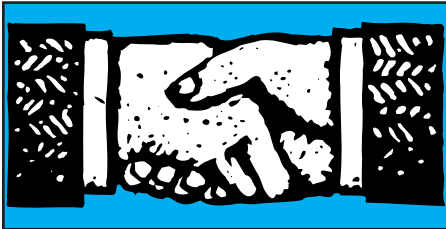


# THE ADVOCATE

## THE ENIGMA OF OPTION CONTRACTS AND THEIR TREATMENT UNDER § 365(I) AND (J) OF THE BANKRUPTCY CODE

By Jan I. Berlage, Esq. and Brent Procida, Esq.



Option contracts have caused considerable dispute among courts that have been forced to deal with them in the context of bankruptcy. The confusion results in large part from the unique interaction between option contracts and the world's most enduring bankruptcy mystery: The definition of an "executory" contract. The stakes are high. If an option contract is executory, then a debtor may reject the option leaving the holder with, in some cases, nothing. If an option is not executory, the holder may be able to exercise it post-petition and remove property from the estate or even take the corporate control over the debtor.

The lack of consensus on the status of options in bankruptcy has been prolonged by the general unwillingness of appellate courts to venture into these muddy waters. The few appellate courts sufficiently daring to address the matter have disagreed with one another and frequently produced decisions that lower courts have gone to great lengths to distinguish. Recent decisions reflect contin-

uing attempts by the courts to find option contracts' rightful place within the language and purpose of the Code, the definition of "executory" and the rights of non-debtor third parties.

An added twist to this analysis is whether the holder of an option to purchase real property, rejected in bankruptcy, is entitled to protection under § 365(i) and (j). No court seems to have addressed this issue as it relates to § 365(i), and only a few courts have

holder of an option to purchase real property that is rejected by a debtor in bankruptcy.

### 1. Option Contracts

An option contract is an irrevocable offer by the owner of property to sell to the optionee at a specified price and on specified terms. 1 Williston On the Law of Contracts § 5:16 at 717-20 (4th ed. 1990). An option is a unilateral contract, i.e., one under which the promise to do something in the future is on only one party. *Id.* On the one hand, the holder of an option may compel the owner of the property to sell at the agreed price at any time during the life of the option, and the failure of the owner to do so is a material breach of the contract. The optionee, on the other hand, cannot breach the option contract, since the owner has no power under the contract to compel the option holder to exercise its option. *Id.* Once the option is exercised, a new relationship is formed: The old option disappears, and a bilateral contract for the sale and purchase of the property is created. Each side now has promised to perform certain obligations in the future, i.e., the optionee, now the purchaser, has a duty to pay the owner of the property and the owner is obligated to provide marketable title to the purchaser. *Id.*; *In re Maier*, 127

*"If an option contract is executory, then a debtor may reject the option leaving the holder with, in some cases, nothing. If an option is not executory, the holder may be able to exercise it post-petition and remove property from the estate or even take the corporate control over the debtor."*

addressed it in the context of § 365(j). Those that have addressed the issue are split in their results. This article will first examine how courts handle the issue of whether options are executory contracts that can be rejected in bankruptcy under § 365(a) and then, in those jurisdiction where they are executory, turn to whether § 365(i) and (j) afford any protection to a

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## FROM THE CHAIR

As the year winds down toward the Annual Meeting in June, the Young Lawyers' Section is preparing some very exciting events for its members. These events will focus on community outreach, networking, member service, and professional development.

One such event is the March 15, 2004 Open Meeting for the Section. This meeting is the members' opportunity to see how the Section is run and to participate in its activities. The highlight of the evening will be a presentation on terrorism and its effect on the legal profession. The panel of speaker's on this topic include a member of the faculty of the University of Maryland Law School and a lawyer with the United State's Attorney's Office. This promises to be a lively and informative discussion and I would encourage the membership to attend!

The Public Service Committee is planning a canned good drive to be kicked off at the Open Meeting on March 15th. Donations collected will benefit community organizations. Please look out for flyers detailing other times and locations to drop off of your donations.

The Section is also planning a seminar to present a primer on "How to Try a DWI/DUI Case." This is one in a series of seminars meant to assist young lawyers of the bar in their respective practice areas. Should you be interested in attending, or in presenting your own idea for a future seminar, I would urge you to contact the YLS Education Committee co-chairs, Jan Berlage and Alice Chong. Your suggestions are welcome! And look out for more information on the Education Committee's program to be presented at the Annual Meeting in Ocean City. The Section is also planning to participate in and present an event in commemoration of the 50th anniversary of the Brown v. Board of Education decision by the Supreme Court

I would encourage any young lawyer to attend and participate in one or more of the programs and activities being presented by the YLS. It is only with the participation of its members that the Section can maintain the exuberance and momentum that it has exhibited of late! We look forward to seeing you!

*Suzanne M. Lewis  
Esq., Chair*



*Suzanne M. Lewis, Esq., Chair*

## SCENES FROM A YLS HAPPY HOUR



**Membership Co-Chairs Jonathan Kagan (left) and Matthew Evans (right) along with BABC YLD Chair, Lauren Calia enjoy their successful happy hour.**



*More photos on page 14*

## THE ADVOCATE

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# Nuts & Bolts

## SAVING FOR COLLEGE 101: THE BASIC OF 529 PLANS AND COVERDELLS

By Tamara Langlieb, Esq.

The thought of having to pay for our children's college tuition brings about sleepless nights for many of us. The anxiety is well founded. Some resources predict that it will cost \$100,000 per year to send a child currently in kindergarten to a private college. In other words, for many of us it could cost more for our child to graduate from a private college than the cost of our house. Not a pretty picture.

There is a silver lining. Due to changes in the tax laws, saving for college is now better than ever. Basically, there are two means to save for college—529 plans and Coverdell education savings accounts. Let's first take a look at 529 plans.

### 529 Plans

529 Plans are broken down into two categories: saving plans and prepaid plans. Both have the same objective—to help families set aside money today to pay for college costs in the future.

### 529 Savings Plans

In a nutshell, a 529 savings plan is an investment plan run by a State which allows an account holder (i.e. a parent) to sock money away in an investment account which can grow free of federal (and in Maryland, state) tax if used by the beneficiary (i.e. a child) to pay for "educational costs." Educational costs include not only college tuition, but also room, board, books, and supplies.

If your child is very young, you should be aware that the provision that allows federal tax-free withdrawals is due to lapse in 2010, unless renewed by Congress. This means that distributions (earnings portion only) made after 2010 will be taxable to the beneficiary at his/her income tax rate. Many in the industry, however, believe that the law will be extended.

### Setting up a 529 Savings Plan

Setting up a 529 savings plan is easy. First, you need to choose a state 529 Plan. Most of the states have a 529 sav-

*"You (and anyone you convince) should make contributions. Parents, grandparents, relatives, or non-relatives can all make contributions."*

ings plan and generally allow participation by non-residents. When comparing plans, it is important to look at the fees associated with the plan, like account management fees, expense ratios, and broker fees. A great resource for comparing plans is [www.savingforcollege.com](http://www.savingforcollege.com) and a chart created by Business Week which is available at their website [www.businessweek.com](http://www.businessweek.com).

