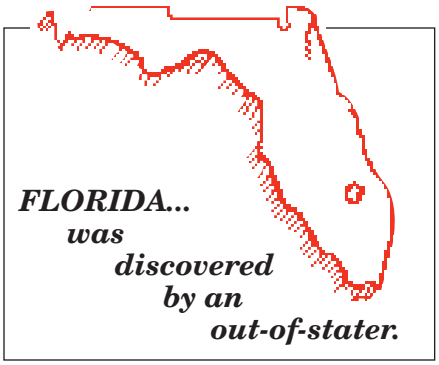


THE PUBLICATION OF THE FLORIDA BAR OUT-OF-STATE DIVISION

State-to-State

flabaroutofstaters.org

Spring 2008

INSIDE:

Coming up!

2008 Annual Florida Bar Convention

Out-of-State Division Schedule

Boca Raton, Florida
June 18-21, 2008

* * *

Out-of-State Division Executive Council Meeting

June 18 – 4:00 - 6:00 p.m.

* * *

"Presidential Showcase"

Presented by the Out-of-State Division

June 19 – 1:00 - 5:00 p.m.

"CLE Potpourri for the General Practitioner"

* * *

50 Year Member Awards Luncheon

Out-of-State Division Members

President's message:

Herding cats?

by Timothy P. Chinaris, President


CHINARIS

One of the great strengths of the Out-of-State Division is our diversity: our members reside throughout the country and practice in every conceivable area of law. That diversity and variety, however, can present difficulties. Unlike other sections of the Bar that are united by a shared practice focus, the primary shared characteristic of our division's members is that we do not reside in Florida. Sometimes, that can be a challenge to recruiting and cohesiveness—like the old saying goes, it can be a little like herding cats.

Our division's leadership and I are asking for your assistance in expanding the activities and benefits available to Bar members who join our division. We already offer an impressive array of opportunities. The OOSD helps its members maintain their awareness of professional responsibility issues by providing a way to obtain free CLE ethics credits. This year, the credits were offered via an audio link on the division's website. The switch from the old method of mailing out tapes to providing streaming audio has been well received.

We continue to offer high-quality CLE seminars in various locations outside of

See "President's message," page 2

How to be 'special counsel' to that 'special client'

by Jason Burnett, GrayRobinson PA


BURNETT

In the last edition of *State-to-State,* Edward Peterson explained how officers, directors and other principals can be protected in Florida under applicable bankruptcy law. This article discusses how the out-of-state attorney can be protected, and compensated, if a client files for bankruptcy in Florida.

It is a situation with which many of us are familiar. Our good client encounters bad times. Perhaps your client is having difficulty in obtaining financing to support its recent expansion or has valuable real estate that just isn't moving quickly enough. You have determined that your client is eligible to be a debtor in Florida, i.e., the business was incorporated in Florida, or assets are located in Florida. (Remember, the bankruptcy court's jurisdiction is construed very broadly.)

So, you have determined that your client needs to file a Chapter 11, you have

See "Special counsel," page 9

Florida. Every year, we have a full-day seminar in New York, ably organized by Governor Richard Tanner. This year's seminar was at St. John's law school in February and was entitled "Out of State Update: New Law and Practice Tips." We had a lively crowd, and the evaluations were excellent. In March, the division cosponsored the "Federal Seminar" in Washington D.C. (along with the Administrative Law Section, the Appellate Practice Section, the Environmental and Land Use Section and the Government Lawyers Section). I am particularly pleased to announce that the OOSD has been selected to present the Bar's prestigious "Presidential Showcase" seminar on Thursday, June 19, at the annual convention. The theme will be "CLE Potpourri for the General Practitioner," and a wide variety of topics will be covered. Everyone is encouraged to attend.

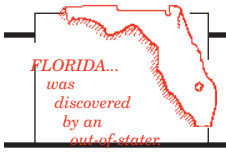
The division also provides opportunities for out-of-state Bar members to meet and talk with the Bar's leadership. We sponsored a reception for The Florida Bar Board of Governors during the board's March meeting in Washington, D.C., and invited Bar members in the D.C. area to attend. Incidentally, I would like to take a moment to recognize the fine work of our out-of-state board representatives, Richard Tanner, Ian Comisky, Brian Burgoon and Eric Meeks.

Another area in which progress has been made involves Florida Statute 733.304. This statute prohibits non-Florida residents (with certain limited exceptions) from serving as personal representatives of a Florida resident's estate—even if the nonresident is an active member of The Florida Bar. For the first time, the division obtained the Bar's approval to lobby for changes to this statute. Although the division was not able to convince the Board of Governors that our position should be adopted as the "big Bar's" position, obtaining lobbying approval was an important step.

