INTER ALIA
the Newsletter of the
Northern District of Ohio Chapter of the Federal Bar Association

Debtors' Attorneys Beware!

Res Judicata and Preservation of Claims in Bankruptcy

by Robert C. Folland

In recent years, a new trap has emerged for the unwary bankruptcy practitioner. This trap is sprung through a motion to dismiss an adversary proceeding (a lawsuit arising out of a bankruptcy) on the basis that the plaintiff's claims are barred by the doctrine of res judicata. Res judicata, also known as claim preclusion, operates to bar claims that could have or should have been brought in a prior action.[1]

An order confirming a bankruptcy plan of reorganization is a final order with res judicata effect with respect to claims that could have or should have been raised before plan confirmation. Accordingly, where a plaintiff (usually a debtor or a liquidating trustee) brings a claim—without reserving that claim in the debtor's plan of reorganization—after a plan of reorganization has been confirmed by the bankruptcy court, that claim is barred by res judicata.

The "exception" to res judicata

Although res judicata is a universal principle that knows no practice-specific or jurisdictional bounds, its application in bankruptcy comes with a twist—even where a claim is otherwise barred by res judicata, Bankruptcy Code §1123(b)(3)(B) may offer the plaintiff an escape hatch. Specifically, that section provides that a plan may provide for the retention and enforcement of any claim. Courts construe this provision as an "exception" to res judicata.

Consequently, once all four elements of res judicata are established, the question then becomes whether—notwithstanding res judicata's otherwise preclusive effect—the confirmed plan of reorganization effectively retained or "reserved" the claim under §1123(b)(3)(B). Courts across the nation vary widely in their requirements regarding what is obligated in order to satisfy the exception. Some courts require only that a plan contain a simple, "general" reservation of claims; other courts, including the 6th Circuit, require a good deal more.

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The split among the courts

Many courts, some citing the plain language of §1123(b)(3)(B), have upheld sweeping, boilerplate reservations of claims. For example, a Kansas district judge recently found that the following reservation was sufficient to allow the plaintiff liquidating trustee to retain and enforce all claims and causes of actions held by the debtor:

> [The Liquidating Trustee has the] exclusive right to enforce any and all present or future Litigation Claims.[2]

In another instance, the 1st Circuit held that a broad reservation of the ability to pursue avoidance actions (i.e., preferences and fraudulent transfers) was adequate to preserve claims of that type, even where the plan did not identify the specific avoidance action or defendant in question. In that case, the plan's reservation provided as follows:

> The Liquidating Supervisor … is authorized to investigate, prosecute and, if necessary, litigate, any Cause of Action [the definition of which includes avoidance actions] … on behalf of the Debtor.[3]

Although the reservation did not specifically mention the particular avoidance claim or identify the defendant, it was nonetheless sufficient to preserve the right to pursue the claim due to the plan's specific and unequivocal language retaining all claims of that type. Thus, both of the above reservations satisfied §1123(b)(3)(B), and the causes of action were not barred by res judicata. Courts upholding general reservations such as these typically explain that §1123(b)(3)(B) does not require specificity and that there is no basis for grafting such a specificity requirement onto the statute.[4]

The 6th Circuit: *Browning v. Levy*

In contrast, the 6th Circuit Court of Appeals, joined by several other courts, has set forth detailed requirements that must be met for a plan to reserve claims under §1123(b)(3)(B). In an opinion frequently cited by defendants arguing for dismissal of claims against them, the Sixth Circuit in *Browning* held the following "omnibus" reservation to be deficient:

> In accordance with section 1123(b) of the Bankruptcy Code, the Company shall retain and may enforce any claims, rights, and causes of action that the Debtor or its bankruptcy estate may hold against any person or entity, including,

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Winter 2008

2007 FBA Investiture Ceremony

Reprint of Remarks By Chapter President, Anthony J. LaCerva

I would first like to thank Chief Judge Carr for administering the oath to our chapter officers and Judge Patricia Gaughan for honoring me by administering the oath to me tonight.

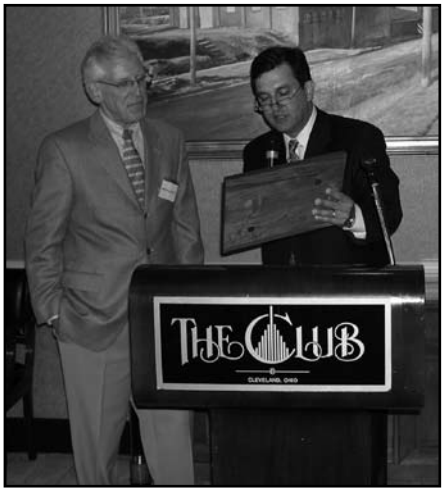
I would also like to thank everyone else here tonight, including all of the federal judges from our district and the state court jurists from across Ohio. I also want to thank all of our other FBA members; my colleagues at McDonald Hopkins; our representatives from the corporate counsel community; and our other special guests.

Judge Patricia Gaughan swears in Chapter President Anthony J. LaCerva during the 2007 FBA Investiture Ceremony.

Let me start by observing that being a lawyer is different than working in other occupations. We actually are, not just work as, lawyers, and we like to do things that make us feel more like lawyers. No offense to any other profession, but being a lawyer is different; it has a more pervasive influence on our characters and on our personalities. I think my wife, Wendy, would agree with this observation, particularly following one of the good-natured debates we occasionally have.

