

Stream of Commerce

Published by the Bankruptcy & Commercial Law Section, Alabama State Bar

NOVEMBER 2010

SAVE THE DATE – BANKRUPTCY AT THE BEACH SEMINAR

JUNE 10 – 12, 2011


**SAVE THE DATE –
BANKRUPTCY AT THE BEACH
SEMINAR – SANDESTIN HILTON –
DESTIN, FLORIDA JUNE 10 – 12,
2011.**

The Bankruptcy and Commercial Law Section of the Alabama State Bar has initiated a substantial change in next year's Bankruptcy at the Beach Seminar. The date for the seminar has been moved from its traditional May setting to June 10 – 12, 2011, in an effort to eliminate conflicts with end of the school year activities and make the seminar more accommodating to attendees and their families. In addition, an expanded program for the 2011 seminar will offer 8 hours of CLE credits instead of 6 while still maintaining the 2 day format. The seminar will continue to be held at the Sandestin Hilton Resort in Destin, Florida and the officers of The Bankruptcy and Commercial Law Section are excited about building upon the success of this year's seminar held back in May.

Under the capable leadership of last year's chair, Jesse Vogtle, the Bankruptcy Section successfully presented a great bankruptcy program with over 150 in attendance. Nationally recognized keynote speakers included Paul Singerman (commercial chapter 11 topics), and U.S. Bankruptcy Judge William Houston Brown, retired, Western District of Tennessee (consumer chapter 7 & 13 topics). Other notable speakers included Tony McLain, General Counsel, Alabama State Bar (ethics); Larry Vinson, Partner, Bradley Arant Boult Cummings (UCC Update), and our local bankruptcy judges (all topics). The seminar provided the attendees with substantive materials and focused discussion about business and consumer issues.

With the help of our steering committees for consumer and business groups, the section leadership changed the seminar format in 2010 to provide multiple venues for lecture and round table discussions with the speakers. The seminar format included one

hour lectures on general bankruptcy topics on Friday afternoon – Ethics, UCC update, 11th Circuit case review. On Saturday morning, keynote speakers appeared in separate one hour breakout sessions to address specific commercial and consumer issues important to the practitioner. At the same time but in different rooms, our local bankruptcy judges participated in panel discussions to review other hot topics. This format provided intense information sharing and allowed attendees to pick and choose between various lectures/topics helpful to their practice.

For their contribution in assisting with the format update in 2010, the section leadership would like to thank Patrick Darby, Mike Hall, Stuart Maples, Jayna Lamar, Von Memory and Jeffery Hartley for helping develop the business program and Linda Gore, Brad Botes, Jeanna Chappell, Vonda McLeod, Kaz Espy, John Dezenberg, Charles Mac Ingram for helping develop the consumer program. A special thanks to Kris

Sodergren for his outstanding service in planning and coordinating the annual golf tournament following the conclusion of the seminar.

Because of the success of this year's seminar, the format will be substantially similar in 2011 but will offer 8 hours of CLE credit instead of just 6. An extra one-half hour will be added to both the 11th Circuit Update and to the UCC/Article 9 Update. In addition, keynote speakers will be afforded 2 hours for their presentations, allowing for more in depth discussion of issues. The keynote speaker for commercial topics in 2011 will be Chief Judge Barbara J. Houser of the Northern District of Texas. Judge Houston Brown will be returning along with Hank Hildebrand as the keynote speakers for consumer topics. Along with these speakers, our local bankruptcy judges will be returning to participate in the lively and informative panel discussions we enjoyed last year.

For next year's seminar, a room block will again be available at discount prices from Wednesday June 8 through Sunday June 12, 2011. The 2011 seminar will be a family event complete with a casual cocktail/dinner party by the pool (children invited) and activities after the conclusion of the seminar, including golf, tennis, fishing, and spa treatments. More specific information about the seminar will be available in a Bankruptcy at the Beach seminar pamphlet due out in the Winter of 2011. In the meantime, you can confirm your reservations for the

2011 seminar now by contacting Sandestin Hilton - 850.267.9500. Block reservations are limited. First come – First served. We look forward to seeing you all next year.

On behalf of the ASB Bankruptcy and Commercial Law Section,

Buddy Oldshue,

Rosen Harwood,

205.344.5000 (ph)
boldshue@rosenharwood.com

Article One: Update on Access to Justice

**By: Thomas J. Methvin
Past President
Alabama State Bar
Association**

The national average of funding for legal aid from state legislatures is \$4.1 million per year, but Alabama receives only \$300,000. Alabama ranks 51st in the nation in legal aid provided to the poor, even behind the territory of Puerto Rico. Less than 20 percent of the civil legal needs of the state's poor are served because of improper funding. The Access to Justice Commission was established by the Alabama Supreme Court to find solutions to the problem. It works in cooperation with the Alabama State Bar (ASB).

