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No Computer Tampering Proved in Test Case of E-Discovery Rules

By Mary Pat Gallagher

MISSING DRIVES NOT ENOUGH: Judge Vincent Grasso found insufficient evidence that e-mails had been destroyed or withheld.

PHOTO BY THE STAR-LEDGER

A New Jersey judge has found no spoliation of e-mail evidence in a business dispute, despite the destruction or disappearance of two laptops, a computer server hard drive and backup tapes.

The Jan. 30 decision, in *DeSantis v. Biehler*, C-196-01 [see Unpublished Opinions column, page 56], appears to be one of the first decisions under new electronic discovery rules that took effect last Sept. 1.

One of those rules, amended R. 4:23-6, contains a safe-harbor provision barring courts from imposing sanctions for failing to disclose data "lost as a result of the routine, good faith operation of an electronic information system," absent exceptional circumstances.

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Bill Would Make It A Crime To Use Public Records For Solicitation

By Henry Gottlieb

Lawyers who work in traffic court have been debating for years whether it's good marketing to gather names of potential clients from court records and woo them with solicitation letters.

Some say it's savvy business. Some say the profit is too low after the cost of data searches and mailing. And some say lawyers should fear they will acquire a reputation for hucksterism.

Now the state Legislature is thinking of ending the debate by making the mail-

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Judge Approves Settlement of M.D.s' Class Action vs. Horizon Blue Cross

By Henry Gottlieb

Rejecting objections from nearly a dozen medical societies, a judge has approved a class action settlement that requires Horizon Blue Cross to reform reimbursement policies affecting most of New Jersey's doctors.

The societies had argued that the settlement, tentatively approved last October, is a sweetheart deal for Horizon

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For 'Badges of Fraud,' Lawyer Is Denied a Bankruptcy Discharge

By Mary Pat Gallagher

A lawyer will not be allowed to clear his debts in bankruptcy because he filed false statements in court, tried to hide his equity interest in a firm and failed to keep records of loans from relatives and clients.

U.S. Bankruptcy Judge Raymond Lyons denied a discharge to Neil Prupis on Jan. 24 at the request of a creditor in a Chapter 7 bankruptcy. Prupis takes issue with the ruling and is appealing.

In the opinion, *In re Prupis/The Cadle Company v. Prupis*, Nos. 04-48414, 05-2674, Lyons tells of how Prupis, a successful tax lawyer for three decades, earned more than $600,000 in his best year, 1998, at Lampf Lipkind Prupis & Petigrow in West Orange.

But Prupis had suffered business losses in the late 1980s and, instead of paying off his

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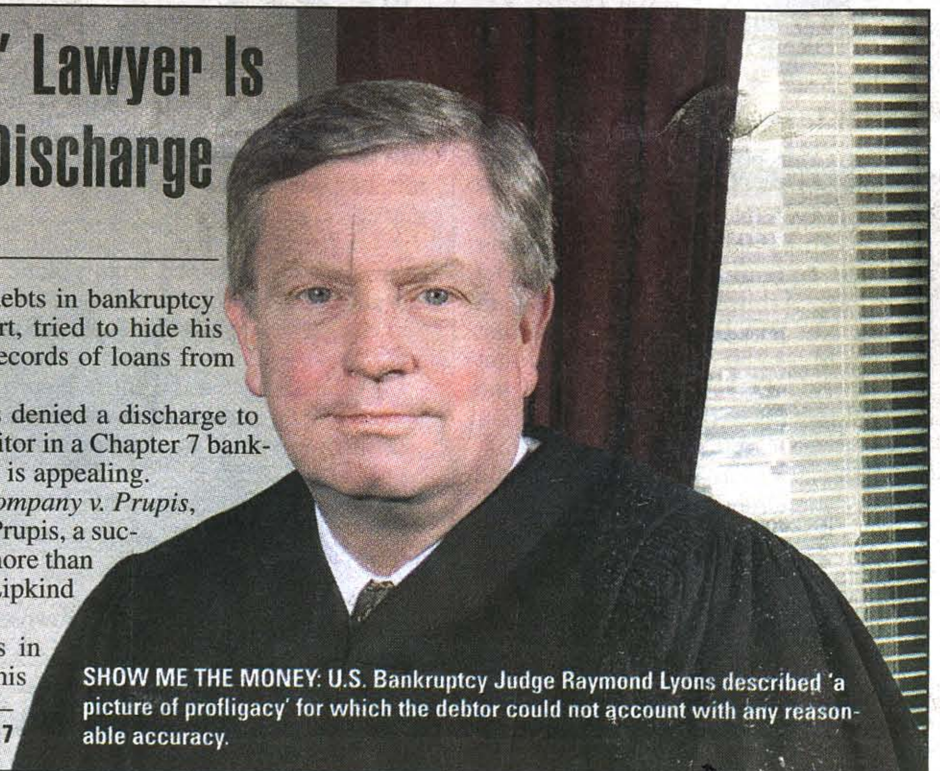