I have been a lawyer as well as member of the Federal Bar Association since 1985, when I started my clerkship with Judge Robert E. DeMascio in Detroit. I am now pleased and excited to assume the duties of president of our chapter, and consider this to be one of the highlights of my 22-year career. We have an extremely talented slate of officers and an incredibly dedicated board of directors to provide even better service to our members in the year ahead. We are, I believe, considered the best Federal Bar Association chapter in the United States. This is due entirely to the talent of the judges and lawyers in our region, many of whom are here with us tonight.

There is no doubt from an economic and cultural point of view that the practice of law in Northern Ohio remains one of the region's great industries, both in terms of the number of practitioners and the quality of our product. Historically, Northern Ohio has been one of the top homes in the country for Fortune 500 companies and other great clients. Our fine bar of today had its roots in providing service to these clients and continues today to practice law at the highest level. Our bench in Northern Ohio is well-equipped to preside over some of the most sophisticated lawyering that takes place in this country.



Federal Bar Association Northern District of Ohio Chapter President Anthony J. LaCerva presents a plaque to outgoing President Arthur M. Kaufman.

While we have had a proud past as a bench and a bar, and while I am proud to be a Northern Ohio lawyer, there are some challenges we face, challenges I hope the Federal Bar Association can help to address in some ways during the next year. First, I am concerned that many of our attorneys, especially

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civil practitioners, are getting too little experience in matters before the courts. I fear that if we get rusty, we will have difficulty competing effectively and dealing with lawyers from other jurisdictions. Second, I believe that the realities of the business of law, including the very real need to compete amongst ourselves for corporate business in Cleveland, has put a strain on our practices, and has hindered civility among our practitioners. Third, while we have both an exceptional bench and an exceptional bar, I believe that we could do even more to strengthen the relationship between the judiciary and the attorneys who practice before it. Sometimes it seems, particularly in light of electronic filing, that we are simply shooting paper at each other and at the court from our respective towers.

During the course of the next year, the FBA will advance some initiatives and sponsor some activities to help deal with these concerns. We want to have even greater and better experiences that will help us to feel more like lawyers. We want to help to promote both the professional and social relationships between our court officers and our attorneys in an effort to make the Northern District of Ohio an even more fulfilling place to practice.

I want to wrap up by saying that I knew, since I was 10 years old, that I was going to be a lawyer and I never really thought seriously of being anything else. I also think that Northern Ohio is the best place that anyone can be a lawyer. Perhaps one day, if all goes right, and if they study their very hardest in school, Daniel, Nicholas and Matthew LaCerva can be Northern Ohio lawyers too.

Federal Bar Association Northern District of Ohio Chapter President Anthony J. LaCerva with his family during the Investiture Ceremony.

Write An Article!

Members of the Northern District of Ohio Chapter of the Federal Bar Association are invited to submit an article for an upcoming issue.

If you are interested in writing an article, please contact me at (216) 706-3874 or sjett@taftlaw.com. The deadline to receive articles for the Spring 2008 issue is Feb. 29, 2008.

Stephen H. Jett
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2007-08 Newsletter Editor

Inside This Issue

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Clerk's Corner

by Geri M. Smith

Ukrainian judges delegation visit Cleveland and Toledo

District Judges Christopher A. Boyko and Jack Zouhary co-hosted the visit of five Ukrainian judges to Cleveland and Toledo, Nov. 10-17, 2007. Our guests were welcomed Sunday evening by Judge and Mrs. Boyko, Judge Dan Polster and his wife Deborah Coleman and Judge John Adams at the Ukrainian Museum-Archives, which is dedicated to preserving the history of the Ukrainian community in Cleveland. Other highlights included a presentation by Prof. Jon Groetingzer, Case Western Reserve School of Law, on the American Judicial System Compared; a joint presentation by Prof. James M. Klein and Prof. John M. Barrett Jr., University of Toledo College of Law, on legal education in America; a cocktail reception hosted by the Toledo Bar Association and the Inns of Court, University of Toledo, College of Law, at which time judicial selection and judicial ethics were discussed; tours of the U.S. court houses in Toledo and Cleveland and of the Lucas County Court of Common Pleas; discussions with assistant U.S. attorneys, federal public defender and Magistrate Judge Vernelis K. Armstrong; a discussion of mediation by Jerome Weiss; and a tour of Thompson Hine LLP, thanks to Kip Bolin; and a visit to the general counsel office of Eaton Corporation hosted by Terry Szmagala, chief counsel—Fluid Power Group Eaton Corporation. A highlight of the visit was lunch at Sokolowski's University Inn where our Ukrainian guests were joined by Ellen Toth and Kip Bolin of our chapter.

2008 Memorial Program—April 14, 2008

The Cleveland Bar Association, in conjunction with the Northern Ohio Chapter of the Federal Bar Association and the Cuyahoga County Bar Association, will host the 2008 Memorial Program to honor Cuyahoga County lawyers who passed away in 2007. The event will be Monday, April 14, 2008, at noon in the atrium of the Howard M. Metzenbaum U.S. Court House.

