

The Sideshow: Anecdotal Evidence of Humor in Bankruptcy; An Insolvent Debate on Bankruptcy

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Authors' Note: This is the second column of Chapter 8, the ABI Journal's humor column. If you missed the inaugural column in the February 2008 issue, you didn't miss much. However, we continue to encourage all ABI members to submit humor columns or send humorous bankruptcy experiences, stories or cases to Eric Van Horn or Scott Brown for inclusion in this column.

One anonymous reader of the inaugural Chapter 8 column featured in the February *ABI Journal* felt that our explanation of the NCBJ could have been more comprehensive—specifically, that the NCBJ is not just a huge conference for bankruptcy judges, but also “a lot of aspiring judges who are willing to pay a ton of money to attend and thereby indirectly and substantially subsidize the judges' cost to attend.” Thanks, anonymous reader. If you or any other readers are looking for a less-expensive conference to attend, please register for the first Bankruptcy Comedy Conference to take place in my Arizona garage at a date/time TBD. The cost is \$9.95 (Euros are also accepted and preferred). Sign up fast! Or at least before June 1, 2008, after which registration will be opened up to all of the neighborhood kids.



Scott K. Brown

Thomas S. Hemmendinger with Brennan, Recupero, Cascione, Scungio & McAllister, in Providence, R.I., offered the following contribution: *In re California Webbing Industries, Inc.*, 370 B.R. 480 (Bankr. D. R.I.

2007). In that case, the bankruptcy court held that the secured creditor had not consented to a carve-out for professional fees. In a footnote, the court stated: “A clearer statement of the secured creditor's intention would be hard to find, and for this Court to conclude, on this record, that CIT consented to a carve-out would last about as long on appeal as it would take

About the Authors

Scott Brown, a partner in the bankruptcy group at Lewis and Roca LLP in Phoenix, is co-editor of ABI's International Committee e-Newsletter and writes humor columns for *The National Law Journal* in his spare time. Eric Van Horn is a member of the Business Reorganization and Bankruptcy Section in Greenberg Traurig's Dallas office.

the reviewing court to write-REVERSED.”

Josefina F. McEvoy, an attorney with K&L Gates in Los Angeles, recently heard President Bush say, in connection with his speech regarding the Bear Stearns bailout, the following: “Some people say we need to change the Bankruptcy Course ... I mean Code.” Well said, Mr. President. **Eric Van Horn** has been working to invite President Bush

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to the next debate in his column, but so far hasn't made it past the White House receptionist desk. Let us know if any of you have a name Eric could drop that would give him direct access to the Oval Office. “Kenny Boy” and “Brownie” no longer work.

Eric and I clerked for the same judge—Hon. **Leif M. Clark** in San Antonio—so we can't help but quote his cases once in a while. A recent case, *In re Texas Pig Stands, Inc.*, 49 BCD 108 (Bankr. W.D. Tex. 2008), takes the bacon. (Yes, I know—jokes like that will put the column out of print before summer.) There, the former employees and vendors—who provided uncompensated post-petition services to the debtor—sought payment of their claims from the proceeds of a liquidating plan. The Texas Comptroller objected, asserting that its statutory tax liens for unpaid sale proceeds trumped the unsecured, post-petition creditors. The judge agreed, although he said the employees and vendors had “clear moral priority” over the taxing authority and, furthermore,

they should contact Texas Governor Rick Perry's office for an explanation of why the state taxing authority should be paid before them.

Finally, in *In re Student Financing Corp. (Stanziale v. SWH funding Corp.)*, 49 BCD 82 (Bankr. D. Del. 2007), the debtor made two advances to a lender in order to induce the lender to make a large loan to it. Both times the lending fell through and, eventually, the debtor was forced into chapter 7. The trustee brought a fraudulent-transfer action against the lender attempting to avoid the two advances made to it by the debtor. The lender moved for summary judgment, but the trustee argued that an e-mail from the president of the lender provided enough evidence for the trustee to avoid summary judgment on an “actual” fraudulent transfer claim. The offending e-mail said: “No joke, you know from the last SFC [the Debtor] deal we have no money. We

were just using the old ‘the documents aren't done’ to get out of financing.”

Backpedaling, the lender tried the old “Michael Scott” defense, claiming the president's “no joke” e-mail was a “sarcastic, tongue-in-cheek” response to the debtor's request that the lender fund the loan before the loan documents were finalized. The court disagreed, finding that the e-mail was enough evidence to get the trustee past summary judgment.