SHOW ME THE MONEY: U.S. Bankruptcy Judge Raymond Lyons described 'a picture of profligacy' for which the debtor could not account with any reasonable accuracy.

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Environmental Law — New Jersey's Dominant Interest Prevails

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10 FIRST-YEAR REFLECTIONS
The U.S. Supreme Court's newest member is settling into the job, but is perplexed by the small number of cases.

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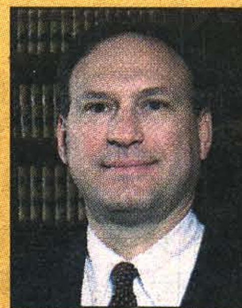

Justice Samuel Alito Jr.

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Judge Approves Settlement of M.D.s' Class Action vs. Horizon Blue Cross

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because it does not include cash payments to doctors.

And they argued it provided too large a fee, $6.5 million, to the plaintiffs' class action counsel, Eric Katz of Mazie Slater Katz & Freeman in Roseland.

But in an opinion made public on Tuesday, Essex County Superior Court Judge Stephen Bernstein said that the settlement was good for doctors and that the fee, to be paid by Horizon, was fair.

"The negotiated business reforms that are to be implemented by Horizon represent significant benefits that will assist tens of thousands of physicians in their interactions with Horizon," Bernstein said in his Feb. 2 opinion in *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, ESX-L-3585-02 [see Unpublished Opinions column, page 56].

He accepted Katz's expert's estimate that the settlement was worth $39 million in administrative benefits to doctors and said Katz's fee, one-sixth of that benefit, fell "squarely within the range of reasonable fees in class action cases."

The suit accused Horizon of creating costly administrative nightmares for doctors by refusing to reimburse them for services to Horizon insureds, paying late and promulgating confusing and arbitrary rules about the rates it would pay for each type of treatment.

Without admitting wrongdoing, Horizon agreed to 13 reforms, including a promise to eschew reimbursement rate reductions more than once a year, if at all, and to allow doctors to close their practices to new patients covered by Horizon. The company won't try to recover overpayments 18 months after the bill was paid and will be more precise about its rate structure.

Horizon representatives told Bernstein during a hearing in December that the company had hired extra employees and made computer changes necessary to make the settlement work.

Bernstein will retain jurisdiction, giving the class the right to seek redress if it feels Horizon is not living up to the bargain.

In his opinion, Bernstein questioned the motives of lawyers asking him to reject the settlement. The objectors included six individual doctors, the Union and Mercer county medical societies, and associations representing the state's pediatricians, osteopaths, pathologists, radiologists and orthopedic surgeons.

The objectors' counsel argued that the settlement merely repeats obligations Blue Cross already has under state statutes and regulations. They decried the lack of cash compensation for doctors and said Katz had sought a fee too high for the effort and the result and should be disqualified.

Bernstein replied that the objectors presented no alternatives of their own and that by seeking to intervene and have Katz removed, they seemed to be motivated by "the possibility of monetary gain."

"In other words, one of the primary objections raised, which was that class counsel was motivated by the fees to enter into this agreement, applies to the objectors' motivations for raising the objections," the judge said. "Other than a handful of named objectors represented by only a few firms, the Court has no way of knowing whether or not a majority or even a significant number of the societies' members stand behind these objections."

