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## McCann trustee to sue Manhattan DA

by Terry Brennan Posted 05:00 EST, 4, Aug 2004

The trustee overseeing the Chapter 11 case of **McCann Inc.** will sue Manhattan's top legal office for \$2 million in alleged fraudulent transfers it collected from the bankrupt construction company's estate, according to his counsel.

The trustee, Lee Buchwald, is seeking to recoup the payments made to the office of Manhattan District Attorney Robert Morgenthau as part of a 1997 plea bargain that never mentioned McCann, explained the counsel to Buchwald, Scott Markowitz of **Todtman, Nach amie, Spizz & Johns PC**.

The payouts to the DA's office between July 1998 and March 2004 were tied to guilty pleas by McCann co-owners Bruce Fahey and Brian McMahon on commercial bribing charges, Markowitz said.

"McCann was not a party to the plea agreement and had no obligation to make the payments, and yet the \$2 million was paid out by the company," Markowitz said. "McCann was insolvent at the time, so we will sue to recoup what are potential fraudulent transfers that should be returned to the estate."

The plea agreement called for quarterly payments to the DA's office starting in July 1998 until the \$2 million settlement was satisfied, Markowitz explained.

One deal called for a \$1.5 million payment by majority owner Fahey and a McCann affiliate, MBF. McMahon was required to pay \$500,000 under a second arrangement, Markowitz said.

"The problem is that the payments came out of McCann's coffers and the DA's office gets to keep a \$2 million windfall while the people who deserve it — the debtor's creditors — get screwed," he said. "We're going to fight to get that money back because we believe they're fraudulent transfers that are voidable under Section 548 of the Bankruptcy Code."

McCann filed for Chapter 11 protection with the U.S. Bankruptcy Court for the Southern District of New York in Manhattan on June 25.

Chief Judge Stuart Bernstein backed a creditors' motion on July 26 when he appointed Buchwald, president of **Buchwald Capital Advisors LLC** in New York, as Chapter 11 trustee. Markowitz was then hired as Buchwald's counsel after an unofficial creditors' committee was disbanded.

Barbara Thompson, a spokeswoman for Morgenthau's office, said she had no knowledge of the McCann case. Debtor counsel **Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow LLP** couldn't be reached Wednesday.

The decision to sue Morgenthau's office is the latest twist in a bizarre Chapter 11 liquidation case that was triggered in April when three disgruntled creditors filed an involuntary liquidation against McCann.

Three electrical contractors with \$9.88 million in trade claims — **Adco Electrical Corp.** of Staten Island, N.Y., **Hugh O'Kane Electrical Corp.** of New York and **Scholes Electric & Communications** of Piscataway, N.J. — filed an involuntary Chapter 7 petition against McCann on April 15 with the Manhattan bankruptcy court. New York-based McCann then made a voluntary Chapter 11 petition on June 25.

Scholes Electric filed a \$4.34 million claim in the case, O'Kane Electrical a \$4.05 million claim and Adco Electrical a \$1.49 million claim, documents show.

The creditors alleged in the involuntary petition that McCann collected \$4 million from construction projects in January and February but failed to pass payments along to subcontractors.

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McCann then abruptly ceased operations on March 1 after a subcontractor complained of nonpayment to the owner of one of the projects, creditors said.

"Apparently, the debtor had submitted certain lien waivers to the owner that were forged, and the owner immediately terminated McCann and that led to others doing the same," the creditors said. "The debtor was unable to maintain its employees, and the business essentially collapsed in a matter of days."

The DA's office launched an investigation into McCann and Fahey of Garden City, N.Y., for alleged violations of Article 3A of New York's lien law, creditors said in a July 12 court filing.

According to Markowitz, the probe centers around possible forgeries of lien waivers that are a standard payment policy in the general contracting industry.

Article 3A of the state's lien law requires a general building contractor to hold a significant portion of payments collected from customers in trust for ultimate payout to subcontractors, Markowitz explained.

The subcontractors would then sign lien waivers upon payment so the contractor could present that to the owners to prove that the subcontractors were being paid, he said.

"A portion of the payments from the building owners is supposed to be set aside until the work, or various stages of the work, is completed by the sub-contractor," Markowitz explained. "The customer would sign off to assure that the subcontractor's work was done properly, and the subcontractor would sign a lien waiver upon payment so the general contractor, or McCann in this case, could present that to the building owner."

An ad hoc committee of six creditors was formed before the filing, but no official panel has been created post-petition in an attempt to limit professional fees during the liquidation, said Markowitz, who was the lawyer for the three creditors that filed the involuntary bankruptcy petition before his representation of Buchwald.

McCann owes unpaid subcontractors at least \$20 million in past-due trade claims, the creditors said in court filings.

The creditors had sought either a special Chapter 11 trustee or conversion back to Chapter 7 liquidation when they alleged an additional \$2.8 million in fraudulent transfers and multiple violations of New York's lien law. The unofficial committee had sought liquidation because it foresaw no chance of reorganization, filings show.

"The debtor and its management have engaged in gross mismanagement as well as engaged in conduct which constitutes a crime of larceny under New York law," the creditors said in court filings. "The committee has no confidence in current management's ability to maximize the liquidation value of the debtor's assets."

McCann never sought the use of cash collateral or debtor-in-possession funding and didn't even hold a first-day hearing since liquidation was always the goal of the filing, according to Buchwald.

"My principal job now is to collect and liquidate the assets, seek to reduce liabilities and to ultimately distribute the proceeds," he said.

**Morgan Stanley** made a \$2.5 million payment to McCann on Feb. 29 for work performed on a project at its Jersey City, N.J., property, but most of the funds due to the subcontractor were never passed along, documents show.

"Almost the entire \$2.5 million received from Morgan Stanley belonged to Scholes Electric, but Scholes only received \$381,330," filings show.

Scholes Electric filed liens against the Morgan Stanley property, and the investment bank is seeking payment of those claims from the McCann estate so the liens can be lifted. Bernstein set an Aug. 24 date for the hearing.

McCann posted \$150 million in gross revenue, according to its 2002 tax return, and similar revenue for 2003, the creditors said.