The lesson from this case is obvious: humorous e-mails are dangerous. For clarity purposes, we suggest that your clients use lots of :) in their humorous e-mails and that lawyers add the following to their standard e-mail “waiver” language:

This message/joke is intended only for the use of the individual or entity to which it is addressed—and is intended to be funny and/or hilarious. If the reader of this message is not the intended recipient or is not laughing his or her head off at my

wit, you are hereby notified that any dissemination, distribution or copying of this message—or reliance on this message for purposes of suing me or my company in the event you do not think it is funny—is strictly prohibited. If you have received this communication in error or in a grumpy mood, please notify us immediately by replying to the sender of this E-Mail by return E-Mail or by telephone or by sending one or more “:(”.

In accordance with Internal Revenue Service Circular 230—which experts believe is the IRS’s first (and last) attempt at humor—we advise you that if this e-mail contains any tax advice that you can possibly understand, such tax advice was not intended or written to be used, and it cannot be used, by any taxpayer (or person who should be a taxpayer) for the purpose of avoiding penalties that may be imposed on the taxpayer, unless done so in a joking manner.

An Insolvent Debate on Bankruptcy

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The 2008 presidential race is *really* heating up, inversely matching the temperature of the economy—a welcome relief to all of us bankruptcy professionals. This is due in part to the narrowing of the candidate field since the Iowa caucuses: There are *only* two Democratic candidates (need we name them?), one Republican candidate and, of course, Ralph Nader—and Ron Paul, sort of. We at Chapter 8 believe it is time for the candidates to have a serious debate about bankruptcy issues.

Unfortunately, we didn’t have the guts to actually call the candidates, and we’re pretty sure they would have “respectfully” declined our invitation citing “irreconcilable scheduling conflicts” (except maybe Ralph Nader and Ron Paul, but no one wants to read a debate between just those two candidates). Someone suggested that we ask the candidates to debate bankruptcy issues through competing essays like the *Federalist* and *Anti-Federalist Papers*, but we have no idea what that means, so we

swiftly rejected the proposal.

As a result, we tried to frame a debate based upon thorough research of all the candidates’ prior and current positions on all bankruptcy and “related to” issues, but that was too much work. So we thought of a better way to “channel” their true views on bankruptcy and what would happen in a bankruptcy debate: We hired a mind-reader. Sit back and relax with your favorite expensive libation now that the good times are back and you can undoubtedly afford it again, and enjoy Chapter 8’s “Great Bankruptcy Debate of 2008.”

The Debate

Moderator: Welcome to Chapter 8’s Great Presidential Bankruptcy Debate Unspectacular of 2008. It is my pleasure to introduce the participants in tonight’s unprecedented debate on bankruptcy. From the audience’s left to right: Senator Hillary Clinton, Senator John McCain, Ralph Nader, Representative Ron Paul, and Senator Barack Obama <small group of Ron Paul supporters cheer wildly>.

Moderator: Tonight’s debate is historic for many reasons. First and foremost, it is the first presidential debate ever held exclusively on the topic of bankruptcy. Second, this debate includes the participation of a noncandidate, Representative Ron Paul, who is technically out of the running now that Senator McCain has locked up the Republican nomination. Because Representative Paul was excluded from a prior debate, Chapter 8 thought that it would be “fair and equitable” to allow Representative Paul to participate just this once. Third, this debate features special “candidate-specific rules” in the spirit of the local rules so popular in bankruptcy courts. Like those rules, these rules can be changed quickly with less than even “Delaware notice.” The rules came from the candidates themselves—that is, rules that the candidates are imposing upon their opponents. Three violations of any of these rules will result in the candidate’s microphone being cut off until the very end when the candidates will be allocated one word to answer the last question. A buzzer will sound when violations occur. The rules are:

- Sen. Clinton may not use any form of the word “fight,” and is prohibited from nodding her head;
- Sen. McCain may not use the phrases “straight talk” or “my friends,” and he may not smile at awkward times;
- Ralph Nader is not allowed to argue

that he was not responsible for the Democrats losing the 2000 presidential election, and he may not refer to the two-party system as a “duopoly”;

- Sen. Obama may not begin any response with the words “look” or “understand this,” and he may not use any form of the word “change”;
- Last, Ron Paul’s 11 zealous supporters must remain calm and quiet during the entire debate. That said, Representative Paul will not be penalized for any outbursts during his introduction before these rules are announced.