Generally speaking, it makes sense for Maryland residents to participate in the Maryland 529 savings plan, which is managed by T. Rowe Price. Although there is an enrollment fee of \$90 (the highest of all the state 529 savings plans) and a management fee of \$30/year (which can be waived, if there is automatic deduction), you can deduct up to

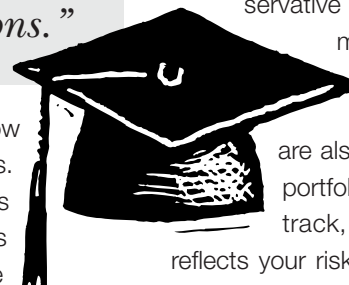
\$2,500 of contributions every year for each beneficiary that has an open account. Any contributions in excess of \$2,500 per year can be carried forward to the next tax year. The \$2,500 per year deduction can only be taken for eleven consecutive years. In other words, the maximum that can be deducted for each beneficiary is \$27,500 (\$2,500 x 11 years). However, each spouse can open an account and take an income-tax deduction for contributions. So married folks can double the deduction if each spouse opens up an account for each beneficiary.

Second, you need to choose an investment option. In Maryland's 529 savings plan, like most other state 529 saving plans, there are a few tracks. There is an age-based portfolio that invests aggressively (mainly in stocks) while a child is young then takes a conservative approach (bonds and money-market funds) when college is closer on the horizon. There are also all-equity and all-bond portfolios. When choosing a track, consider whether it reflects your risk tolerance. If you would not invest entirely in stocks in your 401(k), you probably should not do so for a college savings account.

Third, you (and anyone else you can convince) should make contributions. Parents, grandparents, relatives, or non-relatives can make contributions. There are no federal annual contribution limitations, age-based restrictions, or income limitations. Under the Maryland 529 savings plan, however, there is a \$250,000 contribution limitation per beneficiary.

The only real downfall to 529 savings plan may be that that you have to surrender control of your investment to the state or

*continued on page 4*



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its hired investment firm. If this presents a problem, there is another saving star—the Coverdell education savings account, which is discussed below.

### **Prepaid College Plans**

The other category of 529 Plans is the prepaid college plan. This plan is managed by either a State or, under a recently passed law, by an educational institution. The benefit to enrolling in this plan is that you can lock in the cost of college education at today's prices for your child's future enrollment at your state's public college or certain private colleges. The downside is if your child does not go to the institution where you have "locked" in the price, the return on your investment is not always easy to swallow.

#### *Setting Up a Maryland Prepaid College Plan*

The Maryland prepaid plan allows Maryland residents to purchase tuition and mandatory fees for up to five years at a 4-year college, two years at a community college, or a combination of community college and 4-year college for students in the ninth grade or younger. There are several different payment options, from lump sums to extended monthly payments. Like the Maryland 529 savings plan, there is a \$2,500 state income tax deduction for each account set up. However, the deduction is limited to nine consecutive years.

When the beneficiary enrolls in college in the future, the plan will pay the full in-state tuition and mandatory fees at any Maryland public college, regardless of how much the cost has increased. If the beneficiary selects a private or out-of-state college, the Maryland Prepaid College Trust will pay up to the "weighted average tuition." The calculation of the weighted average tuition is complex, but essentially it is the average tuition cost of all the Maryland public colleges, with a

greater weight on the colleges that have the most attendance by Maryland residents. An interesting thing to note in the Maryland Prepaid College Plan is its unusual refund policy. If you cancel the contract after holding a contract for three years, you get back 90% of the amount the state earns on the underlying investments it makes to fund the program. A contract in existence for less than three years will receive a reduced refund equal to the actual payments made plus or minus 50% of the earnings or losses on payments. (You will get hit with a 10% federal penalty and have to pay federal and state income tax on the earnings—more about this at the end—but still it's a lot better refund policy than most prepaid college plans.)

#### *Enrolling in a Private College Independent 529 Plan*

A new college saving creature to hit the streets is the Independent 529 Plan. (Business Week recently name this plan as one of the best products of 2003.) This plan is a prepaid tuition plan sponsored by over 200 private colleges. It has the same benefit as a State prepaid college plan: lock in the cost of college in the future at today's prices. However, this plan offers a greater choice of colleges and even offers a "certificate discount" off the current tuition rate. The mechanics of the plan are rather complicated because each college sets its own tuition and discount rate. Basically, it boils down to this: when you enroll in an Independent 529 Plan, you are purchasing a percentage of future tuition at any one the participating private colleges. That percentage will vary for each school, depending on its current tuition rate and the discount rate.

If the beneficiary chooses to not enroll in one of the member colleges, then the

refund value is equal to the original investment plus the actual investment return, but (and this is an important but) it is capped by a maximum annualized growth rate of 2% and a maximum annualized loss of 2%.

### **Coverdell Education Savings Account**

The second means to save for college is the Coverdell education savings account or ESA. This program allows \$2,000 per year per student to be set aside in an investment account to be used for educational expenses. The "responsible person" controls the account until the beneficiary reaches 18 and can choose the investment options. It has all the benefits of a 529 Savings Plan (no federal tax—and in Maryland, no state tax—on the earnings) with the ability to choose where (any bank, mutual fund, brokerage, etc.) you want your investments and in what you want to invest. Moreover, the moneys can be used not only for cost of college education, but for the costs of attending elementary or secondary school, be it public, private, or religious. These costs can include tutoring,

special needs, uniforms, computers, books, extended-day program, and transportation.

The hardest part of an ESA is qualifying. Married couples earning more than \$190,000 and singles that earn more than \$95,000 cannot fully fund an

ESA. One way to get around this law may be for parents to contribute the \$2,000 to a grandparent, who could then contribute to an ESA for the child.

If you can handle it, don't think of ESAs and Section 529 plans as mutually exclusive. You can fund both at the same time and because of the greater reach of ESAs, you can better achieve your financial goals.

*"Moreover, the moneys can be used not only for cost of college education, but for the costs of attending elementary or secondary school, be it public, private, or religious. These costs can include tutoring, special needs, uniforms, computers, books, extended-day program, and transportation."*

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B.R. 325, 327-8 (Bankr. W.D.N.Y. 1991); *In re Hardie*, 100 B.R. 284, 287 (Bankr. E.D.C.C. 1989).

## 2. Executory Contracts

The Bankruptcy Code does not define the phrase “executory contract.” Courts generally look to the “Countryman” definition in deciding whether a particular contract is executory. That definition states as follows:

[a] contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other. *In re Sundial Asphalt Co., Inc. (Sundial Asphalt Co., Inc. v. V.P.C. Investors Corp.)*, 147 B.R. 72, 79 (E.D.N.Y. 1992) (quoting Countryman, “Executory Contracts in Bankruptcy: Part I,” 57 Minn. L. Rev. 439, 460 (1973)).

Several courts have found the Countryman definition too stringent and have pointed to the suggestion in the legislative history that a contract be considered executory if some performance remains due from all parties. H.R. Rep. 95-595, 95th Cong., 2d Sess. 58 (1978). In other words, a contract is executory if each side of the contract has some future duty to perform. *E.g., Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1045 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986) (a contract is executory if performance is due to some extent on both sides). Still other courts adopt a “functional approach” to this issue and look to the benefits to be gained by the debtor’s estate to determine if a contract is executory. *In re General Development, Corp.*, 84 F.3d 1364, 1374 (11th Cir. 1996); *Phar-Mor, Inc. v. Strouss Building Assoc.*, 204 B.R. 948, 952 (N.D. Ohio 1997); *In re Seymour*, 144 B.R. 524, 528 (Bankr. D. Kan. 1992).