Despite these accomplishments and initiatives, the division's leadership clearly sees the need to keep expanding the opportunities available to our members. The Board of Governors has been asked to approve changes to the division's bylaws that would increase efficiency by allowing the division's officers to use technology such as email (or even webcasts) to share information, hold meetings and vote on matters as appropriate. This change will be particularly helpful to our division because the members of our governing Executive Council are scattered throughout the country. This will also make it less costly to be a member of the council by reducing travel expenses. Another major change to the bylaws will increase opportunities for participation by expanding the number of at-large Executive Council seats from five to six. Additionally, a primary goal of OOSD President-elect Allyn Kantor will be to increase networking and business referral opportunities for our members.

To help the OOSD grow in size and influence within the Bar, *we need you*. If you're not already a member, join today. If you are a member, we'd love to hear from you. If you have any questions, comments or suggestions, please call me at 334/386-7214 or email me at tchinaris@faulkner.edu.

OOSD President Tim Chinaris *teaches and practices law in Montgomery, Ala. He formerly was ethics director of The Florida Bar and operates the popular legal ethics website "sunEthics" (www.sunethics.com).*



S t a t e - t o - S t a t e

THE PUBLICATION OF THE FLORIDA BAR OUT-OF-STATE DIVISION

State-to-State is devoted to Florida and multi-jurisdictional legal matters. It is editorially reviewed and peer reviewed for matters concerning relevancy, content, accuracy and style. *State-to-State* is mailed to over 1,200 legal practitioners throughout the United States.

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the division.

The deadline for the **Summer/Fall 2008** issue is **July 15, 2008**. Articles should be of interest to legal practitioners with multi-jurisdictional practices. Please submit articles in rich text format (rtf) via e-mail to Susan Trainor, editor@ctf.nu. Include a brief (2-3 sentence) biography and photograph of the author. If a digital photo is not available, please mail a print to The Florida Bar, OOSD, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

Moving? Need to update your address?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their addresses and/or other member information. The online form can be found on the website under "Member Profile."

Asset acquisitions in bankruptcy

by Michael Buskenkell

BUSKENKELL

Bankruptcy can be a favorable, unique and expedient forum for the purchase of assets. Sale prices are typically reduced, the auction provides a finality to the sale and, arguably the biggest advantage, such a purchase is "free and clear" of all liens, which can significantly protect a purchaser and cannot be readily replicated outside of bankruptcy. Considering that the current trend in bankruptcy cases often focuses on sales, this article will discuss the process and advantages (as well as the pitfalls) associated with a "Section 363 Sale" in bankruptcy.

Sale and bidding process

Bankruptcy courts typically must approve a sale of some or all of the debtor's assets. Section 363 of the Bankruptcy Code governs sales of assets in bankruptcy cases where the sale of such assets is outside of the ordinary course of the debtor's business. Considering that most companies are not in the business of selling all of their assets, the purchase/sale of the assets must be accomplished with the bankruptcy court's approval.

A debtor may have located a potential buyer of assets prior to a bankruptcy filing. Oftentimes, the potential buyer is within the same industry or is a direct competitor of the debtor. The potential buyer will usually present a bid that the parties will negotiate, and then prepare an asset purchase agreement. The debtor will then seek the court's approval of the sale/asset purchase agreement. However, the bankruptcy court almost always requires that the buyer's offer will be subject to higher and better offers to be submitted following a time for marketing the assets. Even though the debtor may have obtained a satisfactory offer for its assets, the debtor is required to continue to market the assets in an auction process to entice better bids from other potential buyers.

Stalking horse bidders—process/auction

The buyer that steps up as the initial bidder for the debtor's assets is referred to as the "stalking horse." The debtor will present the stalking horse, and the terms of the sale, to the court as the buyer with which it has elected to proceed in the sale. At this point, if the debtor demonstrates that such a transaction has been made within the debtor's business judgment, then the court will likely approve a bidding and auction process whereby the existing offer made by the stalking horse serves as the floor bid. The bidding process approved by the court will outline items such as the timeframe and means by which the assets will be marketed to qualified bidders, the amount of deposits and financial information needed for additional bidders to qualify to attend the auction, and bid/overbid amounts required to qualify as an acceptable competing bid to the stalking horse.

Following the bidding/marketing period established in the bidding procedures, the debtor will conduct an auction at which qualified bidders present their bids and subsequent overbids. The debtor will keep the auction open long enough to solicit additional competing bids. At the conclusion of the auction (where no additional overbids are received), the debtor, typically in consultation with an official committee of unsecured creditors, will select the "highest and best" offer. It is possible that the stalking horse, which established the initial bid, may not be the eventual successful bidder for the debtor's assets, and it is also possible that the highest offer received may not necessarily be the best offer received, such as a cash deal versus a deal with terms.

Advantages for the stalking horse/break-up fees, etc.