Your bemused expressions must mean that you all are only wondering why it is taking so long to get to the first question, so here we go. The first question is about your respective positions on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Of those of you who voted on it, only Sen. Obama voted against it. Please explain your respective votes.

Clinton <jumping in immediately>:

Here we go again with me getting the first question, and Sen. Obama getting another pass by the media. But I’m happy to answer the question first because I did not vote for or against that particular bill. I abstained. Why? Because I was bedside with my husband, the president responsible for the economic boom times of the 1990s and the president who pocket-vetoed a bankruptcy reform bill while in office, as he underwent surgery that day.

Nader: That seems awfully convenient. Even if I were the one undergoing surgery, I would have crawled out of the hospital bed and hitchhiked to Washington, buckling up in the seat belts I’m responsible for cars having, drinking the water I made clean, and eating food with labels that I made mandatory, just to vote against what should have been called the “Bankruptcy Prevention and Consumer Abuse Act.”

Obama: Look, <buzzer>, before this turns into another South Carolina debate, I do not think that Sen. Clinton should be chastised for missing that vote.

Clinton <genuinely appreciative>:

Well, thank you, Barack.

Obama: But, understand this, <buzzer>, I think it is important to clarify that Sen. Clinton actually voted in favor of a prior version of the 2005 bill.

Clinton <aghast>: And I have been absolutely clear that when I cast that vote,

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I was hoping that the bill would not pass, and it did not.

Paul: Now, that sounds like audacious hope to me.

McCain: But Rep. Paul, didn't you vote for the 2005 bill?

Paul: I did, *and so did you*, Sen. McCain <now smiling awkwardly> <buzzer>. But I didn't vote for it and hope against it. I voted for and hoped for its passage. Just like I want to abolish the IRS <wild cheers> <buzzer>, I want to rid our country of bankruptcy courts because they are totally unconstitutional, and because bankruptcy laws preclude the efficient operation of free markets <wilder cheers> <buzzer>. Bankruptcy is like Alice's Wonderland: It's an alternate universe where valid contracts can be broken, liens can be stripped, and a creditor can be forced to repay money it received for a valid debt. Just ask Walt Disney, who experienced the upside down world of bankruptcy as both a creditor and a debtor before he finished that work. Bankruptcy also violates all principles of free markets, and the Bankruptcy Code is replete with incomprehensible jargon that offends basic principles of the English language. I mean, where else in the universe does the phrase "indubitable equivalent" even exist? Bankruptcy must go, and while I appreciate being invited to this debate, it certainly is not the "indubitable equivalent" of the debate from which I was excluded <Paul's supporters run around the studio in uncontrolled fervor> <buzzer>.

Moderator: Good thing we have ground rules. Sen. McCain, you committed one violation. Sen. Obama, you have two violations <buzzer>. Sen. Clinton, the smirking nod I just saw is your first violation. And Rep. Paul, with those three outbursts by your supporters, your microphone will now be cut off.

Paul <satirically>: Why don't you just get rid of my microphone by selling it free and clear, or cramming it down ... <microphone cut>.

Moderator: One down, four to go ... questions, that is. The second question relates to the ongoing subprime mortgage meltdown. Pending legislation allows bankruptcy judges to modify home mortgages by reducing the value of the mortgages to the value of the homes securing them. What are your respective

positions on this legislation?

McCain: Here is some straight <long pause> speak. Americans are in pain. Mortgage payments are going up, while home values are falling. But I think that it is important to focus on the brighter side of this situation, rather than dwell on the negative. It is true that home values are falling, which is bad, but not all bad because falling home values will mean that the home owners will pay less in property taxes—tax relief that all American homeowners rightly deserve <awkwardly smiling> <buzzer>. Cutting taxes is a centerpiece of my economic policy, just like it was Ronald Reagan's, for whom I proudly served as a foot soldier in the Reagan Revolution.

Obama: What I just heard described by Sen. McCain is not an economic policy, but a wrekenomic policy. I strongly support this legislation, but it faces fierce opposition by the lobbyists on K Street. While I served as a community organizer on the streets of Chicago, I helped fight many of these same special interests that improperly influenced the passage of the 2005 bankruptcy reform bill, and that are opposing the current legislation.

Clinton <incredulously>: Come on, Barack, *is there anything that you did not do as a community organizer on the streets of Chicago?*

Obama: I did not take money from lobbyists or serve on Wal-Mart's corporate board.