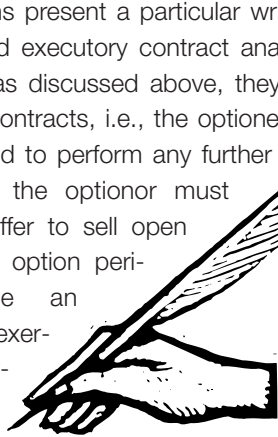
## 3. Are Options Executory Contracts Subject to Rejection Under § 365(a) of the Bankruptcy Code?

Section 365(a) of the Bankruptcy Code authorizes a trustee or a debtor-in-possession, subject to court approval, to assume or reject executory contracts. 11 U.S.C. § 365(a) (2003). Thus, if an option contract is deemed an executory contract, it can be rejected by a trustee or debtor in bankruptcy.

Options present a particular wrinkle to standard executory contract analysis because, as discussed above, they are unilateral contracts, i.e., the optionee is not required to perform any further act, while the optionor must keep its offer to sell open during the option period. Once an option is exercised, however, the resulting contract is bilateral, i.e., material performance is required by both parties. This has led to divergent views as to whether options constitute executory contracts. *In re National Financial Realty Trust*, 226 B.R. 586, 589 (Bankr. W.D. Ky. 1998) (“The contingent nature of the obligations arising from an option agreement make them quite distinguishable from the typical contract. ... This distinction has puzzled many courts, resulting in two distinct lines of cases.”). To some extent, these differing opinions depend on whether the optionee is a debtor or non-debtor. Where the optionee is the debtor and where a finding that the option is an executory contract would negatively affect that debtor’s estate, courts tend to focus on the unilateral nature of the option itself and hold that options are not executory contracts. *In re Robert L. Helms Constr. and Development Co., Inc. (Robert L. Helms Constr. and Development Co., Inc. v. Southmark Corp.)*, 139 F.3d 702, 705 (9th Cir. 1998) (holding option contracts to purchase real property are not executory contracts

that can be rejected unless the optionee exercised the option prior to the commencement of the bankruptcy case); *National Financial Realty Trust*, 226 B.R. at 589 (Bankr. W.D. Ky. 1998) (option agreement for which debtor had paid prepetition, and under which it had no continuing obligations as of petition date except in the event that it chose to exercise its option to purchase, was not “executory contract,” such as had to be assumed in a timely fashion); *Giesing*, 96 B.R. at 232 (option contracts not executory because one side can no longer breach); *In re Continental Properties, Inc. (Travelodge Int’l, Inc. v. Continental Properties, Inc.)*, 15 B.R. 732, 736 (Bankr. D. Haw. 1981) (option contracts not executory in nature).

For example, the United States Court of Appeals for the Ninth Circuit’s *en banc* decision in *In re Robert Helms Construction and Development Co., Inc.*, 139 F.3d 72, specifically overruled its earlier decision in *In re Easebe Enters.* 900 F.2d 1417 (9th Cir. 1990), and held that option contracts are not generally executory in nature. *Compare, In re Jackson Brewing Co.*, 567 F.2d 618 (5th Cir. 1978) (holding that option contracts are executory and may be rejected under § 365(a)). In *Helms*, a bankrupt entity with a confirmed plan of reorganization sought to exercise an option held on real property. The debtor’s confirmed plan indicated that it had rejected all executory contracts. The owners of the real property filed an objection claiming that the option was executory and had been rejected under the plan. The bankruptcy court regarded itself as bound by *Easebe* and held that the option was executory and, therefore, rejected. The Bankruptcy Appellate Panel (“BAP”) held that *Easebe* did not control and that the option was executory. A three-judge panel of the Court of Appeals agreed with the reasoning of the BAP, but held the bankruptcy court was correct in regarding itself as



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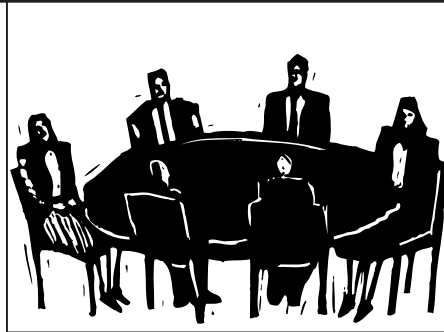
# What We Do...And How to Join Us...

## GET CONNECTED WITH THE COMMITTEES OF THE YOUNG LAWYERS SECTION

### THE ACTIVITIES COMMITTEE

*Douglas D. Guidorizzi and  
Michael W. Siri, Co-Chairs*

The Activities Committee is hard at work planning events for this spring and early summer. The Committee is pooling resources with other YLS Committees in an effort to bring its members fun and educational events. One event being considered is a bull pen party at Camden Yards. If you have a great idea for an event or would like to join the Committee, contact Douglas D. Guidorizzi at [doug-guidorizzi@yahoo.com](mailto:doug-guidorizzi@yahoo.com) or Michael W. Siri at [msiri@robinsonwoolson.com](mailto:msiri@robinsonwoolson.com).



The Committee has also begun to look forward to next year's annual Novemberfest Gala! If you are interested in helping out or if you have a fabulous idea to ensure another successful year, contact Michael Siri at the email address listed above.

### THE DISASTER RELIEF COMMITTEE

*William M. Krulak, Jr. and  
Traci L. Robinson, Co-Chairs*

There were many attorneys who graciously volunteered their time and expertise to victims of Hurricane Isabel and the Disaster Relief Committee would like to thank all of you. However, we need even more help. If you would like to learn more about the Disaster Relief Committee or if you would like to volunteer, please contact William Krulak (410-385-3448 or [wkrulak@milesstockbridge.com](mailto:wkrulak@milesstockbridge.com)) or Traci Robinson (410-396-1779 or [trobenson@statesattorney.org](mailto:trobenson@statesattorney.org)). Watch future mailings for information on training sessions.

### THE MEMBERSHIP COMMITTEE

*Matthew S. Evans, III and  
Jonathan P. Kagan, Co-Chairs*

Thanks to the Baltimore City Bar Association Young Lawyers Division and all the young lawyers who attended the January 29th Happy Hour at Lucille's in Baltimore! Despite Maryland's loss to Wake Forest by a score of 93-85, a good time was had by all who attended. The event was a huge success and an excellent opportunity for the new admittees to the Maryland Bar to meet and greet the YLS Council and learn about becoming active in the City and State Bars.

Thanks also to those who brought their old cell phones to Lucille's. The phones will be de-programmed and given to victims of domestic violence who are represented by the Protection Order Advocacy and Representation Project in the Circuit Court for Baltimore City, a project of the Women's Law Center of Maryland, Inc. Any fully charged cell

## THE PATRIOT ACT

Terrorism is ever present in our society today. Will the government raise or lower the terror level today? How long will it take to get through airport security? Do I have enough duct tape and bottled water at home? What should I do to plan at work? Should I move my office to a lower floor or out of the city altogether?

While we have spent countless hours contemplating our own personal security and how a terrorist attack will affect our daily lives, have you considered how terrorist activity is affecting your practice or your clients?