Considering the auction process in which the stalking horse loses the purchase at auction, one may wonder what advantages a stalking horse enjoys by taking that role. In fact, under these circumstances, it might be counterintuitive for a buyer to want to be a stalking horse when in order to be selected for that position, the buyer must be the first party to review and complete due diligence, running up costs, time and other expenses in evaluating and negotiating the terms of the asset purchase agreement, only to have the possibility of being "outbid" at auction.

However, important incentives exist for the stalking horse to serve in that role: 1) the stalking horse will have more due diligence and have a better understanding of the assets and transaction (as well as the relative worth) than if it were a competing bidder; 2) the stalking horse has significant control over what provisions are contained in the asset purchase agreement, whereas a non-stalking horse bidder is generally subject to the existing terms negotiated by the stalking horse; 3) the debtor and bankruptcy court may have provided reasonable "break-up" fees to compensate the stalking horse for the costs associated with setting the floor bid in the event that it is not the winning bidder; and 5) considering that the stalking horse is responsible for setting the floor bid, a stalking horse may have the ability to underbid for the assets (within reason— remember the debtor and the court still have to approve that amount) with the hope that no competing party comes to the auction, thereby netting the stalking horse the assets for less then it was ultimately willing to pay. Consequently, aside from the possibility of losing at the auction (or having a break-up fee disapproved), being a stalking horse bidder has significant advantages that often outweigh the risks.

Additional advantages for buyers in bankruptcy

Contracts: One of the significant advantages in filing a bankruptcy case is that the debtor can rid itself of burdensome contracts. Similarly, a purchaser of assets has the flexibility to pick and choose which of the debtor's executory contracts and

continued, next page...

leases it wishes to have "assumed" and "assigned" to it by the debtor. Thus, a purchaser need not take any of the contracts it perceives to be above-market, while it can assume the favorable contracts. However, the buyer must be cognizant that, upon assumption, any arrears under the assumed contract must be cured, which is typically a cost borne by the buyer. Accordingly, it is important during due diligence not only to focus on the advantageous nature of the debtor's contracts, but also how much it will cost to bring the contracts current, and whether such cure eliminates the perceived advantage of assuming those contracts.

Sale Order Protections: A buyer can obtain significant protections from the sale order in bankruptcy. Provided the debtor meets certain criteria, the bankruptcy court will enter the sale order after notice to all parties, including those that may wish to object to the sale. Examples of some criteria include:

- sale is an arm's length transaction;
- marketing of the assets was sufficient to solicit the best potential offers;
- sale is based on the best business judgment of the debtor;
- sale represents the highest and best offer; and
- purchaser is a buyer in good faith.

The criteria associated with the sale are important elements that the bankruptcy court incorporates into the sale order. What makes the sale order so advantageous (as opposed to a sale outside of bankruptcy) is the finality of the sale order. As discussed below, parties wishing to make claims later against the debtor for these assets will be directed to the pot of proceeds generated through the asset sale; the buyer will not be bothered. The buyer takes the assets "free and clear" of all liens, claims and encumbrances. The notion of taking assets "free and clear" is a tremendous benefit to a purchaser.

Free and clear: Perhaps the most substantial benefit to purchasing assets out of bankruptcy (in addition to the likely bargain price) is the ability to purchase the assets free and clear of all claims, liens and other encumbrances. In essence, the buyer takes the good and leaves the bad. Rather than follow the assets, these obligations attach to the sale proceeds; these proceeds are used to satisfy the claims in the bankruptcy case. Consequently, the buyer is able to make valuable use of the assets without the headache of dealing with claimants that wish to take a piece of the assets to satisfy their claims. Notably, however, while the "free and clear" concept is associated with the large majority of transactions arising from bankruptcy cases, there are some instances where the buyer does not fully escape liabilities arising from the assets the buyer purchased.

Potential pitfalls

Successor liability. Occasionally, the sale is neither free nor clear. Generally, a buyer of assets that does not contractually assume liabilities does not acquire or succeed to the seller's liabilities with respect to asset acquisitions. However, this general rule is subject, outside of bankruptcy, to "successor liability" exceptions. Likewise, in certain limited instances, assets sold through bankruptcy have been deemed not to have escaped all future liabilities arising from the assets. Under these limited circumstances, a purchaser can be liable as the successor-in-interest, even if an order is entered by a bankruptcy court declaring that the sale is "free and clear" of all interests.

The categories in which the "free and clear" benefit has faced some resistance are products liability, environmental, and labor and employment. Other instances in which successor liability is applied include: 1) express or implied assumption (implied assumption is invoked when there is ambiguous language in the purchase agreement and the buyer conducts itself consistent with assumption of the obligation); 2) de facto merger— continuity of selling corporation, evidenced by the same management, personnel, assets, location, stockholders, etc.; 3) mere continuation— similar to de facto, but mere continuation focuses on whether the purchaser is merely a restructured form of the seller in an attempt to avoid successor liability while remaining in control under a different name; and 4) product line exception—several states recognize this exception to free and clear when the buyer continues to operate the same product line, especially when the bankruptcy is being used to shield liability.

