Fall 2019

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief,
Megan W Murray
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PRESIDENT'S MESSAGE

by Jake Blanchard
Blanchard Law, P.A.

Thank you for the opportunity to serve as the 2019-2020 President of the Tampa Bay Bankruptcy Bar Association. Our Association continues to stand out due to its commitment to service and it seems fitting that this Cramdown edition is being published close to Veterans Day.

Throughout our history, military service members have put on their uniforms to protect the values and liberties that this nation was built on. Veterans Day was first recognized as Armistice Day in 1919 to mark the date when Germany and the allies signed a 1918 agreement to cease World War I hostilities. The fighting ceased on the 11th hour of the 11th day of the 11th month, according to the Department of Veterans Affairs. But, for many Veterans the fighting never ceases, and fear shifts from physical danger to the unknown. There is nothing more uncertain than legal issues.

Many Veterans not only deserve our thanks but also need our help to deal with the unknown and uncertain. There are a number of services providing pro-bono legal assistance to Veterans but the one I'm most familiar with is through the James A. Haley Veteran's Hospital on Bruce B. Downs Blvd. here in Tampa. According to the James A. Haley Veteran's Hospital legal clinic the list of services provided consist of the following: family law; expunging criminal record; driver's license revocation; landlord/tenant; consumer law/consumer fraud; Social Security income and disability; wills/estate planning; and as of now, bankruptcy.

There are a number of ways to make a difference, but the best way is helping a Veteran see a bankruptcy case through from beginning to end. Please contact me if you would like to be connected with a Veteran in need of your skills and services.

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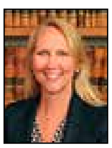

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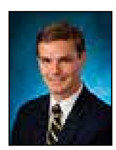

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The *Cramdown* can be accessed via the Internet at www.flmb.uscourts.gov and www.TBBBA.com

Student Loan Sidebar

by: Christie Arkovich
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Why Do We Need the Student Loan Management Program?

To ensure debtors receive a "fresh start" and not a "false start," the Bankruptcy Court for the Middle District of Florida (MDFL) has implemented a Student Loan Management Program (SLMP), which utilizes a transparent portal to obtain relief from federal and private student loans. The SLMP attempts to tackle the $1.5 trillion student loan debt currently owed by 44 million Americans. The goals of SLMP are threefold: 1) increase communication presently lacking between federal and private student loan borrowers and their servicers; 2) raise awareness among borrowers and their counsel of available options; and 3) end unnecessary and costly forbearance during bankruptcy.

The SLMP attempts to tackle the $1.5 trillion student loan debt currently owed by 44 million Americans

Rather than simply leaving these loans on hold to accrue capitalizing interest in a Chapter 13, the SLMP enhances communication and availability of options and end needless forbearance that causes larger loan balances. For instance, a debtor who owes $100,000 in student loans with an interest rate of 8 percent owes over $148,000 after a five-year plan if the loan is simply put on hold. The portal is also designed to accommodate settlements of private student loans via mediation. The automatic stay will be lifted on matters addressed via the portal. The SLMP started October 1, 2019.

In a similar vein, in 2010, the MDFL implemented a Mortgage Modification Mediation (MMM) program to assist debtors in seeking mortgage modification. The MMM program uses a portal to exchange documentation and communicate with mortgage servicers. The debtor would file a Notice of Participation and upload the appropriate documents using the portal. It has been a great success, has reduced litigation, and is recommended by mortgage creditors as a "model" for bankruptcy loss mitigation programs. It has been duplicated in many bankruptcy courts across the country and has saved thousands of borrowers from homelessness. The secure portal provided by DMMPortal at https://www.dclmwp.com has added a dropdown menu for student loan options now available in the Middle District of Florida.

Neither the MMM program nor the SLMP program REQUIRE servicers to modify these loans. They merely encourage the parties to communicate effectively using a portal for transparency. Our experience has been that when a debtor files bankruptcy, he or she cannot submit the applications through the student loan servicer's website and only the debtor receives notifications of the progress of the process. Without an advocate on their side, loan balances continue to rise, as debtors fail to take advantage of various forgiveness programs or inadvertently default, which adds an additional 25 percent in collection costs to the often already high balance.

Why is there a need for such a program?