Criminal attorneys who represent terrorists have considered some of the issues. But do you know how the Patriot Act affects your clients or your law practice? What would you tell your homeowner's association client who asks whether they are required to provide social security numbers for all signatories in order to open a bank account? How do you advise your client who cashes checks or handles financial transactions to comply with the Patriot Act's reporting requirements? What type of reporting are you required to do (or allowed to do) if one of your clients is engaged in "suspicious financial transactions" or is planning a terrorist attack?

These questions, and many more on how your practice and your clients are affected by terrorism will be addressed at Westminster Hall on March 15, 2004. The Open Meeting of the Young Lawyer's Section will begin at 6:00 p.m. Hope to see you there.

*Sponsored by:*

### THE RESOLUTIONS COMMITTEE

*John W. Sipple and  
Michelle E. Stanwinski, Co-Chairs*

phone, despite not having service, is capable of dialing 911. The Women's Law Center greatly appreciates your donation!

The Membership Committee will continue to sponsor happy hours throughout the state. Check your mailbox and your email for upcoming events! If anyone wants to get involved in helping to organize an events, please contact Co-Chairs Jonathan Kagan (410-974-9200 or [jpk@brasselbaldwin.com](mailto:jpk@brasselbaldwin.com)) or Matthew Evans (410-268-6600 or [evans@cbkn-law.com](mailto:evans@cbkn-law.com)).

#### **THE POLICY COMMITTEE**

*Tamara B. Goorevitz and  
Adam T. Sampson, Co-Chairs*

The Policy Committee has been working on several amendments to the existing bylaws which will be mailed to the section membership in March 2004. The proposed amendments will be voted on at the annual business meeting in Ocean City on June 17th. If you have any questions or comments about the proposed amendments, please contact Co-Chairs Tamara Goorevitz ([tgoorevitz@fandpnet.com](mailto:tgoorevitz@fandpnet.com)) or Adam Sampson ([ats@gdldlaw.com](mailto:ats@gdldlaw.com)).

#### **THE PUBLIC SERVICE COMMITTEE**

*Heather J. Crenshaw and  
Hughie D. Hunt, II, Co-Chairs*

The Public Service Committee is please to report that our first Toys for Tots drive was hugely successful! Eleven large garbage bags overflowing with toys were collected and turned in to the Marines for distribution to needy children. Toys for Tots, in turn, was very pleased to have our assistance, especially since their annual toy collection was down for this year, but not the need for the toys. We want to thank everyone who participated in the toy drive for their help.

### **PRO BONO CORNER**

SPOTLIGHTING...MARYLAND VOLUNTEER LAWYERS SERVICE  
*Ashley H. Hou & Shawn Goldfaden, Co-Chairs for Pro Bono Committee*

Maryland Volunteer Lawyers Service (MVLS), created in 1981, is a non-profit organization through which over 2,500 attorneys have taken 15,000 *pro bono* cases for low-income clients throughout Maryland. Its mission is to provide quality civil legal services to Marylanders with limited income. In 2001, MVLS assisted 4,939 individuals.

MVLS matches experienced professional lawyers with people who need legal help. Attorneys can volunteer to accept civil cases on a *pro bono* basis, but may also contribute by joining one of the other programs and services such as the Family Law Assistance Project, Courthouse Advise clinic and Income Tax clinic.

Volunteering with this organization would help Maryland attorneys meet the goal of Rule 6.1 for *pro bono* service hours and help a person in need. For more information, check out the Maryland Volunteer Legal Services at its website <http://www.mvlslaw.org/>

Editors Note: If you are interested in seeing your organization spotlighted in *The Advocate* or if you would like to share an interesting experience you had while providing *pro bono* representation, please contact Gwendolyn Tate at [TheYLSAdvocate@aol.com](mailto:TheYLSAdvocate@aol.com). ■

You can help by signing up to be an email mentor to a child this Spring. Mentors will be responsible for corresponding via email to a child on the subject of a book (which will be provided along with the official topics of correspondence). The book is part of the school's curriculum. This program will run

#### **ATTENTION FELLOW YOUNG LAWYERS!**



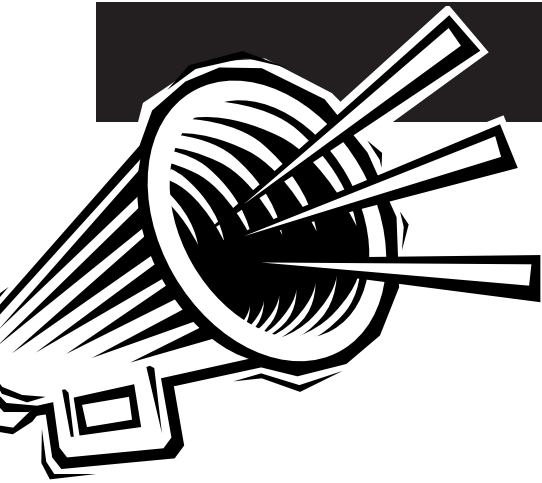
Ready to get started on your New Year's resolutions? The prestigious YLS *Pro Bono* Committee is in desperate need of committee members. Please contact Shawn Goldfaden, Esq. at [shawng@steelssoft.com](mailto:shawng@steelssoft.com) (410) 719-2300 or Ashley Hou, Esq. at [hough\\_ashley@hotmail.com](mailto:hough_ashley@hotmail.com) for more information on how you can be part of a worthy team.

Further, the *Pro Bono* Committee is planning several happy hours over the next few months that will feature free food, drink specials, and renown guest speakers on topics important to your communities. Keep an eye out for the traveling "*Pro Bono* Road Show" coming to your area soon.

Finally, the *Pro Bono* Committee is planning to hold a Spring Fair sometime in mid to late Spring, 2004. This exciting Fair will include free food, speakers from various *pro bono* providers, training sessions, and juicy cases ready for your advocacy. Please submit any ideas, thoughts or suggestions to Shawn or Ashley. We are anticipating a huge turn-out and would love to see you there. Please keep your eyes peeled for a date, time and place.

until the end of April. Contact Hughie Hunt at 301-928-0888 to sign up.

It's almost that time of year again to lend your support to the Special Olympics! If you are interested in volunteering for this upcoming event, contact Heather Crenshaw at [heatherjcrenshaw@aol.com](mailto:heatherjcrenshaw@aol.com). ■



*Circuit Representatives throughout the state act as liaisons with the local bars to publicize YLS events and to help gather volunteers for YLS programs and conversely to let the YLS know about events and programs that the local bars are running. Contact your Circuit Representative to learn more about your Circuit. Or contact the YLS if you are interested in representing your Circuit.*

### **3RD CIRCUIT**

#### **BALTIMORE COUNTY**

*Stuart A. Schadt, Circuit Representative*

The Baltimore County Bar Association's Annual Holiday Party was held on December 1, 2003 at An Poitin Stil. The event was well attended, as always, and the festive atmosphere seemed to breed plenty of holiday cheer.

On December 4, 2003, the BCBA's Young Lawyers' Committee and the Circuit Court Law Library staff hosted the 9th annual Holiday Open House to Benefit Literacy. Members of the Bar Association and the Young Lawyers' Committee and employees of the Law Library, along with family and friends, gathered for this benefit. The event was a huge success. Between the books that were collected and the money that was donated, a total of 550 books were presented to the Baltimore County Department of Social Services to help stock their holiday toy

stores. The toy stores are gift repositories for parents receiving aid to families with dependent children. The books helped those parents provide holiday gifts for their children.

