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CLIENT ADVISOR

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Cases of Interest

- Pending or Adjudged Action Under CERCLA Sections 106 Or 107 Is a Prerequisite to the Advancement of a CERCLA Section 113(F) Claim for Contribution. *Coastline Terminals v. USX Corp., et al.*
- Private Party Cannot Recover for Economic Loss and Property Damage Under CERCLA. *Bello v. Barden Corporation.*
- A Provision of a Debtor's Student Loan Agreement Requiring Loan Proceeds to Be Used Only for Expenses Related to Her Educational Needs Did Not Create a Constructive Trust. *In re Coffman.*
- UCC § 4-406 Does Not Grant Customer Direct Cause of Action Against Bank for Acceptance of Forged Checks. *Carvel Corp. v. Fleet National Bank.*

Bankruptcy Filings Leap to Record Levels

By Myles H. Alderman, Jr.

Now, more than any other time in modern history, you are likely to be directly impacted by bankruptcy filings. The largest cases today dwarf those of the past. Four of the 15 largest Chapter 11 Reorganizations filed between 1981 and 2001 were filed in 2001 with combined assets of more than $121 Billion Dollars. (See Chart 1)

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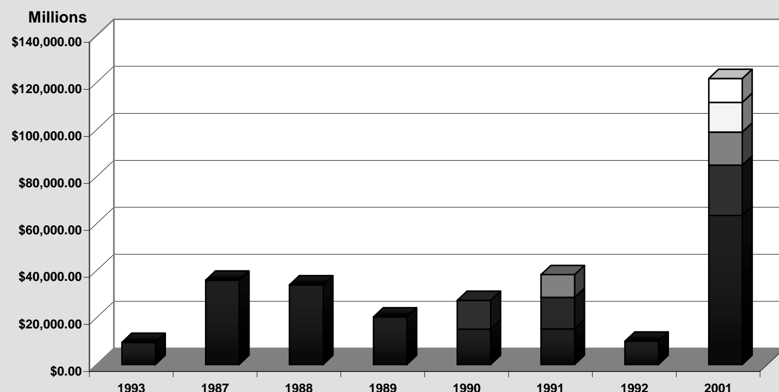
Chart 1
Largest Chapter 11 Cases - 1981 to 2001



Moratorium on Development Does Not Constitute a Taking

By Linda W. Alderman

Does a moratorium on development imposed in order to give a regional planning agency the time to devise a comprehensive land-use plan constitute a taking of property requiring compensation under the Fifth Amendment? In a controversial decision, the United States Supreme Court recently held that it does not. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (April 23, 2002).

In *Tahoe-Sierra*, the Tahoe Regional Planning Agency (TRPA) implemented a regulation that prohibited construction or the removal of vegetation for 32 months in the Lake Tahoe Basin area while it studied the impact of such development on the Lake. Landowners sued TRPA for taking their private property without just compensation. The Court held that rea-

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Clickwrap Agreements

In the age of online commerce, "signing on the dotted line" has for many transactions evolved into "clicking on the 'I agree' box." But the resulting "clickwrap" agreement may be just as enforceable in court as if the parties had solemnly written their signatures at the end of a paper contract. As with so many twists on conventional legal concepts that have been ushered in with the Internet, courts are having to adapt time-tested principles on formation of a contract to the computer age.

Assent may be registered by a signature, a handshake, or a click of a computer mouse.

In one case, a company paid thousands of dollars for sophisticated software. The company claimed that it was entitled not only to use the software but also to receive perpetual upgrades and support. As evidence of such a bargain, the company pointed to the purchase order for the transaction. The seller of the software countered by relying on a later clickwrap license agreement in the software itself that limited its liability to the price paid for the software.

The court ruled that the language in the clickwrap agreement that limited the seller's liability was binding. The buyer clearly had given its assent by clicking "I agree," just as if its representative had signed a standard contract. The only issue, according to the court, was whether clickwrap license agreements are an appropriate way to form contracts, and the court held that they are.