Potential protections against successor liability. A purchaser must fully understand the risks involved when purchasing assets out of bankruptcy. Here are some practical steps that may afford additional protection from successor liability:

- Incorporate very broad releases in the sale order and in any future confirmation order to limit a purchaser's exposure with respect to successor liability.
- Ensure the maximum possible notice with an opportunity to object.
- If the proposed sale is outside of a reorganization plan, insist that any future plan fully adopt or modify the sale transaction, so that a purchaser can obtain the benefit of the discharge injunction pursuant to §1141 of the Bankruptcy Code. (A purchaser may, of course, also request that the sale of assets be conducted pursuant to the plan of reorganization, but this would likely impose an unwanted delay.)
- Ensure the asset purchase agreement unambiguously: 1) identifies liabilities being assumed; 2) states that a purchaser will not be assuming any of the debtor's remaining liabilities; and 3) disclaims any express or implied agreements by a purchaser to assume the remaining liabilities.
- Specify in the asset-purchase agreement both the assets being purchased and those not being purchased. (To the extent that a purchaser does not purchase all of the debtor's assets, a purchaser will be less likely to be held liable as the successor corporation.)
- Clearly state in the sale order that the transaction is not being entered into fraudulently, that the notice is proper and that all aspects of the transaction were adequately disclosed.

Transfer of licensed intellectual property

Exercise caution when purchasing assets in bankruptcy that involve

intellectual property. You may encounter significant challenges associated with the sale and transfer of intellectual property that is licensed by or to the debtor. Special care needs to be taken when conducting due diligence as to the transferability of such licenses.

Conclusion

The advantages to purchasing assets out of a bankruptcy estate typically outweigh any risks associated with such a sale. Of course, thorough due diligence and careful drafting of the asset purchase agreement are essential to protecting and ensuring the consummation of a favorable transaction.

Michael Busenkell *is a member of Eckert, Seamans, Cherin & Mellott LLC and is resident in the firm's Wilmington, Del., and Philadelphia, Pa., offices. Busenkell's practice focuses on bankruptcy and corporate litigation matters.*

Board of Governors' update

At its December 14, 2007, meeting in Amelia Island, The Florida Bar Board of Governors conducted the following business:

- Heard a preview of legislative issues for the regular session of the Florida Legislature, with the main assessment being that budget issues will dominate. The Bar is committed to continuing to support adequate funding for the court system and to oppose budget cuts that would cripple its ability to timely handle cases.
- Approved the Bar's strategic plan for 2008-11, setting as the Bar's top goals protecting the judiciary, promoting the legal profession, ensuring access to the courts and the legal system and enhancing the Bar's services for its members.
- Heard a report on the implementation of a new program that has all grievance complaints, written as well as telephonic, screened through the ACAP program. Preliminary results show a dramatic drop in the number of cases referred to the Bar's counsel for investigation, which is expected to lead to a better use of the Bar's resources.
- Approved overturning a Bar advertising staff ruling on whether an attorney can answer legal questions posed to a group in an Internet chat room. The Board Review Committee on Professional Ethics is studying the underlying advertising opinion on which that ruling was based.
- Heard a report from the Investment Committee, including that none of the Bar's investments are in mortgage-backed securities, and hence the Bar's holdings are not affected by the ongoing subprime mortgage crisis.

Keep current on ethics:
Free publication now available

In the past, out-of-state Florida Bar members have found that it can be difficult to stay abreast of ethics developments in Florida. Now, two free resources are available to help you keep current in this important area.

The "2007 Florida Ethics Review" by Tim Chinaris is available free of charge. This comprehensive compendium concisely summarizes developments in Florida legal ethics during 2007, including rule changes, cases and ethics opinions of interest. Arranged topically, the subjects covered are: Rule Changes (including Proposed Rule Changes); Advertising; Attorney-Client Relationship; Candor Toward the Tribunal; Confidentiality and Privileges; Conflicts of Interest (Including Disqualification); Disciplinary Proceedings; Fees (Including Attorney's Liens); Ineffective Assistance and Right to Counsel; Law Firms; Legal Malpractice; Professionalism; Public Official Ethics and Public Records; Rules and Ethics Opinions; Trial Conduct; Trust Funds; Unauthorized Practice of Law; and Withdrawal From Representation.

To get your free copy, just send an email request to tchinaris@gmail.com. A copy will be emailed to you in PDF format.

