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United States Bankruptcy Court, District of Rhode Island

ON THE DOCKET

Inner Workings: News and Advice

by Susan M. Thurston, Clerk of Court

Welcome to the first 2008 issue of our classic newsletter *On the Docket*. As usual, we have lots of news to report on happenings at the U. S. Bankruptcy Court since last fall. First, many of you surely noticed our new Court Technology Specialist, Mr. Samuel Nogueras, who commenced employment at the Court on January 7, 2008. Sam is an experienced audio system specialist and has seamlessly transitioned to his new role as the Court's digital court recorder operator and sound system expert. As the amount of technology in the courtroom has grown over the years, it is a tremendous advantage to have someone with Sam's expertise and knowledge running the automation equipment during court proceedings. Soon Sam will also be responsible for managing the videoconferencing component, which is nearly ready for prime-time.

2008 also marks the 40th anniversary of Bankruptcy Judge Arthur N. Votolato's continuous service as the sole bankruptcy judge for the

district of Rhode Island. In fact, Judge Votolato is currently the longest serving active duty bankruptcy judge in the entire country. Judge Votolato has handled thousands of interesting cases during his judgeship here, in addition to his work throughout the last four decades helping to educate the bar and public on bankruptcy and other legal topics. This spring, in recognition of his outstanding contributions to law related education in Rhode Island, Judge Votolato was awarded the 2008 Giannini Award by the Rhode Island Legal/Educational Partnership. Please join me in congratulating Judge Votolato on his impressive forty year contribution to the federal bankruptcy system in the district of Rhode Island!



The start of the year – January 1, 2008 –

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ON THE DOCKET

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marked the debut of the Court's new and improved website to the public. The site has been reorganized to better locate critical bankruptcy information, has a much cleaner look and provides easier navigation through the use of hovering menu buttons. We have also added certain content in the Spanish language as this need has grown considerably since BAPCPA. Also, we have added an extensive Self Help/ Pro Se section to answer frequently asked questions and to provide detailed information on the procedural requirements for different chapter filings. As usual, we strongly welcome your comments and suggestions. A Pro Se survey to collect your feedback has been added to the homepage. Please visit the main page to complete the on-line survey. Other recent changes include three amendments to our local rules

which went into effect on February 15, 2008, and a second update to the Means Test forms, effective March 3, 2008. Detailed information on these changes is posted on the main page of the website under News and Announcements.

Lastly, I would like to announce the upcoming departure of two long time employees of the Court – Cindy Cory, Courtroom Deputy and Jonathan Calianos, Career Law Clerk. Cindy will be retiring on June 1, 2008 after almost 37 years of service with the federal government. If you see Cindy in the courtroom between now and June 1, please join me in congratulating her on her amazing service to the federal judiciary and wish her a well deserved retirement! Jonathan, on the other hand, will be transferring to the Executive Branch on May 9, 2008, to begin service as an Administrative Law Judge for the Department of Labor in Boston. Jon has served as Judge Votolato's distinguished Career Law Clerk for the past fifteen years.

Those of you who practice before the Department of Labor may well come before *Judge Calianos* in the near future! Please join me in extending our heartfelt congratulations to Jon on his professional success. As you can imagine, after all these years with the Court, both Cindy and Jon will be sorely missed by their court colleagues and the public they have so honorably served.



CONGRATULATIONS AND BEST WISHES TO JON AND CINDY!

Team Coach

by Lucinda Cory, Courtroom Deputy

It's been a little over a year since the implementation of Mandatory Electronic Case Filing. We now have nearly 100% of the bankruptcy bar e-filing. Congratulations to all of you on your continued success with the electronic filing system! Still, new members of the e-filing community must take some time getting used to the system. This column seeks to help neophytes (and veterans) navigate through the events with ease and comfort.

The questions most commonly faced by ECF users are those involving choosing party filers, event codes and associating the filing to the appropriate document ("linking").

When filing a jointly-signed pleading with a party who has not previously appeared in a case, the ECF user will find that the second signatory is not in the "pick list". The new party must then be added. Using the function ADD CREATE NEW PARTY will allow you to add the joint filer - but please remember the system will ask you to create the attorney/client relationship with the

new party. Many filers seem reluctant to add another party when they see this screen - thinking that they've done something wrong. Simply leave the "association" boxes unchecked and click into the next screen.

