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DID THEY REALLY DO
 THAT?
 CRAZY ARGUMENTS FIND
 TRACTION IN SOME
 BANKRUPTCY COURTS

Most of the amendments to the Bankruptcy Code became effective on October 17, 2005 ("New Law"). Creditors applauded the new legislation, and anxiously waited to see whether the courts would interpret the new law as they expected. This has not always turned out to be the case.

Counsel for debtors have argued extreme interpretations of certain provisions of the New Law, which I sometimes refer to as "crazy arguments". Unfortunately, some courts have actually adopted some of these "crazy arguments". It will be interesting to follow the expected appeals of these decisions.

1. "I financed this vehicle within 910 days, but can still do a cramdown because I didn't buy the car for myself, I bought it for my wife."

Vehicle purchased within 910 days of the Petition found not to be for the personal use of the debtor where the debtor argued that he purchased the vehicle to replace his wife's previous car, and that she had at all times been the primary driver. The Court agreed that the vehicle was not acquired for the debtor's personal use, and therefore allowed the debtor to bifurcate and cramdown the secured

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WHY CAN'T THE SHERIFF JUST
 BREAK INTO SOMEONE'S
 HOME OR BUSINESS TO
 REPLEVIN COLLATERAL

In many replevin cases, collateral which a secured creditor seeks to repossess is stored in a garage or behind a locked fence. Florida Statute 78.10 governs execution of writs of replevins on property located inside buildings or enclosures.

Pursuant to the statute, "if the sheriff has reasonable grounds to believe that the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the sheriff shall publicly demand delivery thereof; and, if it is not delivered by the defendant or some other person, the sheriff shall cause such house, building, or enclosure to be broken open and shall make replevin according to the writ."

Many believe the Sheriff can simply break into someone's home or business and retrieve property during the initial attempt to serve a writ of replevin.

As a practical matter, however, the Sheriff will not break into a building or enclosure when first attempting to serve a writ of replevin. Sheriffs will not make an independent decision that there are "reasonable grounds," and prefer a Court order.

An example of when a Break Order may be necessary is where a Creditor believes the customer is hiding a vehicle in his or her garage, but the

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Crazy Arguments

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creditor's claim. In re Jackson, 338 B.R. 923 (Bankr. M.D. Ga. 2006).

2. "Vehicles financed within 910 days of bankruptcy are not secured claims at all, since §506 is inapplicable to §1325(a)(5)."

The debtor argued that claims are deemed secured only by the application of §506. Since the "hanging paragraph" added after §1325(a)(9) provides that §506 is inapplicable to car loans obtained within 910 days of the bankruptcy filing, such claims cannot be secured. In re Carver, 338 B.R. 521 (Bankr. S.D. GA. 2006).

3. "A debtor can surrender a car financed within 910 days of bankruptcy in full satisfaction of the entire claim."

Since the "hanging paragraph" added after §1325(a)(9) provides that §506 is inapplicable to car loans obtained within 910 days of the bankruptcy filing, such claims must be considered fully secured. The Court found that since the claim is deemed fully secured surrender of the car must mean that the claim is fully "satisfied" after confirmation and there can be no unsecured deficiency claim. In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006).



Dennis LeVine & Associates Welcomes New Attorney

Dennis LeVine & Associates welcomes our new associate attorney, Alison V. Walters. Alison, a native of New Orleans, comes to the Firm with over two years of experience handling Florida creditors rights matters. We know you will enjoy working with her.

Dennis J. LeVine is Board Certified in both business and consumer bankruptcy law by the American Board of Certification. Mr. LeVine was admitted to the Florida Bar in 1983, and practices in the federal courts of all three Florida districts. He has concentrated his practice in bankruptcy and collection law for 21 years.

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Can't The Sheriff Just Break In?

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Sheriff has not actually seen the vehicle. When the writ of replevin is returned unexecuted and the Creditor believes the collateral is in a locked enclosure, the Creditor's counsel files a Motion with the Court and obtains a Break Order. The Break Order is then sent to the Sheriff, who will accompany the Creditor's agent and a locksmith to the premises to break open the locked premises and recover the collateral.



BANKRUPTCY COURT REJECTS DEBTOR'S ATTEMPT TO DISALLOW SECURED CLAIM WHEN COLLATERAL DESTROYED POST-CONFIRMATION

Recently, Dennis LeVine and Associates successfully litigated the issue of whether a debtor can change the character of a secured claim post-confirmation. In In re Torres, 336 B.R. 839 (Bankr. M.D. Fla. 2005), the Debtor had not objected to the creditor's secured claim. The confirmed Plan provided for payment of the secured claim in full with interest. The Debtor surrendered the vehicle, and attempted to have the balance of the claim deemed unsecured.