The BCBA's annual Black Tie Banquet was held on Monday, January 26, 2004 at Martin's West. Over 800 guests were in attendance who were treated to not only a delicious surf and turf meal, but also the words of wisdom from Governor Robert Ehrlich and our guest speaker, the Honorable John Grayson Turnbull, II.

Upcoming events on the calendar for the Young Lawyers' Committee of the BCBA include their annual Bull and Oyster Roast to be held on March 7, 2004 from 1:00 to 5:00 p.m. at the Towson American Legion Hall. This is always a fun-filled event for the whole family and features a wide array of delicious food above and beyond the standard pit beef and raw oysters. There will be live music, a clown, and games of chance. Tickets can be purchased in advance at the Bar Association office or at the door, if still available. This event often sells out so plan ahead and get your tickets in advance.

The members of the Young Lawyers' Committee of the Baltimore County Bar look forward to this and other events promoted under the direction of the 2003-04 Chair, Adam Sampson. Upcoming events will be listed in future Advocates.

All members of the Young Lawyers' Section of the MSBA are welcome to join the BCBA's committee or participate in any of our events. For more information, please feel free to contact Adam Sampson at 410-783-4030 or [ats@gldd-law.com](mailto:ats@gldd-law.com) or Stuart Schadt at 410-296-8870 or [stuartschadt@aol.com](mailto:stuartschadt@aol.com).

### **5TH CIRCUIT**

#### **ANNE ARUNDEL COUNTY**

*Sarah Andrews, Circuit Representative*

The Anne Arundel Bar Association ended 2003 with a fun evening at Bill Bateman's Bistro in Severna Park for our annual holiday party on December 17th. The AABA also welcomed five new members that month.

The New Year began with plenty of activities and meetings. Members enjoyed the benefits of several CLE's including one on what every business law practitioner should know about intellectual property law with guest speaker J. Andrew McKinney, Jr. and another covering business valuation with speaker Robert Oliver. The AABA looks forward to many more compelling and informative trainings on the agenda.

For more information on future events check out the AABA's new website at [www.aabar.org](http://www.aabar.org).

### **6TH CIRCUIT**

#### **MONTGOMERY COUNTY**

*Bradford S. Bernstein,  
Circuit Representative*

Are you a recently admitted member of the Bar? If so, the New Admittees Tour and Reception will be held on February 26, 2004 in the Circuit Court Atrium. The tour of the Circuit and District Court facilities will begin at 4:00 p.m. and the reception will begin at 5:00 p.m. All bar members, judges, and courthouse personnel are invited.

The Continuing Legal Education schedule for the Spring of 2004 has been set. All Programs are held in the Bar Office CLE Classroom (27 West Jefferson Street, Rockville, Maryland 20850). Cost Per 3 Hours: \$30.00 New Practitioner. \$60.00 Regular Member. \$85.00 Non-

# Riding the Circuit

Member. The following programs have been scheduled:

- **March 2 & 3, 2004**—*Bridge the Gap Program*, Starting Out the Practice of Law
- **March 9, 2004**—*Criminal Law Meets Family Law: Family Law and Criminal Law* practitioners should not miss this important CLE.
- **March 10, 2004**—*Tax Aspects of Real Estate*. This seminar will address transfer and recordation tax issues that arise in connection with the transfer of real estate and strategies to address these issues, especially in connection with estate planning.
- **March 16, 2004**—*Anatomy of a Probate: A Case Study*. If you do probate work in Maryland, this is a seminar that should not be missed.
- **March 23, 2004**—*Pension and Retirement Benefits in Divorce: What You Have to Know and What You Should Know*
- **March 31, 2004**—*Asset Protection and Asset Vulnerabilities: Covering Your Assets*.
- **April 14 and 21, 2004**—Rita Rosenkrantz *Basic Family Law Training*. This two part seminar is \$250.00 but free if you take a *Pro Bono Case*.
- **April 28, 2004**—*Following the Yellow Brick Road to a Successful Practice in OZ (And Montgomery County)*. Join a very distinguished panel for a candid discussion about building and maintaining a profitable, well-regarded practice.
- **May 12, 2004**—*Successful ADR*. ADR has emerged as a significant industry which must be considered with respect to every claim and lawsuit. A must program for all litigators.

Each month the Montgomery County Bar Association gets together for a luncheon at the Rockville United Methodist Church. Each lunch is held on the first or second Tuesday of each month. On January 6, 2004, the guest speaker was the Honorable Douglas M. Duncan, County Executive for Montgomery County.

Finally, if you are interested in meeting the Judges of the District Court and Circuit Court of Montgomery County, the Chamber Chat Program is an excellent opportunity to do so. Each month, a Judge from the District Court or Circuit Court hosts an informal lunch in chambers for new practitioners to meet and get to know the Judge off the bench. If interested in the next Chamber Chat Program, please contact program chair, Tanya Bernstein at 301-652-6880.

## 8TH CIRCUIT

### BALTIMORE CITY

*Mont Brownlee, III, Circuit Representative*

The Young Lawyers' Division of the Bar Association of Baltimore City (YLD) has recovered from last December's blowout holiday party at the Belvedere, and has a full slate of programs and events on tap in the new year. First, the YLD and the MSBA-YLS co-sponsored "The First Happy Hour of 2004" on Thursday, January 29th at Lucille's at the Power Plant Live! The event was a great success and the YLD would like to thank all those who came out to root on Maryland Basketball and enjoy the food and atmosphere.

The YLD is also planning a wine tasting and silent auction event for April. Stay tuned for details. Contact YLD Chair Lauren Calia at 410-576-6514 or [lcalia@oag.state.md.us](mailto:lcalia@oag.state.md.us) for more information.

May 1st is Law Day in Maryland, and preparations are already underway for YLD's annual observance of Law Day in the city's schools. Volunteers are needed to make presentations to city school students—this year's topic is the 50th anniversary of the landmark *Brown v. Board of Education* decision. If you are interested in participating, please contact Kate Berry at 410-385-8622 or [kate.berry@affiliates.com](mailto:kate.berry@affiliates.com).

Upcoming YLD Council Meetings are February 24th and March 23rd. ■

## THE ADVOCATE

SAY IT HERE...

**Do you have an area of expertise that your colleagues are always asking you about? Have you been trying to spread the word about your last *pro bono* case? Or do you just have an article that you would like to get published? *The Advocate* is your opportunity to shine!!**

The Editors of *The Advocate* are looking for "nuts and bolts" articles on different areas of law to share with the Section and *pro bono* experience pieces to let the Section know that interesting cases are waiting for them as they aspire toward their *pro bono* goals. If you are interested in submitting an article, or would like more information, contact Gwendolyn Tate (410-783-0377, [TheYLSAdvocate@aol.com](mailto:TheYLSAdvocate@aol.com)).

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## TOP TEN LIST: TAX-SAVING TIPS FOR 2003

By S. Scott Tate, Esq.

*It's that time of year again. April 15th is fast approaching. If you prepare your own tax return, don't panic, and read the instructions carefully. Many deductions and credits are limited by your income and other factors, and you might find something that can save you money. The following is a list of some tax-saving items to look out for when preparing your tax return for 2003.*

**10. Credit vs. Deduction.** Many items, such as education expenses, can be taken as either a credit or a deduction. Credits are usually more valuable because they reduce your tax dollar-for-dollar, while deductions reduce the income on which the tax is computed. You may need to compute your tax both ways to determine which one saves the most tax.