Choosing the right event is important. The "Motion" and "Other" categories are populated with many events from which to choose. Do not try to use 'document' when you are filing schedules, payment advices, or a means test. Many events have special functions, e.g. payment advices, which are private entries and cannot be seen by PACER users who are not parties to a case.

Some have deadlines, linking screens, and occasional questions to be answered. By trying to use 'document' or an inappropriate event, the proper deadlines and linkages may not be available. If in doubt, please check out our list of events located on our website under CM/ECF Info -> User Manual -> Events & Flowcharts.

The rule of thumb for linking is

easy: always choose the initiating motion/document. For example, when filing a motion to continue a confirmation hearing, link your motion to continue to the plan, not the hearing notice.

REMINDERS:

A large number attorneys and creditors are now making use of the Notice of Appearance (text only) event which allows an entry of appearance without a pdf form. Electronic notices go to the parties and attorneys in the case so a certificate of service is not necessary on this particular event. This event is a time-saver for e-filers.

Remember those deadlines! Financial Management Certificates must be filed within 45 days after the first meeting of creditors in order to not hold up a debtor(s) discharge. All P.3 and P.4 Declarations are due 15 days after the underlying document is e-filed. A checklist for each case might be a way to ensure that all necessary paperwork, declarations and certificates have been timely filed.





Are you an attorney who would like to brush up on your efilings skills? Do you have new support staff or existing support staff who could benefit from ECF training? Our court conducts ECF Training Classes every month. We welcome you to take advantage of this training opportunity either for yourself and/or your support staff. Please contact Jennifer Davis at 626-3110 for more information or email her at jennifer_1_davis@rib.uscourts.gov. We look forward to seeing you again!

Chambers Personnel Update

by Leah Waterman, Judicial Assistant

Chambers would like to make two announcements. First, as many of you are aware, **Jonathan Calianos**, who has been Judge Votolato's Career Law Clerk for the past 15 years, will be leaving the Bankruptcy Court at the beginning of May. Jonathan has been **appointed an Administrative Law Judge for the U.S. Department of Labor** in Boston. Needless to say it is with mixed feelings that we say goodbye to Jonathan – it has been a terrific experience to work with him, get to know him personally and watch he and his wife, Catherine, raise three beautiful children. We applaud Jonathan's achievement in earning one of the highest scores on the ALJ Examination. As with all bitter-

sweet events, we are sad to see him leave, but delighted and wish him well in the next phase of his career. The good news is that the Department of Labor ALJs use our courtroom for hearings on a regular basis, so **Judge Calianos** will be coming back to visit often in the future. **Congratulations, Jonathan!**

We are also very pleased to announce that after an extensive search, **Jeffrey Dana, Esq.**, has been appointed as Judge Votolato's **Law Clerk**. Many of us are familiar with Jeff as he has practiced law at Rhode Island Legal Services for many years. His familiarity with bankruptcy law and our ECF system, as well as his fluency in Spanish, are an added bonus! Jeff will officially begin work on April

18, although he will be visiting Chambers during the next few weeks to begin the process of assuming his new duties with the Court. **Please join us in Welcoming Jeffrey Dana to U.S. Bankruptcy Court!**

Jonathan, Jeff and I would also like to take this opportunity to acknowledge **Judge Votolato's** upcoming anniversary of **40 years on the bankruptcy bench. Best Wishes, Judge!**

Congratulations!

Recent Court Decisions

by Jonathan C. Calianos, Esq., Law Clerk

Here is a short digest of some noteworthy opinions from the Court. As always, the full text of Court opinions is available at our website www.rib.uscourts.gov

Is the Court required to approve stipulations between debtors and creditors regarding assumption of leases under 11 U.S.C. § 365(p)(2)?

The Case: *In Re Garbett*, BK No. 07-10404 (Bankr. D.R.I. June 11, 2007)

Short Answer: NO.