Congratulations to James Higgins, circuit executive, on his retirement

James Higgins will retire as circuit executive of the 6th Circuit U.S. Court of Appeals on Dec. 31, 2007, after 40 years with the federal judiciary. Jim served as the circuit's first and only circuit executive. Clarence Maddox has been selected by the 6th Circuit Judicial Council to replace him. Maddox has served for the last eight years as the clerk of court/court administrator for the U.S. District Court for the Southern District of Florida. From 1992 to 1999, Maddox served as an assistant circuit executive for the 11th Circuit, and prior to that, he served as a trial court administrator in the state courts of Illinois. Maddox is a graduate of the University of Minnesota and the University of Denver College of Law, where he received a masters degree in Judicial Administration in 1983.

Selection of Greg White, U.S. Attorney NDOH, as magistrate judge

U.S. Attorney Greg White has been selected to be a magistrate judge by the U.S. District Court for the Northern District of Ohio upon the retirement of Magistrate Judge Patricia Hemann on Jan. 31, 2008. White has served as the U.S. attorney for the Northern District of Ohio since 2003 and previously served as prosecutor in Lorain County for 22 years.

Magistrate judges are appointed by the district judges to serve eight-year terms. The judges interview with the Merit Selection Panel, which is appointed by the active district judges and must consist of lawyers and at least two nonlawyers. The panel reviews the application, gathers information, conducts interviews and determines collectively which individuals among the applicants meet all the standards and appear qualified for appointment as a US. magistrate judge.

CJA budget processing

Robert Ranz of Cincinnati has been appointed to serve as a CJA budgeting attorney for the 6th Circuit. Ranz will be focusing his efforts on capital cases (both capital prosecutions and habeas corpus) and complex, multi-defendant, multi-count noncapital cases (mega-cases). Ranz has been a criminal defense attorney in private practice in Ohio for the last 26 years. He has represented many capital defendants and has extensive experience handling felony cases. Ranz will work with the judges in reviewing case budgets and will be working with panel attorneys on case budgeting procedures for these cases. Ranz can be reached at (513) 564-7358 or robert_ranz@ca6.uscourts.gov.

Excel spreadsheets to be used as part of the budgeting process may be found on the Clerk's Office Web site, www.uscourts.gov, under the Attorney/CJA section on processing CJA vouchers. The spreadsheet will track monies spent and hours expended. In addition, both

the in-court and out-of-court worksheets along with the CJA26 Supplemental Information Statement Forms are available online as fillable forms, which can do calculations. Please remember to use the Web site to check current mileage and hourly rates. Questions on voucher processing may also be directed to (216) 357-7025.

Federal Rules amendments

The following amendments to the rules took effect Dec.1, 2007:

- Appellate Rule 25;
- Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1, and new Rules 6003, 9005.1, and 9037;
- Restyled Civil Rules 1-86, restyled Illustrative Civil Forms 1 through 82, and new Civil Rule 5.2; and
- Criminal Rules 11, 32, 35, 45, and new Rule 49.1. (The Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue is abrogated.)

In accordance with 28 U.S.C. § 2074(a) and the April 30, 2007, Supreme Court orders, they will govern all proceedings commenced on or after Dec. 1, 2007, and "insofar as just and practicable" all proceedings then pending. The text of the amended rules and extensive supporting documentation can also be found on the judiciary's federal rulemaking Web site at www.uscourts.gov/rules.

You should take note of two important changes — the restyled Federal Rules of Civil Procedure and the new privacy rules.

Restyled Federal Rules of Civil Procedure and Illustrative Civil Forms

The comprehensive style revision of the Federal Rules of Civil Procedure and style amendments to the Illustrative Civil Forms took effect Dec. 1, 2007. The Civil Rules are amended to clarify and simplify them without changing their substantive meaning. The restyled Civil Rules are the third set of restyled federal rules, preceded by the restyling of the Federal Rules of Appellate Procedure, which became effective in 1998, and the Federal Rules of Criminal Procedure, which became effective in 2002. More information on the new rules and forms, including the text of the amended rules and a cross-reference chart listing each instance where a current Civil Rule was renumbered in the restyled Civil Rules are posted at www.uscourts.gov/rules/congress0407.htm.

New privacy rules

The amendments to the Appellate, Bankruptcy, Civil and Criminal Rules that implement the E-Government Act of 2002 require that the following personal identification information be redacted from documents filed with the court: Social Security and taxpayer identification numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses.

2008 6th Circuit Judicial Conference

You are cordially invited to attend the 2008 6th Circuit Judicial Conference. The conference will be open to all attorneys admitted to federal practice in the 6th Circuit. All attorneys who attend will receive credit toward life membership in the 6th Circuit Judicial Conference. The conference will be held May 7-10, 2008, at the Marriott Chattanooga Convention Center. The program on Thursday, May 8, will feature two plenary sessions: "Supreme Court Review" by Prof. Erwin Chemerinsky, and "The Federalization of Election Law." The program on Friday, May 9, will feature a plenary session on the 1964 trial of Jimmy Hoffa in Chattanooga in which he was convicted of fraud and jury tampering. This plenary session will be followed by breakout sessions on appellate review, bankruptcy, sentencing and employment law. The conference banquet will be held on Friday evening, May 9, and will feature remarks by 6th Circuit Justice John Paul Stevens. On Saturday morning, May 10, 2008, the program will conclude with circuit and district meetings. For those attorneys attending from Kentucky, Ohio and Tennessee, the conference will seek approved CLE credit for attendance at this program. If you are interested in attending the 2008 6th Circuit Judicial Conference, please contact, by Jan. 31, 2008:

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Cincinnati, Ohio 45202-3988
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Fax: (513) 564-7210
E-mail: ca06-conf@ca6.uscourts.gov

You can request registration materials on the 6th Circuit Web site at www.ca6.uscourts.gov. Please provide your name, address, telephone and fax numbers, your attorney I.D. number, and the district in which you practice. The conference registration materials will be sent out in March 2008 to all those who register with the Office of the Circuit Executive by Jan. 31, 2008.