The court was aware of and sympathetic to the context in which most clickwrap agreements are created. The

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Bankruptcy Filings Leap to Record Levels

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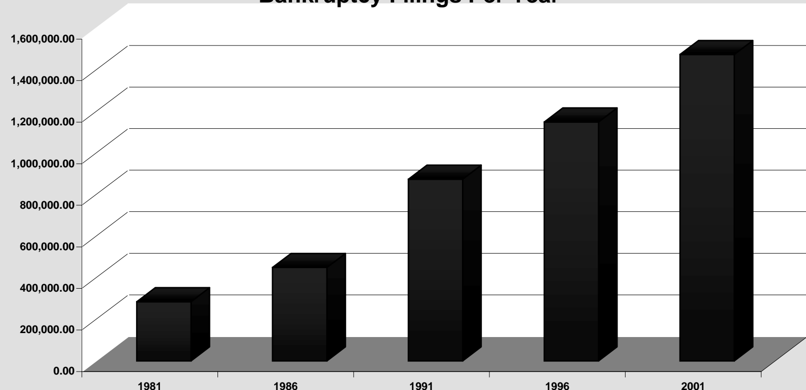
Simultaneously there has been an explosion in the number of Bankruptcy filings. There were approximately 1.5 Million Bankruptcy filings in the United States in 2001 - A staggering number, when compared to the fact that less than 900,000 cases were filed during the peak of the last recession a decade ago, or the fact that less than 300,000 cases were filed in 1981. (See Chart 2 Below)



Personal Bankruptcies out-number business filings more than 35 to 1 and Chapter 7 liquidations out-number Chapter 11 reorganizations more than 85 to 1.

The Peak of the filings may not be behind us. Before the beginning of the recession of the late 1980's the consumer debt payments increased to a record high of approximately 14% of disposable income. That rate dropped to less than 12% before the historic economic expansion of the 1990's. According to the federal reserve, consumer debt payments are again at record highs of over 14%.

If your largest customer(s) seek bankruptcy protection, proper planning could mean the difference between an inconvenience with an increased cost of collection and a total loss of critical account receivables, or even repayment of funds paid to you before your customer filed for bankruptcy. In this climate there are 4 essential questions.

4 Essential Questions:

1. Does your credit policy ensure that you are doing all that you can do to understand the credit risk of each of your customers?
2. Does your business documentation minimize the risk of non-payment from your customers?
3. Have you formulated a plan for meeting your obligations if your largest customer(s) cease doing business?
4. Have you reviewed your business with an attorney to formulate a plan of action if your business is unable to meet its obligations as they come due?

For a complimentary audit of your business's preparedness please contact Myles Alderman.

Moratorium Not a Taking

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sonable delays imposed in the interest in facilitating informed decision making by regulatory agencies, do not constitute a taking for which compensation is owed. "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making."

However, the Court also held that while it cannot conclude that every delay of more than one year is constitutionally unacceptable, longer moratoria should be viewed with "special skepticism."

Landlords and Credit Checks

Landlords are free to use credit reports in evaluating prospective tenants, but they must follow requirements set out in the Fair Credit Reporting Act (FCRA). A new guidance has been issued that describes how the FCRA applies to landlords and what the consequences are for noncompliance. The guidance focuses especially on a landlord's obligation to provide an applicant with an "adverse action notice" when adverse action is taken based on information in the applicant's "consumer report."

A consumer report is a compilation of information about a person's credit characteristics, character, reputation, lifestyle, and rental history. A report is covered by the FCRA only if it was prepared by a consumer reporting agency (CRA). The major credit bureaus are CRAs, as are many tenant-screening services and reference-checking services. If a landlord uses its own employees to verify personal, employment, and previous landlord references, the FCRA does not apply.

The most obvious adverse action that will trigger the notice requirement is outright denial of a rental application. Something short of that can also constitute adverse action so long as it is prompted by information in a consumer report. For example, a notice must be given to applicants who are required by the landlord to: have a co-signer on the lease; pay a deposit not required for other applicants, or an unusually large deposit; or pay rent that is higher than for another applicant.