In 2017, the Consumer Financial Protection Bureau (CFPB) and five State Attorneys General

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sued the largest of the Department of Education's (ED) servicers, Navient, in which they alleged that Navient misallocated payments, steered borrowers away from Income Driven Repayment Program Plans (IDR), and failed to provide clear information on how to re-enroll in IDR plans.

According to an Inspector General's Audit of Federal Student Loan Servicers, it was found that 61 percent of the time, student loan servicers are non-compliant with Federal Loan Servicing Requirements regarding forbearances, deferments, income driven repayment plans, etc. (February 12, 2019 ED-OIG/A05Q0008). We believe it would be beneficial for the debtors to have their own advocate to review their options with them and then apply for the appropriate programs.

The report states that one of Federal Student Aid's (FSA) objectives is to include the implementation of processes, tools, and methods that protect the interests of students, and to support FSA in making service providers accountable. The objective further states that FSA would ensure that its processes for resolving student issues are simple for customers to use and sophisticated enough to capture insights that can be used to refine student aid operations. SLMP has all of these ideas wrapped into one program.

To us, this is a replay of the mortgage crisis: There are affordable student loan repayment plans available from the government, but student loan servicers have not been able to properly assist borrowers, just as the mortgage servicers could not do so. And there are multiple student loan repayment plans that often are confusing to borrowers. This led to the idea that we could use the same MMM process when debtors have student loan debt.

This is largely needed as Congress' intent is for debtors in bankruptcy to receive a "fresh start." Since most student loans are non-dischargeable, this is not the result when debtors have student loan debt. We believe a process is needed that works for all parties to assist debtors to enroll in an available IDR. This would ultimately provide a greater income stream for the government as student loans are abated during bankruptcy and receive little pro-rata distribution from the trustee. This program will encourage debtors to sign repayment plans, which will cause increased distribution from the trustee, and such repayment will match the lender's requirements in the Department of Education's process.

We all agree there are significant problems that debtors face when they are in a bankruptcy case that has federally guaranteed student loans. Leaving this to the debtors to figure it out on their own, the government's website is not working. Leaving it to the servicers, who do not represent the borrowers, is not working. Leaving Chapter 13 borrowers in forbearance, for five years, is not working. We should stop abating these loans and make progress towards a "fresh start" and not a "false start" with student loans. As acknowledged, ED and its servicers place these loans on a "HOLD" while in bankruptcy. This is a sad state of affairs that needs to be fixed.

Just lifting the bankruptcy automatic stay alone will not work. The court and the trustee must supervise the debtor's Chapter 13 plan payments, considering many factors such as disposable income, unfair class treatment, and feasibility, to name a few. The government and the debtor cannot resolve these issues by themselves; it must be within the confines of the bankruptcy process. SLMP is the best way to achieve this goal.

Middle District's Student Loan Management Program

In an effort to ensure debtors receive a "fresh start" and not a "false start", the Middle District has implemented a Student Loan Management Program which utilizes a transparent portal to obtain relief from federal and private student loans. The goals of SLMP are threefold: 1) increase communication which is presently lacking between both federal and private student loan borrowers and their servicers; 2) raise awareness among borrowers and their counsel of available options; and 3) end unnecessary and costly forbearance during bankruptcy.

Rather than simply leaving these loans on hold to accrue capitalizing interest in a Chapter 13, the SLMP is designed to enhance communication and availability of available options and end needless forbearance which causes larger loan balances. For instance, a Debtor who owes $100,000.00 in student loans with an interest rate of 8% ends up owing over $148,000.00 after a five-year plan if the loan is simply put on hold. The Portal is also designed to accommodate settlements of private student loans via a mediation. The automatic stay will be lifted as to matters addressed via the portal. The SLMP will start October 1, 2019.

Supreme Court Closes Out Current Term, Clarifying The Civil Contempt Standard for Violating Bankruptcy Discharge Order

By Stephenie Biernacki Anthony, Esquire

On June 3, 2019, the United States Supreme Court issued a rare unanimous opinion in *Bradley Weston Taggart, Petitioner v. Shelley A. Lorenzen, Executor of the Estate of Stuart Brown, et al.*, 587 U.S. ___ (2019). In so doing, Justice Breyer clarified the analysis to be applied by bankruptcy courts in determining whether a creditor may be held in civil contempt for violating a bankruptcy discharge order under Bankruptcy Code §524. Debtors who receive discharges are often pursued after their bankruptcy cases have concluded, and this is generally inappropriate. But the circumstances vary greatly, and consequences of actual stay violations have been somewhat unpredictable to date. The *Taggart* decision, the Supreme Court has set the standard that civil contempt and resultant sanctions are appropriate if there is “no fair ground of doubt” as to whether a bankruptcy discharge order has barred the creditor’s post-discharge conduct. Said differently, “civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful.” *Taggart’s* guidance provided for bankruptcy courts is fair, consistent with the broader body of applicable law, and practical to apply.