Geri M. Smith *was appointed the Clerk of Court for the U.S. District Court Northern District of Ohio on July 1, 1991, having joined the Court in 1982. She serves as the chief administrative officer of the court as well as the administrative assistant to the Chief Judge.*

The Family and Medical Leave Act

Incomplete Certifications, Intermittent Leave and Eligible Employees

by Robert H. Fisher Jr.

Recently, there have been a number of fascinating opinions issued under the Family and Medical Leave Act (FMLA); some answered important open questions and others served as valuable reminders. Many came out of our own 6th Circuit Court of Appeals and district courts in Ohio.

What must employers do when provided with incomplete certifications?

A very interesting 6th Circuit case addressed the issue of whether an employer must obtain a second medical opinion when provided with a certification for leave that is deficient on its face. In *Novak v. MetroHealth Medical*, an employee was terminated for excessive points under a no-fault attendance system.[1] The employee filed suit and claimed that some of her absences qualified as FMLA leave due to her back condition, her need to care for her adult child who had postpartum depression and her need to care for her newborn grandchild.

The employee initially submitted an incomplete medical certification for her back condition. When her employer notified her that the form was incomplete, the employee contacted an assistant at her doctor's office, told the assistant what to write in the incomplete sections of the form and resubmitted the form without having her physician approve the additions. The employer, with the employee's permission, contacted the physician and was told that he completed the first certification but had not treated the employee in six months and did not authorize the additional comments by the office assistant. The employee subsequently updated her doctor on treatment she was receiving from another doctor, and he completed a third certification based on this second-hand information. Additionally, the employee submitted a certification that stated that her 18-year-old daughter suffered from postpartum depression and a fifth certification stating that she was needed to care for her daughter's new baby.

The court held that the first certification was insufficient because it did not contain the date the condition began, its probable duration or supporting medical facts. The second certification was inauthentic because an office assistant completed the form without the permission of the health care provider. The third certification was unreliable because the doctor signed the form without personal knowledge of the employee's condition for the pertinent dates. The court also rejected the employee's argument that the an employer must use the FMLA's second opinion process to challenge a medical certification. Instead, the court said that an employer may deny leave when presented with an incomplete or inaccurate certification.

Finally, the court held that the employee could not invoke the FMLA to care for a grandchild and that the FMLA authorizes a parent to take leave to care for a child over the age of 18 only if the child is suffering from a serious health condition and is "incapable of self-care because of a mental or physical disability." Significantly, the court ruled that "incapable of self-care because of a mental or physical disability" requires that the adult child be "disabled for purposes of the ADA." Because the daughter's postpartum condition was not severe and only lasted one or two weeks, it did not qualify.

Does the FMLA require that an employer provide light duty?

In *Hendricks v. Compass Group USA, Inc.*, the 6th Circuit ruled that an employer has no obligation to offer light duty accommodations under the FMLA.[2] In *Hendricks*, an injured employee who accepted a light duty job that paid less than her regular position, instead of taking unpaid leave, filed suit claiming that the lower pay violated the FMLA. The court disagreed, stating that an employee who voluntarily accepts a light duty position does not have the right under the FMLA to the same pay that she received in her regular job. The FMLA does not require an employer to offer injured employees light duty, nor does it control what employers pay employees on light duty.

What is "intermittent leave"?

In *Collins v. United States Playing Card Co.*, a diabetic employee certified for intermittent FMLA leave was terminated for leaving his shipping department post on several occasions without obtaining permission from his supervisor.[3] The employee had been caught in the break room at unauthorized times and, on at least two occasions, was caught at his workstation with a newspaper. The employee argued that the unscheduled breaks

fell within his authorized FMLA intermittent leave and were necessary for him to avoid passing out. The court denied the employer's motion for summary judgment, reasoning that even leaves of just a few minutes are not "per se excluded" from the act's protection.

However, the 5th Circuit Court of Appeals dealing with this issue in *Mauder v. Metro. Transit Auth. of Harris Cty., Tex.*, ruled that an employee, whose medication for Type II Diabetes caused him to need frequent visits to the bathroom, was not entitled to "unfettered permission" to take bathroom breaks. Not only was the employee needed at his desk to answer the telephone but his request was not for temporary leave involving time away from work.[4]

What does it mean to be an "eligible employee"?

To be eligible for FMLA leave, an employee must be employed by the employer for at least 12 months, and have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. This year, there have been three noteworthy cases that addressed these issues.

The first, *Mutchler v. Dunlap Memorial Hospital*, addressed the hours of service requirement. In *Mutchler*, a nurse who worked 48 hours during two consecutive weekends, but was paid for 68 hours of work under a program that rewarded employees for working weekends, claimed that the bonus hours should be counted toward the 1,250 hours of service eligibility requirement under the FMLA.[5] Absent these hours, the employee was eight hours short of being eligible for FMLA leave. The court held that the additional hours of pay do not count as hours worked under the FMLA. The pay was an incentive and not compensation for hours actually worked because the employee was free to use her time for her own purposes with no obligation to her employer during those additional hours.