The debtor attempted to assume two automobile leases under Section 365(p)(2) and the creditor specifically asked the Court to approve the stipulations as it did not want to run afoul of the reaffirmation provisions set forth in Section 524 of the Code. While the Court found that it was not required to approve lease assumptions under Section 365(p)(2), it also held that the specific agreements in question went too far by requiring the debtor to waive his discharge as part of the assumption. As such, the Court denied the stipulations, finding them to be incomplete attempts at reaffirmation.

Does Counsel to the debtor in possession owe a fiduciary duty to the bankruptcy estate?

The Case: *In Re Hardman's Hotel of Smithfield, Inc.*, BK No. 05-15700 (Bankr. D.R.I. August 6, 2007).

Short Answer: YES

Prior to filing the Chapter 11 petition, prin-

cipals of the debtor paid a retainer of \$25,000 to the debtor's attorney. During the bankruptcy, counsel did not draw down on the retainer but sought to return the retainer to the principals and seek 100% of its compensation from the estate. The Court denied the request to return the deposit which would have diminished the pool of assets available for distribution to unsecured creditors under the Chapter 11 Plan. The Court also questioned whether counsel to the DIP had a conflict of interest. The debtor's attorney argued that DIP counsel has no fiduciary duty to the bankruptcy estate because he cannot simultaneously represent both the interests of the DIP and the estate, as such interests are inherently in conflict. The Court reviewed Section 1107(a) and disagreed, holding that counsel for the DIP does owe a fiduciary duty to the estate. In so holding, the court followed the path forged by the overwhelming majority of courts that have considered this issue.

Can a debtor include language in his or her Chapter 13 Plan that requires a mortgagee to file a detailed fee application if it is seeking reimbursement of attorney's fees and costs from the debtor or property of the estate for services rendered from the date of filing through confirmation?

The Case: *In re Mihok*, BK. No. 06-10062 and *In re Trigo*, 06-10589 (Bankr.D.R.I. March 14, 2007)

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Inside Story Headline

(Recent Court Decisions Cont'd from pg. 5)

Short Answer: YES– but the secured creditor will not actually be required to file a fee application until the debtor challenges the claim of the creditor.

These cases were consolidated for purposes of the Court's decision because the Chapter 13 plans contained similar provisions requiring the secured creditor to file detailed fee applications if it was seeking reimbursement of attorney fees or costs from the debtor or property of the bankruptcy estate that accrued from the date of filing through and including confirmation. The secured creditor objected, arguing that it would be unduly burdensome and costly to produce fee applications in all Chapter 13 cases. The creditor also contended that the provision impermissibly modified the terms of their note and mortgage, in violation of § 1322(b)(2). The Court disagreed, finding the plan provisions to be acceptable because the funds used to pay mortgagee's attorney fees and costs were property of the bankruptcy estate and that triggered the fee application process. The Court did make the following caveat however: "Where the debtor does not challenge the amount sought, the creditor is not required to prepare and file an application, and the creditor is not entitled to compensation for doing so. ... If the debtor does request that an application be filed, the creditor will be allowed a reasonable fee for preparing the application, provided the request is not materially different, i.e., not a lot higher than the amount allowed. ... If there is a material difference between the request and the award, then

the creditor *may* be required to bear the expense of preparing the application, plus the fees and costs of the debtor incurred in successfully challenging the request, all depending on the facts and circumstance of the particular case."

For purposes of determining substantial abuse under 11 U.S.C. §707(b)(3), will the Court consider voluntary contributions made to a debtor's 401K plan or mandatory repayments on an outstanding 401K loan?

The Case: *In re Mokri*, BK No. 06-11073(Bankr. D.R.I. April 27, 2007)

Short Answer: Assuming no other facts are relevant, the Court will not count 401k contributions or loan repayments as disposable income for determining substantial abuse under Section 707(b)(3).

In this case, the Court was presented with the narrow question of whether voluntary 401k contributions or mandatory 401k loan repayments would be considered disposable income for purposes of determining substantial abuse under Section 707(b). The Court found that because both of these 401k expenditures would not be considered disposable income available to pay creditors in a Chapter 13 proceeding they should not be counted for determining substantial abuse.

