

# DEBTOR/CREDITOR

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## *Trustee Action Limited*

Corporation A sought to acquire Corporation B, and hired attorneys and investment bankers to assist in the acquisition. The transaction turned out to be a mistake, and Corporation A filed for bankruptcy protection. Corporation A's trustee sued officers and directors of Corporation A, alleging that the acquisition caused the demise of Corporation A. The trustee also sued the attorneys and investment bankers for assisting in the transaction.

An Alabama bankruptcy judge dismissed the claims against the attorneys and investment bankers, reasoning that the trustee stood in the shoes of Corporation A and could only assert claims Corporation A could have asserted. Corporation A was barred from suing the attorneys and accountants by the rule of "*in pari delicto*" -- "where the fault is equal", the defendant prevails. Corporation A had engaged in the same acts for which the trustee sought to recover from the attorneys and investment bankers. The trustee, standing in its place, could not sue its professionals for a transaction in which the corporation participated.

*Laddin v. Belden (In re Verilink Corp.)*, 2009 Bankr. LEXIS 1346 (Bankr. N.D. Ala., Apr. 15, 2009).

## *Waiver of NOL Carryback Reversed*

If a business incurs a net operating loss one year, it may elect to apply the loss to the two preceding years, and receive a tax refund, or to waive the carryback and carry forward the NOL to offset future tax liabilities. Under tax law, the waiver of the carryback is "irrevocable".

Can a bankruptcy trustee of a debtor that waived its carryback undo the waiver and recover the tax refund for the estate? A federal district judge in Miami answered in the affirmative.

The court reasoned that the NOL carryback and potential refund were property of the debtor. The debtor

effectively gave this property to the IRS and obtained nothing equivalent in return. Even though the debtor would theoretically be able to use the NOLs to offset tax liability in future years, the debtor was insolvent and had no realistic prospect of earning profits in future years against which to offset the NOLs. Even though the waiver was irrevocable under tax law, it could be voided under bankruptcy law as a fraudulent transfer.

*United States v. Kapila*, 402 B.R. 56 (S.D. Fla. 2009).

## *No Pension Fund Set Off*

When his company fell behind in its pension fund contributions, the owner guaranteed those contributions to the pension fund. However, he failed to pay, and the pension fund obtained a judgment against him for the full amount. The owner then filed a bankruptcy petition and promptly requested the fund to pay him his own pension benefits. The fund refused, seeking to set off his pension benefits against the amount he owed under his guarantee.

By federal statute, creditors may not attach, garnish, or seize pension benefits to collect a debt owed by the pension beneficiary. A Chicago appeals court ruled that the pension fund was no different than any other creditor and could not set off its debt against the pension benefits that it was required to pay.

*Radcliffe v. Int'l Painters & Allied Trades Indus. Pension Fund*, 563 F.3d 627 (7<sup>th</sup> Cir. 2009).

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*This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.*

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