Federal Appellate Courts, 52 District Courts and 44 Bankruptcy Courts are on NextGen. Currently in California, the Southern District's Bankruptcy and its District Courts and the Central District's District Court are already NextGen courts.

The U.S. Bankruptcy Court, Central District of California, is scheduled to transition to NextGen on April 26, 2021. From that date forward, ECF account holders must use PACER's Central Sign-on feature to logon to CM/ECF. To activate Central Sign-on, e-filers must have an upgraded individual PACER account.

How to get ready before April 26:

- ❑ Individuals that have a PACER account: check and verify whether an upgrade on your existing account will be needed at www pacer.uscourts.gov > Move to NextGen CM/ECF > How to: Upgrading Your PACER Account
- ❑ NextGen does not allow e-filers to share a PACER account. To obtain an individual PACER account now, go to www pacer.uscourts.gov > Register for an Account
- ❑ Law firms and other organizations that want group billing for their individual accounts, go to www pacer.uscourts.gov > My Account & Billing > Group Billing Access

Further information and an overview of this information will be made available as the Court gets closer to the NextGen transition date.

Robin Beacham, Special Projects Manager. U.S. Bankruptcy Court, CDCA-Los Angeles

Top 8 Reasons to Join the cdcbaa:

CentralDistrictConsumerBankruptcyAttorneyAssociation

BENEFITS

1. **PROFESSIONAL NETWORKING:** *Have a free exchange of ideas, including common legal and business matters in consumer bankruptcy practice*
2. **"LOCAL-LOCAL" RULES & PRACTICE TIPS:** *Get the inside scoop on what judges and trustees want—instead of learning the hard way*
3. **MENTORSHIP:** *Opportunities to get good advice on troublesome issues in tough cases, hone your practice skills, and avoid malpractice*
4. **A HIGHLY ACTIVE LISTSERVE:** *Post questions and get answers quickly from the bankruptcy community—worth the price of membership alone!*
5. **LEARN FROM THE BEST:** *The cdcbaa has more State Bar Certified Bankruptcy Specialists than any organization in California*
6. **MCLE UNITS OF REAL USE IN YOUR PRACTICE:** *Up to 16 MCLE hours offered per year at Saturday morning seminars—often featuring judges*
7. **FREE CALVIN ASHLAND AWARDS DINNER:** *Rub elbows with your peers, trustees, and judges—included in the price of your membership*
8. **CREDIBILITY WITH CLIENTS AND THE COURT:** *Adding cdcbaa to your resume, website, and promotional materials increases your credibility*

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Central District Consumer Bankruptcy Attorneys Association

Advancing the interests of Consumer Bankruptcy Practice in the Central District of California

I hereby apply for membership in the ***cdcbaa***, the **CENTRAL DISTRICT CONSUMER BANKRUPTCY ATTORNEYS ASSOCIATION**, a nonprofit association, **for calendar year 2021** I understand the basic goals of the organization are to address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California and to provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors. As a condition of membership, I declare as follows:

1. I am a duly-licensed attorney presently authorized to practice law in the Central District of California;
2. I am interested in consumer debtor practice; and
3. I support the basic goals of the ***cdcbaa*** as outlined above.
4. I understand that using any of cdcbaa's marketing/communication resources for announcing a service, an event or a seminar that imposes a fee, I must first obtain Board approval AND that such announcement must be posted only by the President or the Administrator.

I understand the ***cdcbaa*** is incorporated as a 501(c)(6) nonprofit organization and that a portion of my dues will not be deductible as a business expense because ***cdcbaa*** advocates within California for legislation on behalf of consumer debtors.

Name: _____

Bar Number: _____

Firm: _____

Address: _____

Tel: _____

Email: _____

Web Address: _____

Signature: _____

One year membership fee: **$250.00**
(includes one ticket to the annual Calvin Ashland Awards Dinner in November)

Make check payable to: ***cdcbaa***

Mail completed application and fee to:

cdcbaa
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