The relevant and undisputed facts of *Taggart* begin in a routine manner. Mr Taggart was formerly a co-owner of a company, Sherwood. Sherwood, along with two of its other owners, brought a state court lawsuit against Taggart, claiming that he breached Sherwood’s operating agreement. *Ta* Taggart *ggart* filed for bankruptcy under Chapter 7 of the Bankruptcy Code before the trial in the state court lawsuit, ultimately obtaining a discharge order from the bankruptcy court. After the entry of the discharge order, Taggart once again appeared in the state court lawsuit. Ultimately, the state court proceeded to enter a judgment against Taggart and an award for post-petition attorneys’ fees was pursued despite the discharge order. In seeking relief against Taggart after his discharge order was entered, the plaintiffs were able to convince the state court that Taggart had “returned to the fray” post-petition. The Ninth Circuit’s decision in *In re Ybarra*, 424 F. 3d 1018 (2005), provides that a bankruptcy discharge order applies unless the discharged debtor “returns to the fray” post-petition. The state court applied *Ybarra* in granting the relief requested by the plaintiffs.

After the state court ruled against him, Taggart sought refuge from the plaintiffs by returning to bankruptcy court. Taggart sought sanctions against the state court plaintiffs for civil contempt for violating the bankruptcy discharge order pursuant to §524 of the Bankruptcy Code.

Taggart not only that the state court had erred but also that the plaintiffs were liable for post-petition attorneys’ fees incurred in the state court lawsuit under a virtual strict liability standard. Relying upon *Ybarra*, the plaintiffs asserted, among other things, that they had acted in subjective good faith. The bankruptcy

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court ultimately sided with the plaintiffs and made a finding of no civil contempt. On appeal by Taggart, the district court held that Taggart had not returned to the fray and concluded that the plaintiffs violated the discharge order by trying to collect attorneys' fees against Taggart. The district court remanded the same for further findings, at which time the bankruptcy court was constrained to make a finding of "strict liability" civil contempt. The award included $105,000 for attorneys' fees and costs, $5,000 for emotional distress, and $2,000 for punitive damages.

At this juncture, with substantial swings in result at each level of review, the plaintiffs appealed to the Ninth Circuit Bankruptcy Appellate Panel, which vacated the sanctions, relying instead upon a determination based upon a "good faith belief" regarding the legal significance of the discharge order. Upholding this completely subjective analysis of the issue, the Ninth Circuit affirmed the result of the Bankruptcy Appellate Panel.

On certiorari, the Supreme Court rejected the concept of "strict liability" for violations of bankruptcy discharge orders as urged by Taggart, who had been awarded $112,000 in sanctions against the plaintiffs below. The Supreme Court likewise rejected the Ninth Circuit analysis that "subjective good faith" would be determinative of the result. Demonstrating tremendous clarity of analysis, the *Taggart* court analyzed the issue in the context of broader non-bankruptcy common law principles governing civil contempt. Adopting an objective standard to determine whether an objective violation of a discharge order was willful, the *Taggart* court imposed a "fair ground of doubt" standard. The *Taggart* court referenced the common law aphorism "when a statutory term is transplanted from another legal source, it takes the old soil with it." This means that established federal common law relating to civil contempt will be utilized to evaluate violations of the discharge injunction under Bankruptcy Code §524, rather than strict liability, subjective, or any other standards that litigators may wish to innovate.

