

**CARRIBEAN INSOLVENCY SYMPOSIUM
BREAKFAST AND VIEWS FROM THE
BENCHES**

Saturday, February 7, 2009

7:00 a.m. to 8:15 a.m.

**Caribbean Insolvency Symposium
Breakfast and Views from the Benches**

Panel Members

Honorable A. Jay Cristol, Chief Bankruptcy Judge *Emeritus*, United States Bankruptcy Court for the Southern District of Florida, Miami Division.

Honorable Paul G. Hyman, Jr., Chief Bankruptcy Judge, United States Bankruptcy Court for the Southern District of Florida, West Palm Beach Division.

Honorable Enrique Lamoutte, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Puerto Rico, San Juan.

Honorable John K. Olson, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of Florida, Fort Lauderdale Division.

Honorable Steven W. Rhodes, Chief Bankruptcy Judge, United States Bankruptcy Court, Eastern District of Michigan, Southern Division, Detroit.

Moderator

Stephen R. Leslie, Stichter, Riedel, Blain & Prosser, PA, Tampa, Florida

PROGRAM

The “View from the Benches” is an opportunity for bankruptcy practitioners to participate in an interactive lecture session, moderated by a practicing Chapter 11 bankruptcy attorney, and lead by preeminent bankruptcy jurists. The topics identified below are intended to be illustrative of topics that may be addressed during the panel discussion. The cases identified with respect to each topic are generally recent published decisions authored by the panel participants, and are intended to be illustrative of important issues that the panel members have addressed in their courtrooms. The comments to the cases are not intended to be a brief of the case, but do serve to highlight major aspects of the cases.

This outline is intended as a summary reference tool for members of the audience for review during and after the discussion. Be forewarned, however, that any “view from the bench” is dynamic, interactive, and subject to the fluid process that is a hallmark of commercial bankruptcy practice. Looking at the outline is, therefore, like reviewing the docket or the pleadings prior to a hearing. You won’t know how things turn out until you attend the hearing, live and in person.

OUTLINE

I. OPENING REMARKS AND INTRODUCTIONS

II. EXECUTORY CONTRACT AND UNEXPIRED LEASE ISSUES

This topic involves defining precisely what is an executory contract, and addresses the implications of delayed assumption. Because retail cases are on the rise, the panel may also address assumption and rejection issues in retail Chapter 11 cases and, in particular, issues that arise in the landlord/tenant context.

In re: Collins & Aikman Corp., 384 B.R. 751 (Bankr. E.D. Mich. 2008) (Honorable Steven W. Rhodes, Chief Bankruptcy Judge, United States Bankruptcy Court, Eastern District of Michigan, Detroit), involves an automotive tool manufacturer that sought an administrative expense claim in an automotive supplier case based on post-petition performance under certain executory contracts.

In re: Peralta Food Corp., 2008 WL 190503 (Bankr. S.D. Fla. January 18, 2008) (Honorable A. Jay Cristol, Chief Bankruptcy Judge *Emeritus*, United States Bankruptcy Court, Southern District of Florida, Miami), involves a debtor’s efforts to assert that a pre-petition settlement agreement constituted an executory contract under §365 of the Bankruptcy Code.

III. AUTOMATIC STAY ISSUES

This topic will address recent issues that have arisen under §362 of the Bankruptcy Code. The issues may focus on pervasive stay violations by lenders, and the consequences that flow from inattentive lenders. Because of the challenges presented to practitioners by pre-petition bankruptcy waiver provisions that lenders at times insist upon in the context of pre-bankruptcy settlement negotiations, the panel may address the judicial perspective on the nature and enforceability of those agreements when debtors eventually seek relief in bankruptcy.

In re: 5th Avenue Real Estate Development, Inc., 2008 WL 4371336 (Bankr. S.D. Fla. September 19, 2008) (Honorable Paul G. Hyman, Jr., Chief Bankruptcy Judge, United States Bankruptcy Court, Southern District of Florida, West Palm Beach), involves an effort by a debtor to seek damages against Countrywide Home Loans, Inc. for a post-petition violation of the automatic stay.

In re: Bryan Road, LLC, Case No. 07-17922-BKC-JKO (January 12, 2008) (Honorable John K. Olson, Bankruptcy Judge, United States Bankruptcy Court, Southern District of Florida, Ft. Lauderdale), addresses the question of whether a pre-petition forbearance agreement that contains a waiver of relief under the Bankruptcy Code is enforceable, and if so, to what extent.

In re: Haque, 395 B.R. 799 (Bankr. S.D. Fla. October 28, 2008) (Honorable John K. Olson, Bankruptcy Judge, United States Bankruptcy Court, Southern District of Florida, Ft. Lauderdale), involves an instance where the court entered an order sanctioning a creditor and its counsel for filing “less than fifty” false stay relief affidavits claiming entitlement to default interest.