And, stay up-to-date with legal and judicial ethics on a daily or weekly basis by visiting the comprehensive ethics website "sunEthics" (www.sunethics.com). This site offers summaries of cases and ethics opinions as they are released; links to everything related to Florida legal ethics, judicial ethics, bar admissions and professionalism; and links to ethics resources throughout the nation.

CERTIFIED
The Florida Bar

Apply for CLE credit for out-of-state seminars!

The application is available on the Bar's website. Go to www.flabar.org and click on the headings in this order to find the form you see below: CLE/CLER-BSCR Information and Forms/CLE Forms and Applications/ Course Attendance Credit.

For more information on applying for out-of-state CLE credit, contact the CLER department at 850/561-5842.

Continuing Legal Education
Application for Course Attendance Credit
(for courses not previously approved by The Florida Bar)

The Florida Bar
Legal Specialization & Education
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5842

PLEASE TYPE OR PRINT LEGIBLY

Florida Bar # _____ **NOTE: IF A FLORIDA BAR COURSE NUMBER HAS BEEN ASSIGNED, PLEASE DO NOT USE THIS FORM**

1. NAME, ADDRESS AND PHONE NUMBER OF ATTORNEY SEEKING CREDIT:

2. SPONSOR NAME:

3. ACTIVITY TITLE:

4. PROPOSED LEVEL OF ACTIVITY:
   - ☐ BASIC — This course is designed for the practitioner with no experience or limited experience in the area of law with which the course deals. A survey course will be considered basic unless there are recent, significant changes in the law.
   - ☐ INTERMEDIATE — This course is designed for the practitioner experienced in the area but not necessarily an expert. A survey course in which there have been recent, substantial changes will be deemed intermediate. In an intermediate course, some segment may be low, intermediate or basic, and others high intermediate or advanced. In these instances, the course taken as a whole will be considered intermediate.
   - ☐ ADVANCED — This course is designed for the practitioner with extensive experience in the subject matter of the course.

5. DATE:

6. LOCATION:

7. PLEASE ATTACH A COURSE BROCHURE AND/OR OUTLINE WHICH:
   (A) FULLY DESCRIBES THE COURSE CONTENT AND LEVEL OF PRESENTATION
   (B) INDICATES THE TIME DEVOTED TO EACH TOPIC COVERED WITHIN THE PROGRAM
   (C) IDENTIFIES THE INSTRUCTORS

8. INDICATE IF CREDIT IS TO BE ASSESSED FOR BOARD CERTIFICATION, IN ADDITION TO CLER CREDIT.
   CERTIFICATION AREAS: _____ _____

9. TOTAL MINUTES OF INSTRUCTION: (EXCLUDING BREAKS, MEALS AND INTRODUCTIONS AND BASED ON A 50 MINUTE HOUR)
   _____ GENERAL (NON-ETHICS/PROFESSIONALISM/SUBSTANCE ABUSE/MENTAL ILLNESS AWARENESS)
   _____ ETHICS
   _____ PROFESSIONALISM
   _____ SUBSTANCE ABUSE
   _____ MENTAL ILLNESS AWARENESS
   _____ TOTAL CREDIT (TOTAL MIN. ÷ 50 = _____ CREDIT HOURS)
   50

NOTE: IF YOU HAVE COMPLETED THE MINIMUM NUMBER OF REQUIRED CLER HOURS, AND ARE NOT SEEKING CERTIFICATION CREDIT, PLEASE DO NOT SUBMIT FURTHER COURSES FOR EVALUATION. THERE IS NO CARRY OVER OF HOURS IN FLORIDA FROM ONE REPORTING PERIOD TO THE NEXT.

Materials submitted for CLE credit review will be discarded once the credit has been determined. Should you wish to have your materials returned, please enclose a self-addressed stamped envelope.

Florida pet trust

by Marc J. Soss

Individuals have been setting aside funds for the care of their pets since the 19th century. However, prior to 1990 in the United States, state courts frustrated pet owners' desires upon their death or incapacity to provide for their pets' long-term care. The courts classified any bequest or trust for the benefit of an animal to be an honorary trust (unenforceable, but may be voluntarily carried out by the transferee).

In 2003, the Florida Statutes were amended to provide that "[a] trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust will terminate on the death of the animal(s)." Today, 39 states have enacted legislation addressing gifts to pets.

Planning considerations

Most pet trusts are established upon the death of the pet's owner under the terms of the estate planning documents (last will and testament or revocable trust). However, a pet trust may be established during a pet owner's lifetime to ensure, in the case of the owner's disability or incapacity, that the pet is maintained in its customary standard of living.