Taggart is harmonious with the broader corpus of bankruptcy law. Bankruptcy law and debtor-creditor law is replete with objective standards for conclusively establishing subjective intent. For example, in the Eleventh Circuit, the *"Phoenix Piccadilly"* line of case law identifies objective indicia of debtor "bad faith" in filing a bankruptcy case, recognizing that self-serving statements of a debtor cannot be relied upon to shape the outcome of bad faith filing analysis. *In re Phoenix Piccadilly, Ltd.,* 849 F.2d 1393, 1394 (11th Cir.1998) and *In re State Street Houses, Inc.* 356 F.3d 1345(11th Cir. 2004). Similarly, the Uniform Fraudulent Transfer Act, codified at *Florida Statutes* § 726.001 *et. seq*., contains a set of objective indicia of fraudulent intent in determining whether a fraudulent transfer has occurred, because a fraudulent transferor seldom admits to fraudulent intent. The application of a timeless and common-sense standard in the context of analyzing contempt issues involving discharge orders will add great clarity to a legal issue that has until now been causing tremendous confusion and inconsistency in our courts.

Is the Functional Approach to Executory Contracts Dead?

By Sean Horan (Vanderbilt University Law School, J.D. Candidate 2021)
2019 Federal Judicial Intern for the United States Bankruptcy Court Middle District of Florida

Justice Kagan's recent opinion in *Mission Product Holdings, Inc. v. Tempnology, LLC,* raises questions regarding the viability of the "functional" approach for defining executory contracts in bankruptcy. Circuits are split between the "functional" approach and the "Countryman" approach, but in the Eleventh Circuit, the "functional" approach controls.[1] However, in *Tempnology*, the Court applied a definition of executory contracts that is not derived from either of these approaches. Rather, the Court applied the definition of executory contracts found in the Legislative History for Section 365 of the Bankruptcy Code, which defines an executory contract as one where "performance remains due to some extent on both sides."[2] In its opinion, the Court mentions neither the "functional" nor the "Countryman" approach. So, what definition of executory contracts controls?

Tempnology centers on a trademark license. Tempnology manufactured clothing and accessories designed to keep the user cool during exercise and marketed these products under the brand name "Coolcore."[3] Tempnology entered into a licensing agreement with Mission Holdings that gave Mission both an exclusive license to distribute certain Coolcore products and a non-exclusive, irrevocable, royalty-free, perpetual right to use the "Coolcore" trademark.[4] The agreement was set to expire in July 2016, but Tempnology filed for bankruptcy in September 2015 and sought to "reject" the agreement to regain its exclusive right to the "Coolcore" trademark.[5]

Section 365(a) of the Bankruptcy Code allows a trustee to reject or assume an executory contract, subject to the court's approval.[6] The Code does not define "executory contract," so courts have developed their own definitions. In a 1973 Minnesota Law Review article, Professor Vern Countryman defined an executory contract as "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 performance of the other."[7] The allure of this approach is its simplicity, but it has its drawbacks. For example, take an employment contract that contains a non-compete clause. If the employee quits, then the employer's obligation ends, but the employee still has the non-compete obligation. Under the "Countryman" approach this would not be an executory contract, and the debtor/employee could not reject the contract. Thus, the estate would still be burdened by the non-compete agreement.

Some courts have expanded the definition of executory contract under the "functional" approach. The "functional" approach determines whether a contract is executory by the "benefits that assumption or rejection would produce for the estate."[8] This approach works backwards by examining the purpose that rejection seeks to achieve, and if those objectives have already been accomplished or if they cannot be accomplished through rejection, then the contract is not executory for bankruptcy purposes.[9] After *Sipes*, the "functional" approach is controlling in the Eleventh Circuit.[10] So, in the example above, if the employee filed for bankruptcy, the employment contract would be an executory contract because "rejecting" the contract would relieve the estate of the non-compete burden.

In 1977, Congress provided its own definition for executory contracts in the House and Senate Reports for the Bankruptcy Code. Congress states, "though there is no precise definition of what contracts are executory,

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1 *Sipes v. Atlantic Gulf Communities Corp. (In re General Dev. Corp.)*, 84 F.3d 1364, 1375 (11th Cir. 1996).
2 *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019).
3 *Id.* at 1658.
4 *Id.*
5 *Id.*
6 11 U.S.C. § 365(a).
7 Vern Countryman, *Executory Contracts in Bankruptcy*, 57 Minn. L. Rev. 439, 460 (1973).
8 *Sipes*, 84 F.3d at 1375.
9 *Id.*
10 *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007); *Sipes*, 84 F.3d at 1375.

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it generally includes contracts on which performance remains due to some extent on both sides."[11] Rather than use the material breach test in the "Countryman" approach, Congress chose not to adopt a specific definition to protect against any unintended omissions or inclusions and to allow courts to develop their own interpretations.[12] After this legislative definition, courts continued to use the "Countryman" and "functional" approaches.

