

# Recent decision illustrates confusion in new bankruptcy law

Attorneys call a recent decision out of the U.S. Bankruptcy Court in Rhode Island an example of how judges have to grapple with confusing and seemingly contradictory language found in the revamped bankruptcy law.

In the case — *In Re: Pope, David Wayne, et al.* (Lawyers Weekly No. 53-003-06) — Judge Arthur N. Votolato found that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 allows a creditor relief from the automatic stay with regard to two-time debtors and



their property, but not to the property of the debtor's estate.

Peter Iascone of Newport, coun-

**The ruling in *Pope* "shows how poorly drafted this new rule is," says debtors' counsel Peter Iascone of Newport.**

sel for the debtors, noted that the ruling "could have gone either way. It just shows how poorly drafted this

new rule is. Not only is it one-sided against debtors in favor of creditors, but it also wasn't drafted with the greatest care."

Iascone said Judge Votolato had to make a decision "based upon how the statute looks." Congress might not have meant for a stay for a second-time debtor's estate, "but be that as it may, he's got to go with how the law seems to be written."

Calling the decision a victory for consumers, Christopher M. Lefebvre of Pawtucket, who assisted the debtor's attorney in *Pope*, said:

"There are some people who are repeat filers who have to come into the bankruptcy system and try to save their homes and create some type of a feasible alternative to foreclosure."

Votolato's ruling, Lefebvre explained, "means you still have access to the bankruptcy system in cases where [debtors] filed before and the cases were dismissed."

Lefebvre said he was delighted that, despite the "millions paid by banks and finance companies [lobbying for] the pro-creditor legislation, it appears

Continued on page 15

## Important decisions of the week. Opinions begin on page 5.

### BANKRUPTCY

#### Dischargeability - Willful and malicious injury

The plaintiffs' claim, alleging that the defendant debtor and his agents damaged the plaintiffs' car while towing and storing it, is dischargeable, as the evidence does not demonstrate that the debtor or his agents acted willfully and maliciously, rules a U.S. Bankruptcy Court judge. **page 6**

### ADMINISTRATIVE

#### Fine - Sewer authority

A \$314,581.28 fine imposed by the defendant Warwick Sewer Authority must be vacated because there is no evidence in the record as to what the plaintiff is being fined for or how the amount was calculated, a Superior Court judge decides. **page 7**

### CIVIL PRACTICE

#### Class certification

A plaintiff is entitled to certification of a class of all of those persons, entities and/or property owners who have paid or been assessed an open space fee in accordance with the town of Lincoln Land Development and Subdivision Regulations, Article F, within the three years prior to Nov. 16, 2005, concludes a Superior Court judge. **page 11**

## RITLA hands out awards



Page 16

# Recent decision illustrates confusion in law

Continued from page 1

that perhaps what the banks and finance companies [wanted] ... isn't necessarily what the language has been interpreted to [mean]."

The creditor's attorney, Thomas E. Carlotto of Pawtucket, declined to comment. The Chapter 13 trustee's attorney, John Boyajian of Providence, did not return phone calls from Lawyers Weekly.

## Frustrating exercise

The parties in the case debated the meaning of the statute's language, which said that if a case is filed and the debtor had another bankruptcy case pending within the last year, the automatic stay "... shall terminate with respect to the debtor on the 30th day after the filing of the later case ..."

Such confusion over language in the new law is common, according to Matthew J. McGowan, a Providence bankruptcy attorney.

In an e-mail to Lawyers Weekly, McGowan said that anyone trying to decipher whether, "in simply using the term 'property' without any embellishment, Congress meant to refer to property of the [bankruptcy] estate or property of the debtor, winds up re-reading the statute three to four times, attempting to parse its language."

Bankruptcy judges, McGowan added, "find that exercise to be particularly frustrating because they feel that they were shut out from Congress' final drafting of the language of BAPCPA — which was certainly a mistake."

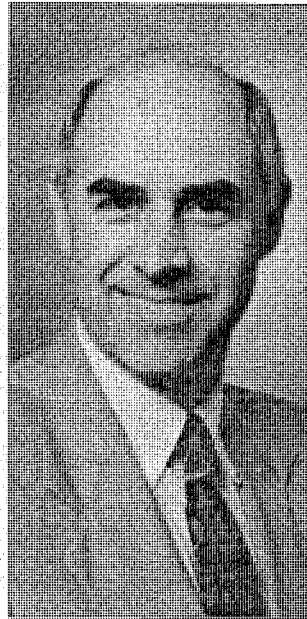
Indeed, Votolato complained in *Pope* that the law suffers from "mediocre draftsmanship."

McGowan said it is not uncommon to find judges unhappy with the bankruptcy reform act.

"Though there is no sense of this in the *Pope* case, there is an interesting 'under-current' to many of the Bankruptcy Court decisions interpreting BAPCPA throughout the country by judges who, understandably, are quite angry at what Congress left them to wade through after having first left them out of the debate," he said.

McGowan added: "What I would call 'plain meaning' with a vengeance is now being played

out where there is the perceptible sense that some bankruptcy judges, who were never too quick to embrace 'plain meaning' in interpreting the Bankruptcy Code, are now telling Congress through their decisions interpreting BAPCPA: 'You wanted plain meaning, well you got it — here it is, now you deal with the mess.'"



**"There is an interesting 'under-current' to many of the Bankruptcy Court decisions interpreting BAPCPA throughout the country by judges who, understandably, are quite angry at what Congress left them to wade through after having first left them out of the debate."**

— Matthew J. McGowan, Providence bankruptcy attorney

## No clear path?

Examples of two-time bankruptcy debtors clashing with creditors over the automatic stay "don't happen too often," according to Iascone.

"I do quite a bit of bankruptcy, and this is the second one," he noted. "The statute is so young, there's no clear path. You'll see more legislation on it, as they clean it up and tweak the statute."

In *Pope*, Votolato wrote that "Congress has demonstrated an awareness of the difference between a stay against property of the estate, and a stay against the debtor ..."

McGowan disagreed that the statute allows for an automatic stay for the estates of second-time debtors.

and property of the debtor there, as it does in other provisions. Thus, where it used simply the term 'property,' it had to have meant the larger concept of property of the bankruptcy estate."

That made it unnecessary to explicitly state that each sentence addressed the estate, McGowan said. "Where the context did not require Congress to make that distinction, the fact that it did not do so is, I believe, of no consequence."

## Difference of opinion

Bankruptcy judges around the country have come to a variety of conclusions about the meaning of different sections of the statute.

Earlier this year, a Massachusetts judge took note of another section of the law that addresses those who file for bankruptcy more than two times, and suggested a literal reading of the law regarding two-time filers made little sense.

The Massachusetts judge wrote that "[t]he Court does not believe that Congress intended to give a debtor filing her second bankruptcy within one year after her previous case was dismissed significantly greater protection than a debtor who is filing her third petition. Read together, the distinction that Congress was intending is that the 'two-time filer' gets some breathing space ... while a debtor filing her third or more petition has no automatic stay protection."

But Judge Votolato said he agreed with the "majority view" of those judges across the country who have addressed the issue.

The difference of opinion between judges in the 1st Circuit sets the stage for an appellate court decision, predicted Lefebvre.

"You can see that, just within Massachusetts and Rhode Island, we have a divergence of opinion," he said. "The Massachusetts case has been appealed so ... this issue will probably make its way up to the 1st Circuit and we'll get some guidance."

RILW

— NOAH SCHAFER

noah.schaffer@lawyersweekly.com