A pet trust should be drafted with very specific language regarding the pet's: 1) standard of living and care; 2) food and diet; 3) daily routine and socialization; 4) toys; 5) grooming; 6) medical care (preferred veterinarian) and health conditions; and 7) disposition of remains (burial, cremation, memorial, etc.) upon death. The pet trust should also specify: 1) the name of the trustee and successor trustee; 2) the name of the pet's caregiver and successor caregiver (if different than the trustee); 3) information identifying the pet; 4) the property that will be used to fund the trust; 5) liability insurance (in case the pet injures someone or another animal); 6) circumstances under which the pet should be put to sleep; and 7) direction for distribution of remaining trust assets, if any, upon the death of the pet.

Caregiver: The most important decision will lie with the selection of a caregiver for the pet. The caregiver will be entrusted to care for the pet and to provide a stable home environment. An alternate caretaker should be selected in case the initial caregiver is unable or unwilling to serve and to ensure that the pet ends up with a happy home.

Trustee: The second most important decision will lie with the selection of a trustee for the pet trust. The trustee should be an individual or a corporation (bank or trust company) that will manage the trust property prudently and ensure that the caregiver is properly taking care of the pet. Successor trustees should be listed in case the initial trustee is unable or unwilling to serve.

Funding: It is important to allocate sufficient funds to accomplish the objective of the pet trust. The amount of funds set aside for the pet should be based upon: 1) the type of animal (dog, bird, etc.); 2) anticipated life expectancy (many pets can outlive their owners); 3) desired standard of living; 4) anticipated future medical treatment; 5) annual trust distributions on the animal's behalf; and 6) compensation for services payable to the trustee and the caregiver. In addition, the pet owner must account for a court's ability to reduce the amount of funds allocated for the care of the pet to what it may consider to be a reasonable amount.

Tax considerations

The Internal Revenue Code (IRC) classifies an animal as an item of personal property and includable in a decedent's estate. An animal does not fall within the IRC's definition of a "person," precluding it from being a trust's beneficiary.

Under the IRC, the beneficiary of the trust will be entitled to deduct the amount of "distributable net income" paid out to the caretaker on behalf of the pet. The caretaker may be required to recognize the income on his or her personal income tax return.

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Out-of-State Division 2008-2009 Slate of Executive Council Nominees

The following slate of nominees will be voted upon on Wednesday, June 18, 2008, at The Florida Bar Annual Meeting in Boca Raton, Fla.

Officers

President – Allyn Kantor, Ann Arbor, MI
President-elect – Bill Lee, Waterville, MA
Secretary – Mike Busenkell, Wilmington, DE
Treasurer – Ward Griffin, Washington, DC

Executive Council

Scott Atwood, Atlanta, GA – 1 year term
E. Duffy Myrtetus, Richmond, VA – 1 year term
Bard Brockman, Atlanta, GA – 1 year term
John Voorn, Palos Heights, IL – 2 year term
Philip Sprinkle, Richmond, VA – 2 year term
Victoria Wu, Silver Spring, MD - 2 year term

YLD Liaison

Mindi Wells, Ada, OH – 2 year term

Florida Pet Trust

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This will result in either the trustee or the caregiver paying income taxes, depending on whether the income is accumulated or distributed each year. If the income is retained, it will result in the pet trust being taxed as a complex trust that has not made any distributions.

If a pet were considered to be the beneficiary of a pet trust (under a "statutory" pet trust), the trust would not receive an income tax deduction for distributions made on the pet's behalf. Alternatively, if the pet is considered property of the pet trust, expenditures made for its care could be classified as deductible trust administration expenses and a reduction in the amount of income taxable to either the trust or the caretaker. A trustee may further reduce the amount of taxable income attributable to the pet trust or caregiver by deducting expenses incurred "in connection with the performance of the duties of administration" (trustee and professional fees).

Another factor that must be considered is that the trust's income will typically be subject to income tax at the highest marginal rate after only $9,550 of income. The IRS has softened this negative impact by taxing pet trusts at an income tax rate comparable to married individuals filing separate returns.

IRS's position. The IRS's position on pet trusts provides that "[i]n the absence of a state law to the contrary, a bequest in trust to provide for the care of a decedent's pet animal is void from its inception, and unless otherwise indicated in the will or specified by statute, the trust property passes to the residuary legatee and income earned on such property is includible in the income of such legatee." The position is supported by the term "animal" failing to fit within the IRC's definition of a "person" (which includes a trust, estate, partnership, association, company or corporation). Therefore, an animal may not be a trust's beneficiary, and without a beneficiary, the trust is an invalid instrument.

Charitable remainder beneficiary. Under Revenue Ruling 78-105, the IRS has ruled that a trust established for the benefit of a pet with the remainder passing to a qualified charity will not be eligible for an estate tax deduction. IRC Section 2055(e)(2)(A) disallows a charitable deduction when an interest in property passes or has passed from the decedent for a charitable purpose and an interest in the same property passes or has passed for a non-charitable purpose. For the purposes of the IRC, a pet does not fit within the definition of the term "person," and consequently, no IRC Section 2055(a) deduction is allowed for a charitable remainder interest.