Nader: Well, while Sen. Clinton was serving as a Wal-Mart director, and Sen. Obama was organizing everything on the streets of Chicago, I was actually fighting the special interests in enemy territory, on K Street. Nader's Raiders ran around-the-clock operations fighting the cash, access and excess of K Street, something the two parties and their duopoly <buzzer> could not and would not do.

Clinton: While I respect Ralph's work and his work as a consumer advocate, I cannot underscore enough how much of a fighter <buzzer>, I mean warrior, that I am. As first lady, I single-handedly defeated all efforts by lobbyists to reform the Bankruptcy Code in an ongoing series of barroom-like brawls that the public never saw or heard about. And when the bill came to the White

House for my husband—the former president during the good times—to sign, I was the one who actually folded up the bill and put it in his pocket where I knew he would forget about it.

Moderator: After two questions, Sens. Clinton, Obama and McCain each have two violations, and Ralph Nader has one. This third question comes from an anonymous contributor who identifies him or herself only as "R.G. from N.Y.C." R.G. asks: "9/11 changed everything. How did it change your perspectives about bankruptcy?"

McCain: R.G. brings up a great point my friends <buzzer>. We needed the tougher bankruptcy laws passed in 2005 because the last thing we want to do is allow terrorists to fund their war against America with credit cards, file for bankruptcy, discharge the debt and then kill innocent Americans while sticking them with what we know is a \$400 per family per year bankruptcy tax.

Obama: What Sen. McCain fails to understand is that Islamic law prohibits interest-bearing loans, so the terrorists would not likely use American-style debt to fund their operations. This fundamental misunderstanding is just like his failure to understand that Shiite-Iran would not train Sunni-al-Qaeda for the insurgency in Iraq. Given that failure, it would not be surprising if Sen. McCain would not even know the difference between an adversary proceeding and a contested hearing.

Clinton: And you do? If anything is clear, it is that Sen. Obama probably does not know the difference between a fraudulent transfer and a campaign contribution, given the shady land deal he entered into with the criminally indicted Tony Rezco <nodding confidently> <buzzer>.

Obama: As I've said before, I regret that land deal, even though it enabled my children to have a bigger backyard to play in. What is clear is that the American people deserve better from us than what we have demonstrated tonight, and they deserve a true change <buzzer> from the politics of division that plague Washington.

Moderator: After only three questions, Sens. Clinton, McCain and Obama have each committed three violations of their candidate specific rules, leaving only Ralph Nader

Nader <cutting in>: It is no surprise that I am standing center stage with the ability to freely engage the American public because the members of the two-party duopoly <buzzer> have failed to abide by the rules. In fact, the two parties have failed to abide by any rules except the rules set by the lobbyists in Washington. And just look at their sideshow distractions: Whitewater-gate, Playscape-gate, Iran/al-Qaeda Conflate-gate. It is clear that these “leading” candidates are incapable of truly changing Washington. As for Rep. Paul, it is clear he would get nothing done because his supporters would be far too distracting, probably even trying to scale the White House fences. This is why the American people deserve a true third choice, and that choice is

Moderator <cutting in>: Sorry Mr. Nader, our time is almost over and we have only enough time for the last question, for which you all only have one word to answer.

Nader: But I didn't commit three violations. I did not even argue that I was not responsible for the Democrats losing in 2000 <buzzer>.

Moderator: You just did. So now all of you must answer this last question with only one word. Recently, the House of Representatives' Financial Services Subcommittee on Financial Institutions invited four citizens to Washington to provide testimony about their credit card experiences. But the citizens were not allowed to testify because they would not agree to sign waivers that would allow their credit card companies to publicly disclose financial information about the

citizens, like their credit scores and purchases. Republicans and Democrats on the subcommittee allegedly worked out this deal in order to be fair to the credit card companies. In one word, or less, what are your respective reactions?

Clinton: Appalling.

McCain: Repugnant.

Nader: Duopolistic.

Obama: Reprehensible.

Paul: Disgusting.

Moderator: Thank you candidates, and Rep. Paul. This concludes the historic Chapter 8 Great Presidential Bankruptcy Debate Unspectacular of 2008. We thank all but 11 members of the audience for remaining calm throughout, and we look forward to the Swell Bankruptcy Debate of 2012.

Paul: Not if I abolish bankruptcy courts before then.

Moderator <yelling over wild cheers>: Good night.

Consequently, the views expressed herein are the views/predictions solely of the mind-reader, and are not those of ABI, the author, any law firm or other entity or organization associated with the author or ABI or their respective mind-readers. Hey, that rhymes! Hey, that rhymes...sort of. ■