The second case addressed the 12 months of service requirement.[6] There, it was determined that an employee who worked for a company for several years in the mid-1980s and then returned in May, 2005 could combine the two periods of service to meet the FMLA 12 months of service eligibility requirement. Shortly after being re-hired in May 2005, the employee was injured in an automobile accident but continued working despite her injuries. Later that year, her performance was rated unsatisfactory in four categories, three of which included references to the earlier accident creating numerous absences. The employee provided the employer with a letter from her physician describing her condition, which included ongoing extreme headaches and depression. The employee ultimately requested time off to seek additional medical consultation and was told that she could take the time off once she had completed the employer's budget. The plaintiff resigned and sued under the FMLA. The employer's claim that the employee did not meet the 12-month service requirement failed. The court upheld the Department of Labor's (DOL) interpretation of the act as permitting an employee to combine all periods of employment toward the 12 months of service requirement.

In the third case, it was determined that an employee who commenced a leave of absence before he met the 12-month eligibility requirement cannot invoke the protections of the FMLA merely because his leave extended past his 12-month anniversary.[7] The employee began working for the employer on March 28, 2005. On Jan. 23, 2006, he requested a leave of absence for depression and migraine headaches and was told that he was not entitled to FMLA leave because he had not completed 12 months of service. He was allowed to take short term disability leave, but he was informed that he was not guaranteed reinstatement. When he sought to return to work in April 2006 the company was unable to find a position for him, and he was terminated. The employee then brought suit, claiming that since he met the 12-month service requirement while still on leave the leave was transformed into FMLA leave. The court rejected this argument because the employee was on one uninterrupted leave of absence and under the FMLA regulations the employee's eligibility for FMLA leave must be determined "as of the date leave commences."

What qualifies as "notice" of desire to take FMLA Leave?

In *Aleman v. U-Haul Company of Illinois*, the court found that an employee's statement that his stepfather was scheduled for "surgery" was not sufficient notice that the employee was requesting FMLA leave.[8] The court went on to explain that without more, such as a reference that care after surgery is required, that the surgery is major or that the surgery is an in-patient procedure, the employee's notice was insufficient. The court, however, found that there was an issue for trial on the extent to which the employer provided the required FMLA information to its employees. The regulations require that employers place general information about the FMLA in employee handbooks and respond to requests for leave with specific information about FMLA requirements and procedures. Although the court was not inclined to find that the failure to include FMLA information in a handbook excused the employee from providing sufficient notice of the need

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Employee Theft: How to Keep it Out of Your Business

by Virginia Davidson Hearey

Employee theft robs businesses of billions of dollars a year, primarily through check writing, deposit, cash skimming and false invoice schemes. Half of frauds are discovered by a fellow employee by accident, another third by internal whistleblowers. More than 80 percent of frauds are discovered from within, yet less than 10 percent of small businesses have anonymous fraud reporting systems or policies. Less than one-fifth conduct surprise audits or anti-fraud training.

Who commits fraud?

You have heard it before: the embezzler in your midst is the person you least suspect. Trust ("We treated her just like family"), opportunity (access to cash and checks) and rationalization ("just this once" becomes a way of life) combine to create a powerful temptation. Pay attention to the employee who:

- Refuses to take vacation, seldom leaves his or her desk or hoards data.
- Feels unappreciated. Management "owes" him or her, and she will extract her due by other means;
- Lives beyond her means; why does your bookkeeper wear $500 shoes?
- Endorses paychecks to a third party or commercial check casher.
- Through no fault of his or her own, suffers financial hardships caused by layoffs, health crises or family dependents.

Trust, but verify

Simple controls, applied evenly, can prevent fraud from poisoning a successful business. Although no one measure is right for every business, here are some areas to consider:

- Background checks. More than a third of resumes contain false statements, yet less than a third of employers verify that information. Get written permission to check backgrounds. You will learn about criminal and credit histories, prior employment and education, and verify licenses and certifications. A more extensive check is worthwhile for higher-level employees.
- Whistleblower policy. Anonymous tips are more effective than audits, especially in frauds of $1 million or more. A policy should encourage employees to report, and protect their confidentiality. Make sure new hires know about it. Allow reporting to an immediate supervisor or a second person of the employee's choosing.
- Audits, inside and out. Most frauds begin in the weeks after outside CPAs complete their field work and leave the premises. That is when a designated internal auditor should be especially vigilant. The external CPA's job is not to uncover fraud, but to state whether financial statements are materially accurate. As part of that task, however, the CPA must assess risks, advise as to internal controls and report significant concerns. It is better if the auditor's report of any such concerns can say that management has corrected the problem.
- Bank records. Consider having bank statements and checks mailed to a new, trusted location without advance notice. You may be surprised at what you learn.
- Check writing and approval. Require that checks be signed by an officer and a co-signer who neither approves the payment nor works in accounting. Keep up with developments in check paper stock. Number check requests. Ensure that deposits go to the proper accounts. On deposit endorsement stamps, spell out the company's full name and omit bank name and account number. Keep checks and deposits under lock and key, and process them promptly.
- Cash, credit cards and postage meters. Require a written receipt for every cash transaction. Consider using random shoppers to see if receipts are frequently voided (a fraud indicator). Do not allow employees to obtain postal money orders. Make sure postal refunds are credited to the proper account. Shred offers for pre-approved loans and credit cards.
- Fraud insurance. Consider a fidelity bond to cover the company, key employees and anyone who handles money.
- Computer data. Back it up daily and store it off site.
- Outside vendors. Inventory and supplies are areas ripe for collusion. Reconcile purchase records. Have personnel in more than one department review your company's choice of vendors from time to time. Establish a written conflict of interest

policy and require signed certifications of compliance.
- Bad debt write-offs. Keep an eye on upward trends.
- Mandatory time off. No exceptions.
- Expense accounts. Establish controls that make sense for your business, and audit them.
- Exit interviews. Schedule them close to departure. Have someone other than the employee's supervisor find out why the employee is leaving, where she is going next and how she feels the organization can be improved.