Judge Jennemann in Orlando held that the Debtor's attempt to modify the confirmed Plan and reclassify the creditor's secured claim was no longer permitted, since the Debtor had completed the Plan payments and received a Discharge. Importantly, Judge Jennemann also found that the *res judicata* affect of the confirmed Plan prevented the Debtor from seeking to reclassify the creditor's claim. The Court recognized a split of authority on the issue of whether a debtor can modify a confirmed plan to surrender collateral and reclassify any resulting deficiency claim as unsecured. [Compare In re Nolan, 232 F.3d 528 (6th Cir. 2000) and In re Knappen, 281 B.R. 714 (Bankr. D. N.M. 2002)]. The Court found that in the Eleventh Circuit, the terms of a Chapter 13 Plan are binding on both a secured creditor and the debtor. In re Stevens, 130 F.3d 1027, 1029 (11th Cir. 1997). Therefore, Judge Jennemann in Torres concluded that the amount and status of the secured creditor's claim was determined at confirmation, and the Debtor could not reclassify the claim to shift the burden of the collateral's loss to the secured creditor. This is a continuing area of litigation in many Bankruptcy Courts, with varying results in different districts.

**IN MEMORIAM OF
BUD STRAKA 1924-2006**

Clarance "Bud" Straka, a native of Cleveland, Ohio, died on May 19, 2006, in Tampa, Florida. For the past eight years, Bud shared an office and worked with his daughter Francine at Dennis LeVine & Associates, his son-in-law's office in Tampa. Bud came to the office every day, and handled the banking deposits and check writing for the Firm. All of the members of Dennis LeVine & Associates were very fond of Bud, and he will be greatly missed.

Born on November 12, 1924, Bud served in the United States Army in Europe in World War II. After the war he met Christiane Monseu in Belgium. They married in Cleveland in 1948. Christiane and Bud moved to Brandon, Florida in 1997. Christiane passed away in August, 2005. Bud is survived by his son, Alan Straka of Rochester, Minnesota, and his daughter, Francine G.P. LeVine of Tampa, Florida, and five grandchildren (Ari, Marci, Jack, Lida and Veronica LeVine). He was a life-long Cleveland Indians fan, a devoted husband, father and grandfather.



**THE PULSE OF CONSUMER
BANKRUPTCY FILINGS**

The New Law took effect on October 17, 2005, prompting a surge of 619,322 personal bankruptcy filings for that month as debt-laden consumers rushed to court. According to information from Lundquist Consulting Inc. and the Administrative Office of the U.S. Courts, here is what has occurred since then:

- For the first quarter of 2006, 102,949 bankruptcy cases were filed nationally, down from 381,743 in the same quarter of 2005.
- Thus, bankruptcy filings are down 73% nationally when compared to the same period for 2005. Chapter 7 filings were 80% lower and Chapter 13 filings were 53.6% lower compared to the same period for 2005.
- Filings are slowly trending toward pre-new law levels. New cases plunged to 13,758 in November, 2005, then rose to 21,636 in December, 27,235 in January, 35,352 in February, and 49,977 in March, 2006 (compared to the monthly average of 130,183 new cases in 2004).



**COURT ORDERS PARTIES TO PLAY
"ROCK, PAPER, SCISSORS" TO
RESOLVE DISPUTE**

A federal judge, clearly fed up with two attorneys' bickering about minor discovery disputes, ordered them to settle their latest dispute in an unusual way. The argument was over the location to take the sworn statement of a witness. U.S. District Judge Gregory Presnell of Orlando ordered the two opposing attorneys to meet at a neutral location at 4 p.m. June 30 to play a round of "rock, paper, scissors", the hand-gesture game often used to settle childhood disputes. If they could not agree on the neutral location, the Court ordered them to play on the steps of the federal courthouse. The winner gets to choose the location for the witness statement. This Order has been widely circulated among Judges, and has already been cited in Court in a case the Firm is handling. The Order can be found at <http://howappealing.law.com/PresnellOrder.pdf>.





More of The Timeless Wisdom of Yogi Berra

- *“If you can’t imitate him, don’t copy him”.*
- *“It gets late early out there”.*
- *“Why be jealous over things you don’t have”.*
- *“We made too many wrong mistakes.”*
- *“It was a once-in-a-lifetime opportunity, and I’ve had a couple of those”.*



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Secured Creditor & Bankruptcy News

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