**9. Student Loan Interest.** You can deduct up to \$2,500 of student loan interest "above the line," subject to certain income limitations. The deduction is phased out for single taxpayers having income over \$50,000 and married couples with income in excess of \$100,000.

**8. Education Expenses.** There are several credits and a deduction available for those who pay higher education expenses for themselves or a dependent. A deduction of up to \$3,000 is available "above the line" for expenses of post-secondary education paid for the taxpayer, the taxpayer's spouse, or a dependent. The Hope scholarship credit and Lifetime Learning credit are also available, with the Hope providing up to \$1,500 per student for the cost of the first two years of post-secondary educa-

tion, and the Lifetime credit up to \$2,000. Both credits have income limitations and must be coordinated so that the expenses are not claimed more than once.

**7. Health Insurance.** If you are self-employed, you can deduct 100% of your health insurance premiums. This deduction was previously capped at 70% of the expenses.

**6. Business Assets.** The deduction for the cost of assets purchased for use in a trade or business, such as computers and office furniture, has been increased to \$100,000 for 2003 – 2005. The cost of these items is ordinarily deducted over several years, but there is an election available whereby they can be fully deducted in the year of purchase.

**5. Capital Gains and Dividends.** The tax rate for capital gains and for dividends has been reduced to 15% for most taxpayers. The reduced capital gain rate decreases after May 6, 2003, but the dividend rate applies to all dividends received during 2003. Make sure to check the dates of your sales of capital assets (i.e., stock, mutual funds) so that you can take advantage of the lower rate.

**4. Individual Retirement Account.** You can deduct up to \$3,000 if you made a contribution to an IRA during 2003, or if you make a contribution by April 15, 2004. The deduction is limited if you contribute to your firm's 401(k) plan. Let Uncle Sam subsidize your retirement!

**3. Child-related Credits.** Taxpayers with children have several tax credits that may be available. There is a credit of \$1,000 for each qualifying child, subject to cer-

tain income limitations. If you received a \$400 advance payment check, you must reduce the credit on your tax return accordingly. A credit is also available if you pay for child care.

**2. Itemize, Itemize, Itemize!** Many taxpayers think that they cannot itemize their deductions if they do not own a house and have the mortgage interest to deduct. But many of those same taxpayers have paid enough in state income taxes alone to reach the itemized deduction threshold. Check your (and your spouse's) W-2 and see how much state income tax was withheld. If the withholding is more than the standard deduction of \$4,750 for singles, or \$9,500 for married couples, you can itemize your deductions. Itemizing also allows you to deduct gifts to charities, unreimbursed business expenses, investment expenses, casualty losses, and other items. Homeowners may deduct mortgage interest, points, and real estate taxes. Itemized deductions are listed on Schedule A and are subject to limitations.

**1. Contribute to your firm's 401(k) and Flexible Spending Plans.** If you did not contribute to these plans during 2003 it will not help you with this year's tax return, but it may not be too late to join for 2004. Wages contributed to both plans are income tax free, and contributions to the flexible spending plan are free from Social Security taxes as well. Flexible spending plans enable participants to use pre-tax dollars to pay for medical and/or child care expenses. ■

*S. Scott Tate, Esq. is an associate in the Baltimore office of Ober|Kaler.*

## THE ENIGMA OF OPTION CONTRACTS

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bound by *Easebe*. The en banc decision ratified the reasoning of the BAP and overruled *Easebe*.

After discussing the conceptual problems with fitting options into the Countryman definition of executory contracts, the Court held that the proper test of executoriness is to look to the outstanding obligations at the time the petition is filed and determine whether performance is still required from each side. *Helms*, 139 F.3d at 706. The Ninth Circuit adopted the Countryman definition of executory contracts. See *In re Texscan*, 976 F.2d 1269 (9th Cir. 1992). The Court went on to hold that "Performance due only if the optionee chooses at his discretion to exercise the option doesn't count unless he has chosen to exercise it." *Id.* Then in a statement consistent with the decision's logic but puzzling in its

results, the Court added, "An option may on occasion be an executory contract, for instance, where the optionee has announced that he is exercising the option, but not yet followed through with the purchase price." *Id.* Thus, the *Helms* decision suggests that an optionee, who exercises an option one day before a petition is filed may have a contract rejected but one who exercises an option the day after the filing cannot have a contract rejected.

The *Helms* decision is both broad and narrow. The decision appears to include all manner of options within its holding, regardless of actual distinctions that may exist between options on real property and options on personalty such as stock. Because *Helms* involved an option held by a debtor, the Court only decided that unexercised options are not executory. As a result, *Helms* avoided a number of difficult questions. In particular, what happens to an option held by a non-debtor third party? For example, can a non-

debtor exercise an option against property of the debtor's post-petition estate? Would the exercise of such an option require relief from the automatic stay? What if the property is vital to the reorganization? If an optionee cannot obtain specific performance, does the optionee have an administrative claim for damages? In situations where the debtor is the optionor, courts tend to hold that options are executory contracts where the optionee is a non-debtor. They do this by looking beyond the option contract to the contract that will be created once the option is exercised. See, e.g., *In the Matter of Jackson Brewing Company*, 567 F.2d 618 (5th Cir. 1978); *In re Riodizio, Inc.*, 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) ("Here, the Warrant is executory; each party must perform under the Warrant in order to obtain the benefits under the contingent bilateral contract of sale."); *In re A.J. Lane & Co. Inc.*, 107 B.R. 435, 437 (Bankr. D.

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Mass. 1989) (“It is the contingency of exercise which makes the option executory for our purposes. ... Upon exercise, substantial performance remains on both sides—conveyance of the property by Debtor and payment of the purchase price by Santa Fe.”); *Hardie*, 100 B.R. at 287 (“The unexercised option does not create the relationship of vendor and purchaser, and the optionee has no interest in the land legal or equitable, but only a in rem right to exercise the option. ... This Court is of the opinion that the option contract in the present case is executory within the meaning of § 365.”); *In re G-N Partnership*, 48 B.R. 462 (Bankr. D. Minn. 1985); *In re Waldron*, 36 B.R. 633, 637 (Bankr. S.D. Fla. 1984), *rev'd on other grounds*, 785 F.2d 936 (11th Cir. 1986) (options are executory because upon exercise both parties have future obligations). That contract is executory, since it requires further action on the part of both parties. Thus, these courts reason option contracts can be rejected under § 365(a) because upon “exercising the option, the option will immediately transform into an executory contract for the sale of real property.” *Waldron*, 36 B.R. at 637.

In *In re Simon Transportation Services, Inc.*, however, the court was more blunt about what it was really doing. 292 B.R. 207 (Bankr. D. Utah 2003). There, the court took a “functional approach” to determining whether the options at-issue where executory contracts. In other words, the court looked to the benefits to be gained by the debtors if the options were deemed executory. Finding that it was in the debtors’ interests to exercise those options, the court

held the options to be executory contracts. *Id.* at 219.

In sum, court decisions on this issue, at least those that are published, tend to be result oriented. Courts are more likely to find option contracts to be executory where the optionor is the debtor; thus, allowing the debtor to terminate the option. Where the optionee is the debtor and it is in the debtor’s interest to exercise the option the results tend to be the reverse. Consequently, it is difficult to predict the outcome of a particular case; although where the debtor is the optionee it is more likely that the option can be

*“It is difficult to predict the outcome of a particular case; although where the debtor is the optionee it is more likely that the option can be exercised in bankruptcy. But even if a court allows the option to be terminated, remedies may still be available to the optionee.”*

exercised in bankruptcy. But even if a court allows the option to be terminated, remedies may still be available to the optionee as discussed below.