Among the factors judges must weigh in considering class action settlements is whether the number of opt-outs demonstrates significant disdain for the deal. Bernstein said about 1,000 members of the class have opted out. That's fewer than 2 percent of the 60,000 health providers covered by the pact, according to the plaintiffs. The objectors say the settlement applies only to 18,000 licensed physicians who are practicing in New Jersey, many of whom do not treat Horizon insureds.

But even if the 18,000 figure is right, the opt-outs represent 5.6 percent of the class, too small to disturb the settlement for lack of class member support, Bernstein ruled.

He also brushed aside complaints that doctors should have received cash payments for their damages, which by some estimates could have been pegged at $100 million. In a class of 60,000, that's $1,666 per member, reduced by attorneys' fees and distribution costs, the judge said.

The reforms are worth a lot more and will last for years, Bernstein said. He noted that the settlement specifically allows New Jersey doctors to participate in a national class action case in which cash payments are envisioned, *Love v. Horizon Blue Cross Blue Shield Association*, cv-03-21296, in federal court in Miami.

Charles Gormally of WolfBlock Brach Eichler in Roseland, who represents eight of the objecting medical groups, says Horizon is likely to treat the doctors who opt out no differently from those who remained in the class.

At the same time, he says, the opt-outs can "enforce their provider agreements and contractual obligations that Horizon has to them. The rest of the physicians in the state have released Horizon from any and all claims that they may have had against Horizon prior to the settlement date, by virtue of this settlement."

Gormally says, "Horizon just purchased a clean slate from nearly all physicians in New Jersey for a small fraction of the damages caused by their

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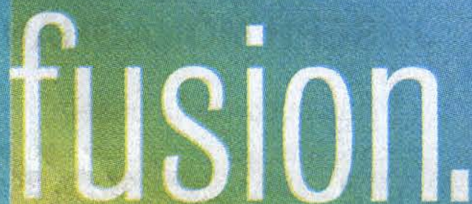

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For 'Badges of Fraud,' Lawyer Is Denied a Bankruptcy Discharge

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heavy debts, led a "lavish lifestyle" fueled by loans from people he knew, underpayment of taxes and bogus tax deductions, Lyons said.

It eventually caught up with Prupis in later 2004, when he was sued by The Cadle Co. of Newton Falls, Ohio, which buys debts and collects them. Cadle acquired a $265,000 judgment against Prupis, obtained by Mountain Ridge State Bank in 1990, shortly before the West Orange bank went into receivership. By the time Cadle sued Prupis in federal court in Newark, the debt had allegedly grown to $537,755, with interest.

Cadle alleged in the suit that Prupis' liabilities rendered him insolvent in 1990 and that he has concealed his assets from creditors since then by transferring them to relatives and into trusts. Prupis allegedly transferred more than $1.3 million to his wife Joy since 1998, as well as keeping title to the marital home in her name while he pays all expenses.

The company also sought to recover an estimated $120,000 Prupis spent on college tuition for each of his three children while allegedly insolvent; monies allegedly transferred to or held by his mother; life insurance premiums he paid, and money in two trusts he established.

Cadle also sought to recover on two other debts it bought: a 1991 judgment for $36,940 in favor of Inter Community Bank and a $26,747 promissory note in favor of Livingston Limousine.

One month after Cadle sued, Prupis filed his Chapter 7 petition in *In re Prupis*, 04-48414, claiming more than $2 million in debt and no assets. The filing triggered the automatic stay, placing the district court action on hold.

"I never would have gone bankrupt but for Cadle," Prupis said in an interview Wednesday, noting that he was already paying off his other biggest creditor, the Internal Revenue Service, on an installment plan.

Cadle filed three proofs of claim totaling about $595,000 and commenced an adversary action. The company then engaged in such all-out discovery against Prupis, his family and firm that Lyons called it "the equivalent of a full body cavity search."

In upholding Cadle's objections to discharge, Lyons described "a picture of profligacy, for which Mr. Prupis cannot account with any reasonable accuracy. Despite high earnings for many years, Mr. Prupis claims to own no non-exempt assets."

Lyons found that though Prupis purported to have given up his ownership interest in his law firm in 1990, his compensation agreement resembles that of a half-owner, with net profits split 50-50 between Prupis and William Lipkind, while all other lawyers are paid a salary.