There has been a lot of progress in Alabama as a result of this partnership. In 2008, the Supreme Court approved an amendment to Rule 1.15 of the Code of Professional Responsibility, implementing a mandatory Interest on Lawyers' Trust Accounts (IOLTA) plan and a rule

requiring banks to pay a fair interest rate. As a result, millions of dollars will be available to improve our pro-bono efforts. Additional funds also are available from the Bar's *Pro Hac Vice* fee increase. The \$200 increase was earmarked for access to justice programs, generating a supplemental \$125,000 per year. The Commission also approached the Alabama State Legislature in 2008 and 2009, and secured an additional \$300,000 appropriation. Recently lawyers added to this by raising \$275,000 in voluntary contributions for Access to Justice.

The ASB also works with Legal Services Alabama (LSA), a statewide nonprofit organization dedicated to providing access to justice. LSA operates 10 offices in Alabama and serves the legal needs of all 67 counties. It helps people by providing representation in judicial and administrative forums, free legal counsel, community education and mediation services. In 2008, the ASB partnered with the LSA in the Mortgage Foreclosure Program, providing a toll-free hotline with free help from lawyers for people facing foreclosure. It has helped more than 3,600 callers, saved countless people's homes and created positive publicity for the Bar. A public service announcement on TV and radio ran statewide, directing people who need this service to contact the ASB to be put in touch with a free lawyer. We helped a lot of people and got positive PR for lawyers.

The partnership with LSA was so successful that the same model was adopted to help with domestic violence cases. Legal Services receives clients with

domestic abuse issues that are unable to be helped by the Volunteer Lawyer Program (VLP).

Through the VLP, the Alabama State Bar refers cases to private attorneys who agree to provide free legal assistance. There are four VLPs affiliated with the Alabama State Bar: Birmingham, Mobile and Madison County, and the ASB VLP. The VLP began the Wills for Heroes program in 2008 and has provided free wills for more than 1,200 police officers, firefighters and first responders. Also, the ASB VLP, in conjunction with the Montgomery County Bar Association, implemented a pilot program in November 2009 in Montgomery County to provide a monthly free legal services clinic.

In recognition of Volunteer Lawyers, the Alabama State Bar celebrated the first annual Pro Bono Week in 2009. Each Judicial Circuit participated and promoted volunteer lawyer service to the community. Activities included free legal clinics; proclamation presentations by local governments; a statewide proclamation by Gov. Bob Riley recognizing Pro Bono Week; media coverage; and visits to civic groups and organizations. More than 3,200 Volunteer Lawyer hours were contributed during Pro Bono Week alone.

According to statistics compiled by the ASB, lawyers rendered 11,531 volunteer service hours through the VLPs statewide in 2009. This includes 6,105 hours contributed by the ASB VLP; 3,821 from the Mobile VLP; 1,320 from the Birmingham VLP and 285 hours from the Madison County VLP. Considering many of these programs are in a growth phase, we're expecting even bigger numbers in 2010. Also, since we started our recruiting efforts in

January 2009, 700 new attorneys have joined VLP.

Please consider being a part of our Volunteer Lawyer Program. If you are not already a member of the VLP, you can join online at the State Bar web site at www.alabar.org, Mobile VLP web site at www.vlpmobile.org, Birmingham VLP at www.vlpbirmingham.org, or Madison County VLP at www.vlpmadisoncounty.com, depending on where you practice. Thank you for considering this.

We have made great progress in Access to Justice, but we still have a long way to go. It's going to take all of us, working together, to improve in this area. It is our opportunity, and our responsibility, to help the least among us in ensuring true justice for all.

Article Two: Section 362(C)(3): The Meaning of the Phrase "With Respect to any Action Taken."

**By: Jennifer Leigh Shea
Law Clerk to Judge C.
Michael Stilson**

Section 362(c) provides, in pertinent part: (c) Except as provided in subsections (d), (e), (f), and (h) of this section- (3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was

dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b). (A) the stay under subsection (a) **with respect to any action taken** with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case; 11 U.S.C. § 362(c)(3) (2005) (emphasis added).

Section 362(c)(3) terminates the automatic stay after thirty days if an individual files a case within one year of being dismissed from a previous case. 11 U.S.C. § 362(c)(3). As simple as this appears, numerous issues have been raised in bankruptcy courts across the country about the extent to which the automatic stay is terminated. For example, some courts have interpreted the phrase "with respect to the debtor" to mean the debtor or property of the debtor, thereby finding that the automatic stay terminates with respect to the debtor and property of the debtor, but not with respect to property of the estate. *See, e.g., Jumpp v. Chase Home Finance, LLC (In re Jumpp)*, 356 B.R. 789 (1st Cir. BAP 2006). In addition, some courts have interpreted the phrase "action taken" to mean "a formal action such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding," thereby finding that the automatic stay terminates only with respect to formal proceedings commenced prepetition. *See, e.g., In re Paschal*, 337 B.R. 274, 279-80

(Bankr. E.D.N.C. 2006). This article will concentrate on the meaning of the phrase “with respect to any action taken” and whether such phrase limits the extent to which the automatic stay is terminated.