If you uncover suspicious activity

Before confronting anyone, get the facts. An attorney, working with a forensic accountant, can quickly and economically freeze accounts; save computer data, voice mail and documents; and minimize damage. An independent adviser protects the company's officers from becoming witnesses in any later investigation, and can help you communicate with your employees, the government and the press. Notify your insurance carrier.

If you must question an employee, do it after hours, with a witness present. Depending on the circumstances, you may want a law enforcement officer present. Retrieve any company property.

Done correctly, an immediate investigation can mean the difference between a quick recovery and years of playing expensive catch-up. Fraud in the business world is inevitable. Disproportionate costs of getting back to business are not.

Virginia Davidson Hearey *is a partner in the firm, Calfee Halter & Griswold LLP. and serves as chair of the firm's White Collar Defense and Investigations practice. The practice represents and counsels publicly held corporations, public bodies, boards, committees and individuals in federal, state and local investigations, criminal, regulatory and civil prosecutions, and compliance reviews.*

(Family and Medical Leave Act, continued from page 7)

for FMLA leave, failure to provide the more specific information may excuse the employee from following certain FMLA requirements.

Does a waiver of FMLA rights require DOL approval?

We were again reminded of an important lesson in *Taylor v. Progress Energy Inc.* where an employee who had signed a release subsequently sued her former employer under the FMLA.[9] The company's motion to dismiss based on the release was denied. Section 825.220(d) of the implementing regulations provides that employees cannot waive and employers cannot induce employees to waive their rights under the FMLA. The court held that this refers not only to prospective waiver of rights but to all rights under the FMLA, including the right to bring suit. As a result, the court determined that FMLA rights cannot be waived without prior approval by a court or the Department of Labor.

Endnotes

[1]2007 WL 2807004 (6th Cir. Sept. 28, 2007).
[2]2007 WL 2230161 (7th Cir. Aug. 6, 2007).
[3]466 F. Supp. 2d 954 (S.D. Ohio 2006).
[4]446 F.3d 574 (5th Cir. 2006).
[5]485 F3d. 854 (6th Cir. 2007).
[6]*O'Connor v. Busch's Inc.*, 492 F. Supp. 2d 736 (E.D. Mich 2007).
[7]*Adly v. SuperValu, Inc.*, 2007 WL 2226040 (D. MN Aug. 3, 2007).
[8]2007 WL1468610 (N.D. Ill. May 18, 2007).
[9]2007 WL 1893362 (4th Cir. 2007).

Robert H. Fischer Jr. *is an associate in the Cleveland office of Taft Stettinius & Hollister LLP. He received his undergraduate degree in political science and economics, graduating summa cum laude, from Ohio University and law degree from Vanderbilt University School of Law. He concentrates his practice on labor and employment matters.*

Welcome New Chapter Members

Mark Bennett, U.S. Attorney's Office, Northern District
James Dimitrijevs, Baker & Hostetler LLP
Erin Flanagan, Thompson Hine LLP
Valerie Mininger, Law Student
Michael Mumford, Baker & Hostetler LLP
Gregory Vickers, Fay Sharpe LLP

Get Involved in Your FBA Chapter

The Northern District of Ohio Chapter of the Federal Bar Association is actively engaged in numerous projects in support of our federal judiciary and the community as a whole.

The chapter has experienced dynamic growth over the past few years and can no longer rely on word of mouth to publicize volunteer opportunities. If you would like to volunteer, please contact the appropriate committee chairperson listed below.

Board Development Committee
Co-chair: Carter E. Strang, (216) 696-3956, carter.strang@tuckerellis.com; Co-chair: Ellen Toth, (216) 241-6100, ellen.toth@ogletreedeakins.com
The Board Development Committee shall consider, form and suggest to the Board of Directors ideas for the enhancement of the experience of chapter Board members. This will include procedures and policies for the recruitment and orientation of new Board members; methods to facilitate a greater understanding of the functions and the responsibilities of Board members; and ways to enhance Board members' skills in rendering services to this chapter and in other civic and professional endeavors.

Continuing Legal Education Committee
Chair: Kip T. Bollin, (216) 566-5786, kip.bollin@thompsonhine.com
The CLE Committee plans the FBA Northern District's CLE programs. The ethics, professionalism and substance abuse CLE is held every December and the criminal law CLE is held every August. Other programs are scheduled based upon interest. Other CLE programs have included: Federalism, handling the media, complex civil litigation, appellate practice and *Brown v. Bd. of Education*. In the planning stage are CLE programs on environmental law and advanced federal practice.