The essential contents of an adverse action notice are established in the FCRA. The notice must contain the name, address, and telephone number for the CRA that supplied the report, a statement that the CRA did not make the rental decision and that it cannot give the specific reasons for that decision, and notification that the consumer has rights to a free report and to dispute the accuracy or completeness of information in the report. Even landlords for whom a consumer report played only a minor role in the decision to take an adverse action must give the notice to the applicant. A written notice is the best proof of compliance.

Landlords are well-advised to stay in compliance with all FCRA requirements.

Landlords are well-advised to stay in compliance with all FCRA requirements, including adverse action notices, as the consequences for noncompliance can be significant. For lack of required notices, a landlord can be sued by individuals in federal court and made to pay compensatory damages, punitive damages if the violations are deliberate, and attorney's fees. Federal or state agencies can also sue landlords and get civil penalties. An isolated and inadvertent failure to send a notice, however, will not result in landlord liability if the landlord has reasonable procedures in place to assure compliance with the FCRA.

Stolen Customer Lists

TOP SECRET

Home food service companies sell and deliver food products and appliances to their customers, many of whom later reorder more products. When a home food service company bought a customer list of one of its competitors, what might have been a competitive advantage instead became a legal headache. The list had been stolen and the food service company that bought it knew it was stolen.

The company whose list got into the wrong hands sued the purchaser of the list for misappropriation of a trade secret. Some courts have refused to recognize customer lists as protected trade secrets when they contain information that is readily available from public sources. The essence of a trade secret is that it has value because it is not easily ascertainable. The customer list for the home food service company was protected because of the time and effort that had been expended to identify particular customers with particular needs or characteristics. The defense that the list contained only information that was easily compiled was undercut by the fact that the defendant had paid a lot of money for it.

A state court found a violation of the law governing trade secrets. It ruled that monetary damages should be awarded to the plaintiff based on net profits earned by the defendant from improper use of the list. The court also barred the defendant from ever using the stolen list again.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Clickwrap Agreements

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typical consumer, having paid a substantial sum for software, rushes it into the computer, clicks on "install" and scrolls past the fine print in the license agreement. Arriving at the "I agree" box, the customer clicks on it with hardly a thought. The lesson from this case is that the click of a mouse is the equivalent of the stroke of a pen.

Clickwrap agreements are no less enforceable than conventional contracts, but neither will they be recognized by courts if the basic elements of offer and acceptance are absent. From the early common law of England to American law today, promises become binding only when there is a meeting of the minds. As another court faced with a disputed clickwrap agreement put it, "[a]ssent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet."

That court had to resolve a dispute between visitors to a website who obtained a free software program that makes it easier to download files from the Internet. Someone wishing to download the free program would see at first only a "download" box but no reference to a license agreement. Only on the second screen was there an invitation to review and agree to a license agreement. A click on that invitation led to an unequivocal statement that the user must agree to the terms in the agreement before installing the software, and another click revealed the agreement in full. In short, visitors to the website were not required to indicate affirmatively their assent to the license agreement, or even to view the agreement, before downloading the software.

Individuals who had downloaded the software sued the provider because they believed that using the software caused private information about their Internet activity to be transmitted to the software provider, which was a violation of federal law. The court ruled that they were not bound by a clause tucked away in the license agreement that required arbitration of disputes in a specific location. From the user's vantage point, the software was like a free neighborhood newspaper at a supermarket counter, there simply for the taking. The provider of the "newspaper" could not impose contract terms on its taking without clearly requiring assent to the terms before a customer could take the paper.

Starting a Business? Get an EIN.

A new business must get a nine-digit employer identification number (EIN) from the Internal Revenue Service if it either pays wages to one or more employees or files pension or excise tax returns. An EIN is like a Social Security number for a business. It is used when filing a federal tax return, as well as for correspondence with the IRS or the Social Security Administration.

IRS Form SS-4 is an application for an EIN, with information on how to apply by mail or by telephone. The IRS now has a toll-free telephone number for getting an EIN: (866) 816-2065. Taxpayers also can download forms from the IRS website at www.irs.ustreas.gov.

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