As alluded to above, the phrase “with respect to any action taken” contained in § 362(c)(3) raises the question of whether the automatic stay is terminated only with respect to formal proceedings initiated by a creditor prepetition. The seminal case finding that the phrase “with respect to any action taken” contained in § 362(c)(3) does in fact limit the application of that subsection to formal proceedings commenced by a creditor prepetition is *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006). The *Paschal* decision concentrates on the difference between the term “act” and the term “action” After comparing various subsections of § 362 that contain either the term “act” or the term “action” the court concluded that the term “action” is much narrower than the term “act.” *In re Paschal*, 337 B.R. at 279 -80. The court concluded that the term “action” means “a formal action, such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding.” *Id.* The court went on to note that “the action with respect to which the stay terminates is an ‘action taken,’ which means an action in the past, prior to the filing of the debtor's bankruptcy petition.” *Id.*

Other cases have examined the phrase “with respect to any action taken” and come to the

conclusion that the phrase does not limit the termination of the automatic stay to formal proceedings commenced prepetition. One such court examined the overall scheme of § 362(c)(3) and noted that the court has the discretion to extend the stay as to “any or all creditors,” not solely creditors that took formal action against the debtor or the debtor's property prepetition. *In re James*, 358 B.R. 816, 819 (Bankr. S.D. Ga. 2007). The court also placed emphasis on the fact that § 362(k)(2) contains the phrase “action taken.” *Id.* at 821. Section 362(k)(2) limits damages to actual damages if a violation of the automatic stay is based upon “actions taken” in the “good faith belief that a debtor has not timely filed, and acted upon, a statement of intention regarding personal property.” *Id.* at 820. The court concluded that the “action taken” pursuant to § 362(k)(2) does not have to be a formal action as a creditor does not have to take a formal action to violate the automatic stay. *See id.*

This author agrees with the conclusions reached by the court in the *James* opinion. To interpret the statute otherwise requires a distinction between the term “act” and the term “action” that is not always present in the English language as the term “action” has various meanings. One such meaning is “the initiating of a proceeding in a court of justice by which one demands or enforces one's right; also : the proceeding itself.” *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com>

m/dictionary/action (last visited March 17, 2010). Another such meaning is “an act of will.” *Id.* To determine which definition is applicable in any given circumstance, one must look to the context in which the term is used. The *Paschal* decision lists numerous instances where the term “action” is used to indicate a formal proceeding, and this author agrees that those instances listed in the *Paschal* decision do in fact use the term “action” to indicate a formal proceeding. However, this author does not agree that “action” always means a formal proceeding. It is only when the term “action” is used in conjunction with other words such as “proceeding” that the term “action” means a formal proceeding. When the term “action” is not surrounded by words which indicate that Congress intended for the term to mean a formal proceeding, such as in § 362(k)(2), this author believes that Congress intended for the term “act” and “action” to be synonymous. In fact “act” and “action” are synonyms when used in certain contexts. *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/act> (last visited March 17, 2010) (showing action as a synonym for one definition of act). Because § 362(c)(3) does not contain any contextual clues to indicate that the term “action” is being used to indicate a formal proceeding, this author has come to the conclusion that “action” is synonymous with “act” in such section. Therefore, the use of the phrase “with respect to any action

taken” in § 362(c)(3) does not indicate that Congress intended to limit the termination of the automatic stay to formal proceedings commenced prepetition.

The views and opinions set forth in this article do not necessarily represent the views and opinions of Judge C. Michael Stilson.

Bankruptcy & Commercial Law Section Officers

Chairman

Buddy Oldshue

Vice Chairman

Melissa W. Wetzel

Treasurer

Sabrina L. McKinney

Secretary

Eric J. Breithaupt

Newsletter Editor

Carla M. Handy

Immediate Past Chairman

Jesse C. Vogtle

News from Northern District

The Court has recently released new Local rules which have been in effect since July 1, 2010. Please see the Court’s website at www.alnb.uscourts.gov to obtain a copy of the new rule amendments.

News from the Middle District

The Court is pleased to announce that they have launched an updated website. Please check for their updated website at www.almb.uscourts.gov.

News from the Southern District

In January 2010 the Court entered Local General Order 7 which provides for noticing requirements in cases where the schedules or matrix are filed subsequent to the petition. For the full text of this order, please visit the Court’s website at www.alsb.uscourts.gov.

Dues Notice and Section Membership

A reminder to our current membership and former membership. The Dues for maintaining your membership to the Alabama State Bar Association – Bankruptcy and Commercial Law Section is now paid through the Bar Association. To renew your please visit the Bar Association’s website at www.alabar.org/sections to download the Bar Section Membership application or to login to your Bar membership and renew online. Annual membership dues are only \$20.00 per year. **Please renew your membership today if you have not already done so for this year. Thank you for your continued support.**

BANKRUPTCY AT THE BEACH –
SAVE THE DATE

SANDESTIN HILTON RESORT
JUNE 10 – 12, 2011

8 Hours CLE Credit
(applied for)