Membership Committee
Chair: John Gerak, (216) 479-6190, jgerak@vssp.com
The Membership Committee encourages lawyers and law students to join and become active members in the Northern District of Ohio Chapter of the Federal Bar Association. To further this objective, the Membership Committee disseminates information regarding the benefits of membership and the positive contributions that the Northern District of Ohio Chapter continues to make on a regular basis to our communities.

Program Committee
Chair: Bruce Wilson, (330) 253-8300, brucewilsonesq@aol.com
The Program Committee, subject to the approval of the Board of Directors, shall plan and conduct informative and entertainment programs consistent with the objectives of the chapter, as provided in Article II of the by-laws.

Nominations and Elections Committee
Chair: Steven J. Paffilas,(216) 622-3698, steven.paffilas@usdoj.gov
The Nominations and Elections Committee shall consist of a chairperson, the president-elect and at least three other members. The committee shall have charge and control of the nomination and election of officers and directors as provided in Article V, Sections 3 and 4 of the by-laws.

Publicity and Public Relations Committee
Chair: Diana Thimmig, (216) 623-0150, dthimmig@ralaw.com
The Publicity and Public Relations Committee, subject to the approval of the Board of Directors, shall inform the members of the chapter and public about chapter activities and matters of interest through the preparation and distribution of announcements, press releases and other such communications channels deemed appropriate by the Board of Directors.

Newsletter Committee
Chair: Stephen H. Jett, (216) 706-3874, sjett@taftlaw.com
The Newsletter Committee, subject to the approval of the Board of Directors, shall be responsible for the preparation of a chapter newsletter to be distributed to the chapter membership at regular intervals deemed appropriate by the Board of Directors. The Newsletter Committee shall take steps as are necessary to select the content of such newsletter, prepare the newsletter layout, and to arrange for printing and distribution of such newsletter.

Younger Lawyers Committee
Chair: Meggan A. Rawlin,(216) 586-3939, mrawlin@jonesday.com
The Younger Lawyers Committee is comprised of all members of the chapter who are 36 years of age and under or who have been admitted to practice for three years or less. This committee works hand-in-hand with our local federal judges on projects meaningful to the profession and to the community at large. For example, it was the Younger Lawyers that worked with Magistrate Judge Hemann to organize the "A Book of Your Own" book drive that collected more than 5,000 books for Cleveland City School students. More projects are always in the works, as are events planned to provide our younger members with the opportunity to work with and learn from our federal judiciary.

(Debtors' attorneys, continued from page 1)

> without limitation, claims and causes of action arising under sections 542, 543, 544, 547, 548, 550 or 553 of the Bankruptcy Code.[5]

The court held that res judicata barred the plaintiff's claims due to this reservation's failure to expressly reserve the specific claims (legal malpractice and breaches of fiduciary duties) asserted by the plaintiffs.

In its holding, the *Browning* court made it clear that to be effective, a reservation of a claim must identify the defendant, and it must also identify the specific cause of action, as well as the factual basis for the cause of action. In the absence of such particularity and specificity, a reservation is ineffective. In sum, the claims arising in *Browning* were barred by res judicata, the reservation was too general, and §1123(b)(3)(B) did not save them.

Implications for practitioners

Res judicata is a rule of "fundamental and substantial justice" serving "vital public interests."[6] Defendants seeking dismissal of an action on this basis invariably argue that the claims asserted in the adversary proceeding could have and should have been brought during the bankruptcy prior to plan confirmation; because they were not, they are now barred by res judicata. They then go on to explain why the confirmed plan failed to reserve the claims to the satisfaction of §1123(b)(3)(B), often relying on *Browning*.

It does not take a bankruptcy practitioner (or a genius) to recognize that the varying applications of §1123(b)(3)(B) set forth above can lead to profoundly different outcomes—namely, while debtor A may be completely free to pursue a post-confirmation cause of action in one jurisdiction, debtor B might be forever barred from pursuing the identical cause of action against the very same defendant in another jurisdiction, simply because the cause of action was not preserved by the confirmed plan with the specificity required by that circuit's courts.

Given the disparities that exist within and among the circuits over what is required by Bankruptcy Code section 1123(b)(3)(B), it is likely that the Supreme Court will eventually confront the issue and provide specific guidance as to what 1123's requirements are. Until it does, bankruptcy practitioners—particularly, debtors' attorneys—in the 6th Circuit and elsewhere should make *Browning* mandatory reading before and during the process of drafting their plans of reorganization. Until there is greater clarity in this arena, the best approach is to be as inclusive and specific as possible, while also including a broad, "catch-all" reservation of claims. Debtors' counsel who fail to draft their reorganization plans specifically with *Browning* in mind risk placing themselves in a very uncomfortable position with needless litigation and expense, or worse, the loss of valuable claims that would otherwise be available to satisfy estate creditors.