IV. SECTION 1112(b) GROUNDS FOR DISMISSAL OR CONVERSION

This topic involves the question of how the courts have addressed the new grounds for conversion or dismissal of Chapter 11 cases under BAPCPA and §1112(b) of the Bankruptcy Code.

In re: Gilroy, 2008 WL 4531982 (1st Cir. BAP August 4, 2008) (Honorable Enrique Lamoutte, United States Bankruptcy Judge, District of Puerto Rico, San Juan), discusses §1112(b) and how BAPCPA has limited the bankruptcy court’s discretion to dismiss or convert a Chapter 11 case “for cause”. This particular case involves failure to maintain proper insurance.

V. SALE ISSUES – SECTION 363

This topic will focus on, initially, the present status of Chapter 11 (which in some minds is felt as being used exclusively as a procedure for liquidating assets under §363 sales). The panel participants may discuss why this happening, the challenges with classic reorganizations, and how courts are dealing with these issues. In this context, the panel may address the perceived use of the Chapter 11 process by lender-driven filings, and the cost and consequences that flow from that type of case. Specifically, in a case where the theme is liquidation of a lender's collateral, what should unsecured creditors or other constituencies expect by way of carve-out or otherwise? Also, can a debtor use Chapter 11 as a platform to involuntarily liquidate a lender's collateral-to the lender [i.e. dirt for debt]?

In re: Ocean Blue Leasehold Property, LLC, 393 B.R. 792 (Bankr. S.D. Fla. September 5, 2008) (Honorable A. Jay Cristol, Chief Bankruptcy Judge *Emeritus*, United States Bankruptcy Court, Southern District of Florida, Miami), involves an instance where the trustee of a real estate entity entered into a contract with a purchaser post-petition, pursuant to an order approving the sale. The purchaser subsequently attempted to withdraw from the contract. The case discusses the fallout and ramifications of such withdrawal.

No discussion of this topic would be complete without addressing the case of *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008), reversing *In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299 (11th Cir. 2007), and its impact in this area.

VI. AVOIDABLE PREFERENCES/PROPERTY OF THE DEBTOR

This topic addresses the issue of what is (or is not) an “interest of the debtor” in property within the meaning of §547(b) of the Bankruptcy Code.

In re: Velazquez, 2008 WL 5050125 (October 27, 2008) (Honorable Enrique Lamoutte, United States Bankruptcy Judge, District of Puerto Rico, San Juan), involved the debtor's sale of real property prior to the petition date and the deposit of the funds into an account held by a non-debtor. The funds were then attached within the preference period.

VII. DISCHARGEABILITY – INDIVIDUAL BUSINESS DEBTORS

This topic addresses the potential ramifications for individual principals of business entities that may seek relief in a personal bankruptcy.

In re: Brunett, 394 B.R. 425 (Bankr. E.D. Mich. October 8, 2008) (Honorable Steven W. Rhodes, Chief Bankruptcy Judge, United States Bankruptcy Court, Eastern

District of Michigan, Detroit), involved a dischargeability question related to a debtor/contractor claim under the Michigan Builders Trust Fund Act.

VIII. *THE “CHIEF RESTRUCTURING OFFICER” IN CHAPTER 11*

Many commercial debtors face challenges related to the pre-petition acts and conduct of management or principals. This topic addresses the phenomena of the “Chief Restructuring Officer” and its impact as a tool to further the goal of a successful reorganization. The topic will also focus on how Courts address Section 1104(e) when faced with the potential appointment of a “CRO” in the same context as a request to appoint a trustee.

In re: PUIG, Case Number 07-14026 (Docket No. 337) (Bankr. S.D.Fla. July 20, 2007) (Honorable Robert Mark, United States Bankruptcy Judge, United States Bankruptcy Court, Southern District of Florida, Miami); and *In re Blue Stone Real Estate, Const. & Development Corp.*, 392 B.R. 897 (Bankr. M.D. Fla. 2008) (Honorable Catherine Peek McEwen, United States Bankruptcy Judge, United States Bankruptcy Court, Middle District of Florida, Tampa), are examples of decisions that approved of the appointment of a “chief restructuring officer” under the particular circumstances of the cases.

IX. *PROFESSIONAL COMPENSATION ISSUES.*

Every professional in a bankruptcy case faces issues related to compensation. The issues that may fall within this topic include standards for fee allowance, allowance in cases where the result is “imperfect”, awards tethered to performance and “benefit to the estate”, and holdback issues. Since professional awards are not limited to debtor’s professionals, the topic may also address circumstances where a fee would be awarded to a creditor for a substantial contribution in an “imperfect result” scenario.

X. *PRACTICE POINTERS: A JUDICIAL PERSPECTIVE.*

This topic will allow professionals to be guided by tips and practice pointers from the judicial perspective. The panel may address the questions of how bankruptcy professionals can help the judicial process in these trying economic times and better fulfill their duties as officers of the court.