***Marc J. Soss, Esq.**, is a director in the Estates and Trusts Group of the Cohen & Grigsby law firm. His practice areas include estate and tax planning; probate trust and guardianship administration and litigation; corporate and commercial transactions; and IRS tax controversies. A member of The Florida Bar since 1992, he is based in Cohen & Grigsby's Bonita Springs, Fla., office. He can be reached at 239/390-1900 or msoss@cohenlaw.com.*

Special counsel

from page 1

determined that Florida is an excellent venue for Chapter 11 (whether because of the judges, quick response times or other reasons) and you have located Florida counsel to act as Chapter 11 counsel. Now what? There are three questions that you must answer: 1) How do you determine if you are protected for fees that you have already received; 2) How do you obtain fees that are currently owed to you; and 3) How do you obtain fees in the future?

Keeping what you have

The Bankruptcy Code provides that the debtor may recover from any of its creditors (including its attorneys) payments made within 90 days of the filing of the bankruptcy if the debtor was insolvent. See 11 U.S.C. § 547(b). The exceptions to this rule include the following: 1) the payment was made in a contemporaneous exchange for new value; 2) the payment was incurred in the ordinary course of business or financial affairs of the debtor; and 3) after the payment, the creditor gave new value to or for the benefit of the debtor. See 11 U.S.C. § 547(c). These three exceptions are the most common that would apply to law firms. A careful analysis of all payments received by your client in the preceding 90 days is a must. If you wish to continue representing the client post-bankruptcy, it is extremely important that you review this information with the primary bankruptcy counsel and ensure proper disclosure for your retention.

Getting (re)hired

The Bankruptcy Code allows for an attorney to represent a debtor for limited purposes. This is known as being "special counsel" and is governed by 11 U.S.C. Section 327(e). If you intend to act as special counsel, you will need to disclose the existence of any outstanding fees and your waiver of same, so as to eliminate any conflict in representing the debtor going forward.

Retention in a Chapter 11 case begins with the filing of a retention application. The application, typically signed by an officer of the debtor, is accompanied by an affidavit or declaration signed by the attorney, attesting to, among other things, the attorney's qualifications, billing practices, "disinterestedness" and representing that he or she holds no interest adverse to the estate. See Fed.R.Bankr.P. 2014.

Although 11 U.S.C. Section 327(e) governs the appointment of special counsel, a review of Section 327(a) is necessary to an understanding of Section 327(e). Section 327(a) sets forth a two-part test to determine when an attorney may act as counsel for the debtor: 1) counsel may not represent an interest materially adverse to the estate; and 2) counsel must be disinterested.[1] "Disinterested person" is defined in the Bankruptcy Code to include a person that "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders. …" 11 U.S.C. §101(14)

Additionally, all courts agree that there are at least three requirements of Section 327(e). They are:

1) The appointment of special counsel must be in the best interests of the estate.

2) Special counsel must not hold an interest adverse to the estate with respect to the matter for which he or she is employed.

3) The special purpose for which counsel is appointed must not rise to the level of conducting the bankruptcy case for the debtor.[2]

Section 327(e) does not authorize employment of the debtor's attorney to represent the debtor in the conduct of the bankruptcy case. Rather, special counsel is often engaged when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has commenced would be detrimental to the other litigation.[3]

One court has concluded that Section 327(e) "recognizes that continuing the retention of pre-petition counsel will avoid wasteful expense and delay that might result from having to hire disinterested counsel unfamiliar to the subject matter."[4]

Section 327(e) is not as strict in disqualifying attorneys as is Section 327(a). Unlike Section 327(a), Section 327(e) does not contain the requirement that the attorney be a "disinterested person." The only prohibition in Section 327(e) is that the attorney cannot hold an adverse interest to the debtor or to the estate for the matter for which the attorney is engaged. "[B]ecause of the more limited scope of the employment of special counsel, some connections to the case may be allowed that would not otherwise be allowed under Section 327(a)."[5]

For example, in *In re Servico, Inc.*[6] the United States Bankruptcy Court for the Southern District of Florida ruled that the receipt of a potentially preferential payment by a pre-petition attorney for the debtor did not prevent the attorney from being employed as special counsel to debtor.[7] The law firm had represented the debtor pre-petition in matters regarding real property. The firm received a payment from the debtor 48 days before the debtor filed its Chapter 11 bankruptcy.[8] The firm completed the representation post-petition and was paid for its work.

Getting paid

So, your client has filed bankruptcy, and you have been hired as "special counsel." Now, how do you get paid? The good news is that requested fees are rarely reduced.[9] This good news is tempered by the fact that fees are paid subject to review of creditors, interested parties and approval by the bankruptcy court.