#### 4. Treatment of Executory Contracts for the Sale of Real Property Under § 365(i) and (j).

Sections 365(i) and 365(j) offer certain protections to potential purchasers under contracts for the sale of real property that are rejected by a debtor in bankruptcy. In pertinent part, § 365(a), (i), and (j) provide as follows:

a) the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property.

\* \* \* \* \*

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.” (emphasis supplied).

In other words, § 365(i) and (j) protect potential purchasers by either allowing them to remain in possession of the property or, if they are not in possession, providing them with a lien interest in the property for any amount of the purchase price paid to the seller.

#### 5. Treatment of Option Contracts Under § 365(i) and § 365(j).

##### i. Decisions Suggesting that Option Contracts are Entitled to Protection Under § 365(i) and § 365(j).

Several courts have addressed the issue of whether an option contract or, a similar first refusal contract, for the sale of real property can create a § 365(j) lien for the amount paid for that contract. However, no court has commented on the application of § 365(i) to such contracts (presumably because most optionees do not take possession prior to exercising their options). The analysis of § 365(i) should be similar, however, to that of § 365(j). Of the courts that have dealt with the issue in the context of § 365(j),

<sup>1</sup> While the court noted, “[u]nder the functional approach, the [option] Agreements would likely be executory contracts,” its analysis did not stop there. *Id.* at 219. The court looked to two additional areas of law for guidance: (1) the economic realities of commercial contracts, and (2) options as executory contracts. Although the debtors were not contractually bound to exercise the options, the court observed that the economic realities of the situation demanded that debtors either exercise those options or assign them to third parties. By analogy, the court then looked to Tenth Circuit cases that had used such economic considerations to find agreements that were nominally called leases to be installment sale contracts. *Id.* (citing: *In re Fashion Optical, Ltd.*, 653 F.2d 1385 (10th Cir. 1981); *United States ex rel. Eddies Sales and Leasing, Inc. v. Federal Ins.*, 634 F.2d 1050 (10th Cir. 1976); *Percival Constr. v. Miller & Miller Auctioneers, Inc.*, 532 F.2d 166 (10th Cir. 1976)). Based upon that case law, the court concluded the economic realities of the situation advocated finding the options to be executory contracts. *Id.* at 220. The court then looked to several cases that dealt with the executory nature of options. First, the court looked to *Harper v. Great Salt Lake Council, Inc.*, 976 P.2d 1213 (1999), in which the Utah Supreme Court held that an earnest money agreement for the purchase of land was an executory contract. *Simon Trans.*, 292 B.R. at 220. The court then looked to two United States Supreme Court decisions for the concept that an option is an executory contract: *Mabry v. Johnson*, 467 U.S. 504 (1984) (plea bargain agreement is as an executory contract even though the defendant has the option to withdraw the plea agreement until approved by the court); and *Central Tablet Manufacturing Co. v. United States*, 417 U.S. 673 n.7 (1974) (“executory contract to sell is to be distinguished from a contract of sale. This distinction recognizes the significance of the point in time where the parties can no longer opt out of the transaction.”). Thus, the court reasoned these cases supported its holding that the options were executory contracts.

three courts have suggested that holders of unexercised options are entitled to § 365(j) protection.

In *In re Sundial Asphalt Co.*, the Court held that option contracts for the purchase of real property are executory and, therefore, subject to rejection under § 365(a). Prior to that analysis, the Court stated, in dicta:

If Sundial [the debtor] were to prevail in this matter [i.e., in rejecting the option contract as executory], the appellee VPC [the non-debtor optionee] would fit the latter criteria [of § 365(j)]—namely, a party whose executory contract to purchase real property from the debtor has been rejected and under which such party is not in possession. Therefore, the vendee VPC would have a lien on the interest of the debtor in such property to recover any portion of the purchase price it may have paid. 147 B.R. at 79.

While *dicta*, the Court seems to suggest that the holder of an unexercised option is a vendee, and that a lien should be impressed on the property to secure reimbursement of the consideration paid for the option.

*In re Fleisman* involved a non-debtor obligee under a first refusal contract, which is similar to an option contract in that it creates an irrevocable offer by a property owner to sell its property upon the accrual of a condition precedent. For reasons that apply equally to an option contract, the Court concluded that a right of first refusal contract is executory and subject to rejection. The Court went on to state in dicta:

If Jacobs [the holder of the right of first refusal] had paid for the Right of First Refusal, or had paid for an option to purchase the property in the future for a stated price, he would have a lien [365(j)] for the consideration paid for that right, plus reasonable compensatory, consequential, and incidental damages as a result of its breach

## JOIN THE YLS AT THE OPEN SECTION MEETING FOR A LIVELY PANEL DISCUSSION ON THE PATRIOT ACT

Westminster Hall  
Fayette Street, Baltimore  
Monday, March 15, 2004  
at 6:00 p.m.

**The YLS will also be  
collecting canned goods  
at the door to benefit  
local charities!**

*Hope to see you there!*



... That is not the case here, for there is no indication that any consideration was given for the Right of First Refusal, nor is Jacobs economically harmed in any way by his inability to exercise the Right. 138 B.R. 641, 647-8 (Bankr. E.D. Mass. 1992).

Finally, in *In re Coordinated Financial Planning Corp.*, in dealing with a first refusal contract, the Court held:

When an executory contract for the purchase of land is rejected § 365(j) grants a purchaser not yet in possession a lien on the real property to the extent any money has been paid. To the extent the appellees [the holders of the right of first refusal] have paid any money for the preemption agreement, they should be given a lien for that amount. 65 B.R. 711, 713 (9th Cir. BAP 1986).

Thus, the Court created a lien in the debtor's property in favor of the holders of the right of first refusal under § 365(j).

*ii. Decisions Suggesting that Option Contracts are Not Entitled to Protection Under § 365(j).*

At least one court has refused to create a § 365(j) lien in favor of an obligee of an option contract that has been rejected

by a debtor in bankruptcy on the grounds that an amount paid for an option is different than an amount paid towards the purchase price of the property. In *In re Waldron*, the Court held that a non-debtor obligee under an option contract was not entitled to a § 365(j) lien because that section is inapplicable to a sale that had not yet taken place. The Court reasoned that a contract for the sale of real property would occur only after the obligees "exercised their option to purchase the subject property." *Id.* at 64; *see also, Hardie*, 100 B.R. at 287 (stating that an option contract is transformed into a contract and is specifically enforceable "upon acceptance by the optionee"). Having concluded that no contract of sale for real property existed, the Court then found that the amount paid for the option was not attributable to the purchase price of the property and, thus, did not create a § 365(j):

Section 365(j) was intended only to create a lien on real property in favor of a non-possessory purchaser to secure the amount of the purchase price paid. ... Accordingly, even if this option contract were to be viewed as an executory contract for the sale of

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## THE ENIGMA OF OPTION CONTRACTS

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real property within the meaning of § 365(j), [the obligee] would not be entitled to a lien on the property, since no amount of the [] purchase price has been paid. *Waldron*, 36 B.R. at 641.