He viewed the transfer as a "continued concealment" of property and thus deemed to exist within the year before the Chapter 7 petition was filed.

Prupis admitted he surrendered his stock in the firm so his partners would not be hounded by creditors, noted Lyons.

Combined with other "badges of fraud," the admission provided a basis to deny discharge under 11 U.S.C. 727(a)(2), which applies where a debtor transfers, removes or conceals property within a year before filing a petition, with the intent to hinder, delay or defraud a creditor.

Lyons also found denial of discharge warranted for making a false oath or account under 11 U.S.C. 727(a)(4)(A).

Prupis' sworn statement of financial affairs required identification of any bank accounts closed during the year before bankruptcy. There were two, but Prupis failed to list them, which Lyons termed a "material falsehood," though Prupis later told the trustee about them.

Lyons also found that despite a levy on one of his bank accounts by state tax authorities, Prupis answered that none of his assets had been garnished or seized by a creditor.

Prupis' actions "demonstrate a reckless disregard of the serious nature of the bankruptcy process and the necessity of full disclosure," wrote Lyons.

Discharge was also denied under 11 U.S.C. 727(a)(3), for failure to maintain and produce records. Prupis had no documentation for loans totaling more than $100,000 from his mother, brother, cousin and more than half a dozen clients, said Lyons.

Prupis filed an appeal from the decision on Feb. 1. He said an in an interview that his record keeping was "adequate" and "everybody knew" about the closed bank accounts since he told Cadle about them during deposition. As for his interest in the firm, he insisted he has no equity stake but is an employee whose contract sets his compensation based on the business he generates.

Lyons' ruling on discharge is not Prupis' only problem. He also faces a suit by Chapter 7 trustee Jonathan Kohn who seeks to set aside hundreds of thousands of dollars as allegedly fraudulent transfers or transfers to creditors on account of antecedent debt.

Kohn's Dec. 7, 2006, complaint mirrors the district court action filed by Cadle, seeking monies transferred to family members, used for college and insurance, or deposited into trusts. Among other relief, Kohn is asking the court to impose a constructive trust on Prupis' law firm and his home, and to award punitive damages.

Kohn, of Newark's Rothbard Rothbard Kohn & Kellar, says he is negotiating with Prupis to resolve the suit for about $200,000 to $300,000.

"A good portion will go to pay the IRS before Cadle sees any of it," says Kohn.

The IRS is claiming $674,375, of which $155,058 is a priority claim and $350,007 is secured. The next largest creditor is Sovereign Bank at $69,000.

Kohn anticipates Cadle will object because it is going after the same assets.

The district court case, *Cadle Co. v. Prupis*, 04-Civ.-5402, is still pending.

On Jan. 10, U.S. Magistrate Judge Ronald Hedges signed an order to show cause why the case should not be dismissed for lack of prosecution.

At the request of Cadle's lawyer, David DeLonge, Hedges adjourned the hearing date from Jan. 22 to Feb. 13.

The automatic stay terminated on the denial of discharge, under 11 U.S.C. 362(c)(2)(C).

Kohn says any settlement with Prupis would leave him open to claims by creditors to the extent their debts are not satisfied.

Prupis is also exposed to disciplinary action on account of Lyons' opinion, says Kohn. "Someone is going to call this opinion to the ethics committee's attention."

According to the Office of Attorney Ethics, Prupis has a clean record with no charges pending against him.

DeLonge, of Jersey City's Schumann Hanlon, declines comment.

Prupis' lawyer, Brian Baker of Roseland's Ravin Greenberg, did not return a call seeking comment. ■

Continued from preceding page

claims handling processes."

He calls it "a great deal for Horizon and for class-action attorneys — a bad deal for physicians and the people who pay for insurance."

"Since the settlement does not pay physicians anything, the small fraction that Horizon does pay is in attorney fees approved by the court," he says.

"These fees compensate the attorneys representing the class at a rate in excess of $1,700 per hour for all the time they spent on the case," he says. "Whether viewed from the perspective of the rate payer (who ultimately pays for these fees) or the physicians (who received nothing beyond that which Horizon is legally required to provide already) the approved settlement is a woefully inadequate." ■

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