Endnotes

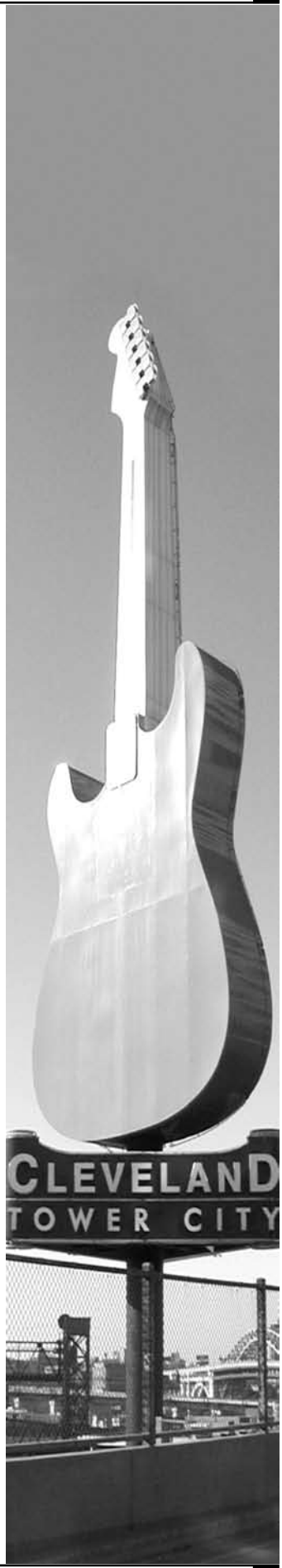
[1]To trigger res judicata's application, the following four elements must be satisfied: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit or, put another way, the plaintiff could have or should have litigated the claim in the prior action. Stated succinctly: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The burden of proof for each of the four elements is on the defendant.

[2]The plan defined "Litigation Claims" as all "claims, rights, causes of action, defenses, counterclaims, suits or proceedings, whether in law or in equity, whether known or unknown, that the Debtors … may hold or assert against any non-Debtor Entity." *JP Morgan Trust Co. v. Mid-America Pipeline Co.*, 413 F. Supp. 2d 1244, 1274 (D. Kan. 2006). (§1123(b)(3)(B) simply provides for the retention or enforcement of any claim or interest, without making any distinction between the degree of specificity required to preserve particular types of claims).

[3]*Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51, 59 (1st Cir. 2004).

[4]See, e.g., *Alary Corp. v. Sims (In re Associated Vintage Group, Inc.)*, 283 B.R. 549, 564 (B.A.P. 9th Cir. 2002) (departing from prior 9th Circuit precedent (among others, *Kelley v. South Bay Bank (In re Kelley)*, 199 B.R. 698, 704 (B.A.P. 9th Cir. 1993) in which general reservations of claims were held to be insufficient to avoid res judicata).

[5]*Browning v. Levy*, 283 F.3d 761, 774-75 (6th Cir. 2002). See also *D&K Properties Crystal Lake v. Mutual Life Ins. Co. of New York*, 112 F.3d 257, 260-61 (7th Cir. 1997) (plan reservation provided that the disbursing agent "shall enforce all causes of action existing in favor of the Debtor." Held: A blanket reservation that purports "to reserve all causes of action reserves nothing."). Note that in *Browning*, the 6th Circuit examined the reservation in the debtor's disclosure statement (as opposed to the debtor's plan). There is a question under the statute (which authorizes a plan to provide for the retention of claims) regarding whether a disclosure statement's reservation should even be considered as part of the



Brown Bag Lunch With Judge Economus

by James W. Satola

On Monday, Dec. 3, the Federal Bar Association's Northern District of Ohio Chapter hosted another Brown Bag Luncheon with one of our Northern District of Ohio judges. This luncheon, however, provided many Cleveland and Akron based members with an opportunity to hear from a judge we may not regularly appear before, U.S. District Judge Peter C. Economus, who is resident in the Youngstown courthouse. The luncheon was held in the chief judge's courtroom of Cleveland's Carl B. Stokes Federal Courthouse. The event was attended by approximately 30 of our chapter members.

After being introduced by Northern District of Ohio Chapter Board Member and event Chairperson, Bruce Wilson, Judge Economus started his talk with an overview of his background, beginning with his training as a biologist, followed by a brief stint as a staff attorney at the Mahoning County Legal Assistance Association from 1971 to 1972. He then described his 10 years in private legal practice, with his father, where he handled a variety of both civil and criminal matters. The judge then recalled his efforts to swim against the then-prevailing tides of the Mahoning County Democratic Party to run for election as a judge on the Mahoning County Common Pleas Court, an effort for which he was successful, winning the seat in 1992. The judge's presentation was topped off with his recollections of being appointed to the federal bench in 1995 by President Clinton.

As always, the event culminated with an open question and answer session, a featured part of our chapter's Brown Bag Luncheon format. Among the issues discussed was the decreasing frequency of cases proceeding to trial, especially civil cases. Judge Economus noted that the most recent civil trial that went forward in his courtroom was more than 18 months ago. The expense of proceeding to trial is obviously a key factor in this. The judge considers one of the most important functions in his role as a judge is to put his best efforts toward assisting the parties to achieve a settlement. He noted his reputation for often bringing the parties to a resolution of their cases during his time as a common pleas court judge and today, and commented that a trial often represents, in a sense, a "failure" to find that common ground. Judge Economus also noted how much he enjoys the opportunity to mentor and interact with the new lawyers and law students who have worked with him over the years as law clerks and interns.

Our chapter's Brown Bag Luncheon series provides a wonderful opportunity for our members to meet in an informal setting with the judges of our court, as well as with fellow lawyers with an interest in the federal courts. These regular luncheons are one of the many benefits our chapter offers to its members. We look forward to seeing each of you at our next Brown Bag Luncheon, as well as at the other fine programs offered by our chapter.

James W. Satola
is a senior attorney with Squire, Sanders & Dempsey L.L.P., as well as a past president and current board member of the FBA Northern District of Ohio Chapter.

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