Examining this analysis, one legal commentator argues the logical conclusion to be drawn from the *Waldron* Court's holding is that, even if the price paid for an option is to be applied to the purchase price of the property, that amount cannot create a § 365(j) lien prior to the exercise of the option to buy, since prior to that time no contract of sale for the property can exist and, therefore, amounts paid for the option cannot be credited to the purchase price. David B. Young, "Unwarranted Lien Protection: The Misuse of Section 365(j) of the Bankruptcy Code for the Benefit of Holders of Options and Preemptive Rights," 24 Sw. U. L. Rev. 273, 296 (1995).

Only a few courts have addressed the issue of whether holders of options or rights of first refusal can have § 365(j) liens for amounts paid for those rights when those contracts are rejected in bankruptcy under § 365(a). Much of this discussion has occurred in *dicta* and is not binding even on the courts that made these comments. An argument can be made

## ATTENTION YOUNG LAWYERS!

Please Join the Maryland State Bar Association for a Presentation on  
**"HOW TO TRY A DWI/DUI CASE"**

**DATE:** Wednesday, March 3, 2004

**TIME:** 6:30 p.m.

**PLACE:** FRANKLINS, 5123 Baltimore Avenue,  
Hyattsville, MD 20781, 301-927-2740

**RSVP:** Judy at 410-685-7878 ext. 232 or at [JLarrimore@msba.org](mailto:JLarrimore@msba.org)

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*Jan I. Berlage and Alice Chong, Co-Chairs*



that, having made these comments in *dicta*, these courts failed to fully analyze the issue. The courts that have actually ruled on this issue are split. Thus, the law on this issue is unclear. The better reasoned position, however, appears to be that a party is not entitled to a § 365(j) lien for amounts paid for an option or first refusal right, since § 365(i) is intended to create a lien only on those amounts paid towards the purchase price.

This conclusion may be different where the amount paid for the option is to be credited to the purchase price, since arguably that payment was also made towards the purchase of the prop-

erty. But a technical argument exists that such amounts cannot be attributed to the purchase price until the option is exercised because there is no contract for the sale of real property until that time. It is unclear how courts will handle this argument. Thus, there is a risk that if the seller were to file bankruptcy and reject the option contract, the purchaser would not be entitled to a § 365(j) lien for the amounts it had paid for that option even where upon exercise of that option those amounts would be created to the purchase price of the property. ■

*Jan I. Berlage, Esq. and Brent Procida, Esq. are associates at Ballard, Spahr, Andrews & Ingersoll, LLP.*

## SCENES FROM A YLS HAPPY HOUR

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**SAVING FOR COLLEGE 101:  
THE BASIC OF 529 PLANS AND COVERDELLS**

*continued from page 4*

**Issues That Many Arise Under 529 Plans and ESAs**

Now that you (hopefully) understand the basics, lets take a look at some possible issues.

*"What happens if my child decides not to go to college?"*

Generally, if the money is withdrawn for non-educational purposes, the earnings will not only be taxed at your (the parent's) level for federal (and in Maryland, state) income tax purposes but federal law imposes a 10% penalty. In addition, if you took a deduction on your state income tax return, generally there will be additional state recapture of income. There is an exception to the 10% penalty if the account is terminated because your child dies or is disabled. In addition, if your child receives a scholar-

ship, the amount of the scholarship can be withdrawn without hitting the penalty.

However, if your child just decides college is not "his thing," the best move may be to transfer the account to any member of his "family." Family is broadly defined. It includes not only siblings, parents, children, and grandchildren but also nieces, nephews, first cousins, in-laws, or spouses of these individuals (except first cousins). It should be recognized that ESAs provide one additional limitation—the family member must be under the age of 30.

*"Are my contributions to a State 529 Plan and an ESA considered to be a completed gift under federal law?"*

The quick and easy answer is yes. However, the contributions qualify for the \$11,000 annual gift tax exclusion and if you can contribute up to \$55,000 immediately (\$110,000 for married persons) generally you can treat the gift as made over 5 years and still fit within the exclusion.

*"How will the money in 529 Plans and ESAs affect a student's eligibility for federal financial aid?"*

It will hurt a child's chance to receive need-based financial aid. However, this should not turn you off on 529 Plans and ESAs because most financial aid comes in the form of loans, not grants, so you end up paying it back anyway.

*"Any good websites to learn more information?"*

[www.savingforcollege.org](http://www.savingforcollege.org) is chocked full of information.

[www.collegesavingsmd.org](http://www.collegesavingsmd.org) is the website for Maryland's 529 plans. ■

*Tamara Langlieb, Esq. is currently serving as vice chair of the YLS Publications and assistant editor of The Advocate.*

\* Editors Note: For a more detailed discussion on 529 Plans and the tax consequences, check out "The Section 529 Plan: Even Better Under the New Tax Law," by Gilda M. Zimmet, Esq. This article was published in the Winter, 2002 issue of *The Advocate*, Vol. 18, No. 2 which is available on the YLS website.

## JOIN US AND GET INVOLVED!

Take advantage of the various committees and activities that the Young Lawyers Section has to offer. Tell us how you would like to get involved:

**YES! Sign me up. (check all that apply):**

- Activities committee.** This committee plans the Section's signature gala event, Novemberfest, as well as organizing various other events to benefit our membership throughout the year.
- Disaster Relief committee.** In conjunction with the ABA and FEMA, this committee provides emergency legal assistance to victims of federally-declared disasters.
- Education committee.** This committee sponsors educational programs targeted to be of value to our membership, including legal research, trial skills, and time management.
- Membership committee.** This committee wages a continuing campaign to increase the Section's membership by sponsoring socials and other events statewide.
- Pro Bono committee.** This committee works to increase pro bono representation by young lawyers statewide by promoting *pro bono* service, sponsoring projects, and

seeking expanded *pro bono* opportunities for lawyers in every specialty.

- Public Service committee.** This committee coordinates the Section's public service projects throughout the year, enabling us to give back to our community.
- Publications committee.** This committee publishes *The Advocate*, our award-winning quarterly. We need writers, editors and people who can contribute story ideas.
- Law Student projects.** This committee plans social and educational events to help our associate members bridge the gap from law school to practice.

Name: \_\_\_\_\_

Street Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Daytime Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

Clip and return this form to the MSBA Young Lawyers Section, Attn: Greg Derwart, Maryland Bar Center, 520 West Fayette Street, Baltimore, Maryland 21201, or email your interests and contact information to Greg Derwart at [gderwart@msba.org](mailto:gderwart@msba.org).

# CALENDAR OF EVENTS



- March 3rd:** “How to try DWI/DUI Cases”  
*Sponsored by the Education Committee (pg. 14)*
- March 7th:** YLD of Baltimore County Bar Annual  
Bull & Oyster Roast (pg. 8)
- March 15th:** YLS Open Meeting and Canned food drive (pg. 13)
- April:** YLD of Baltimore City Bar Wine Tasting and Silent Auction
- May 1st:** LAW DAY!! Check out your local Bar Association  
for events in your County!
- Spring:** YLS *Pro Bono* Fair  
Montgomery County CLE Spring 2004 Curriculum (pg. 9)  
Special Olympics
- PLUS:** Coming to a town near you...The *Pro Bono* Road Show!

***Check out the “What we do” Section on page ## and  
watch your mailboxes for more details on these and other exciting events!***

## THE ADVOCATE

### Section of Young Lawyers

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