The attorney wishing to be special counsel should have a very clear understanding at the beginning of the bankruptcy case of how he or she is to be compensated. That understanding should be outlined in the application to employ the attorney as special counsel.

Florida bankruptcy courts allow "evergreen" compensation, wherein attorneys are compensated on a monthly basis by the debtor. Alternatively, and more frequently, courts award fees on an interim basis (quarterly or annually), subject to a final fee application at the conclusion of the bankruptcy case. It would be important for special counsel to confer with lead bankruptcy counsel and assure that the billing, in both form and substance, conforms to the requirements of the bankruptcy court's policies and procedures.

As a general matter, the case of *American Benefit Life Ins. Co. v. Baddock* (*In re: First Colonial*

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Special counsel

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Corp.), 544 F.2d 1291 (5th Cir.), cert denied, 431 U.S. 904 (1977), enumerates 12 factors a bankruptcy court should evaluate in awarding fees. *First Colonial* remains applicable in the Eleventh Circuit to determine the reasonableness of fees to be awarded under the Bankruptcy Code. *Grant v. George Schumann Tire & Battery Company,* 908 F.2d 874 (11th Cir. 1990) The 12 factors are:

1) The time and labor required;
2) The novelty and difficulty of the questions presented;
3) The skill required to perform the legal services properly;
4) The preclusion from other employment by the attorney due to acceptance of the case;
5) The customary fee for similar work in the community;
6) Whether the fee is fixed or contingent;
7) The time limitations imposed by the client or circumstances;
8) The amount involved and results obtained;
9) The experience, reputation and ability of the attorneys;
10) The undesirability of the case;
11) The nature and length of the professional relationship with the client; and
12) Awards in similar cases.

Conclusion

Following the guidelines enumerated above, and with help from Florida bankruptcy counsel, you will ensure that you continue as special counsel to your client and that you will be compensated for those efforts.

Endnotes:

[1] In re AroChem Corp., 176 F.3d 610, 621 (2d Cir. 1999).

[2] See, e.g., In re DeVlieg, Inc., 174 B.R. 497, 502-504 N.D. Ill. 1994); In re Southern Kitchens, Inc., 216 B.R. 819, 826 (Bankr. D. Minn. 1998).

[3] H. R. Rep. No. 595, 95th Cong., 1st Sess. 328 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 38-39 (1978).

[4] In re Southern Kitchens, Inc., 216 B.R. 819, 826 (Bankr. D. Minn. 1998).

[5] In re Hub Business Forms, Inc., 146 B.R. 315, 319 (Bankr. D. Mass. 1992).

[6] In re Servico, Inc., 149 B.R. 1009 (Bankr. S.D. Fla. 1993).

[7] Id. at 1013.

[8] Id. at 1010.

[9] Chapter 11 Professional Fee Study, American Bankruptcy Institute, November 2007, Steven J. Lubben.

Sponsored by:
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Jason Burnett *obtained his J.D. degree from Florida State University. He served as a law clerk to the Honorable George L. Proctor, United States bankruptcy judge, Middle District of Florida. Burnett is a shareholder with the firm GrayRobinson PA with 10 offices throughout the state of Florida. He specializes in representing debtors and creditors in bankruptcy and state court proceedings. Burnett can be reached at 904/598-9929.*

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Practicing With Honor: Traditions of the Past – Foundations for the Future

CLE Potpourri for the General Practitioner

Thursday, June 19, 2008, 7:55 a.m. – 12:00 noon
Boca Raton Resort & Club, Boca Raton, Florida

CLE Program Chair: Eric Meeks

7:55 a.m. – 8:00 a.m.	**Welcome and Introductions**
8:00 a.m. – 8:40 a.m.	**Basic Estate Planning and Probate Issues for the Multi-Jurisdictional Practitioner** *Bill Lee III, ME*
8:40 a.m. – 9:20 a.m.	**Guerilla Marketing Techniques for Small Firm Lawyers (A Small Budget Approach to Enhancing Your Client Base)** *Richard Tanner, NJ*
9:20 a.m. – 9:30 a.m.	**Break**
9:30 a.m. – 10:10 a.m.	**Contractual Arbitration: Beware of the Pitfalls!** *Allyn Kantor, MI*
10:10 a.m. – 10:50 a.m.	**Doing Business With a Financially Distressed Company and How to Protect Your Clients** *Michael Busenkell, DE*
10:50 a.m. – 11:30 a.m.	**Ethical and Practical Considerations in Representing the International Client** *Ian Comisky, PA*
11:30 a.m. – 12:00 noon	**Trusting Your Trust Accounting Recordkeeping** *Eric Meeks, OH*

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