Enter *Tempnology*. In its opinion, the Court states that "a contract is executory if performance remains due to some extent on both sides," citing *N.L.R.B. v. Bildisco & Bildisco* and the legislative history for this definition.[13] The Court's exclusive reliance on this test indicates that this definition may be controlling. However, there may still be room for the "functional" approach. That is because the ruling in *Tempnology* primarily focuses on the effects of rejection and not whether the licensing agreement was an executory contract.[14] Thus, it could be dictum. And immediately after defining an executory contract, Justice Kagan discusses the purpose of § 365(a) by focusing on the benefits or detriments to the debtor's estate—the analysis in the "functional" approach.[15] Thus, although the Supreme Court omitted mention of either the "functional" or "Countryman" approach in its definition of executory contract, the rest of the opinion suggests that courts may apply the "functional" approach when it benefits the estate, and the definition was not the primary focus of the opinion.

The Eleventh Circuit's treatment of executory contracts after *Bildisco* supports the proposition above. In the 1985 *Bildisco* case, the Court defines an executory contract as one where "performance remains due to some extent on both sides."[16] Like *Tempnology*, the primary dispute in *Bildisco* was not whether an executory contract existed, but whether modifying one of the provisions in an executory contract after filing bankruptcy constituted an unfair labor practice.[17] In 1996, the Eleventh Circuit in *Sipes* began with the legislative definition. The Eleventh Circuit then expanded definition to include contracts where only one party has material obligations, if assuming or rejecting the contract benefits the estate and its creditors—in other words, the "functional" approach.[18] The Eleventh Circuit reaffirmed this approach again in *Thompkins v. Lil' Joe Records, Inc.* Even though the decisions in *Sipes* and *Lil' Joe* run contrary to *Bildisco*, the legislature never clarified the definition of executory contracts, nor did the Supreme Court overrule the Eleventh Circuit's decisions.

Perhaps the Supreme Court in *Tempnology* is following the lead of Congress and allowing each circuit to continue using its preferred definition. The Court may be doing so because executory contracts cover a wide range of different contracts. For example, a consumer debtor rejecting a non-compete clause has a much different effect than a multi-million dollar company that rejects services it is obligated to provide to an entire city. After *Tempnology*, if performance remains on both sides then the contract is clearly executory per the Supreme Court's definition.[20] However, the remainder of the opinion indicates that, in some circumstances, the "functional" approach can best achieve the purpose of § 365(a).

11 S. Rep. No. 95-989, at 5844 (1978); H.R. Rep. No. 95-989 at 346 (1977).
12 *Sipes* 84 F.3d at 1374.
13 *Tempnology, LLC*, 139 U.S. 1652, 1657.
14 *Id*. at 1659-1660.
15 *Id*. at 1657.
16 *N.L.R.B. v. Bildisco and Bildisco*, 104 U.S. 513, 522 (1985).
17 *Id*. at 521-522.
18 *Sipes* 84 F.3d at 1374.
19 476 F.3d 1294, 1306 (11th Cir. 2007).
20 *Tempnology, LLC*, 139 S. Ct. 1652, 1657.

Beware, All Ye Who Practice Here

By Derek Andersen (Columbia Law School, J.D. Candidate 2021)
2019 Federal Judicial Intern for United States Bankruptcy Court for the Middle District of Florida

While it is widely recognized that courts have the power *sua sponte* to call a witness to the stand in a trial, this anomalous practice is rarely invoked outside of criminal jury trials. In March of this year, a bankruptcy judge sitting in the District of Maryland exercised this power in an adversary proceeding in the case of *In re Spearman*.[1] Judge Robert A. Gordon called debtor Kathryn Spearman's counsel to the stand to testify regarding significant errors in her bankruptcy filings. The plaintiff creditor in the proceeding alleged that Ms. Spearman should be denied a discharge under various provisions of § 727(a)[2] of the Bankruptcy Code. Generally, these provisions deny an individual debtor a discharge when the debtor has committed some form of fraud in connection with his or her bankruptcy petition. The Court issued a short opinion weighing the impropriety of setting a precedent that grants a discharge to a debtor who had rampant deficiencies in her filings against the particular circumstances of Ms. Spearman's case. Judge Gordon determined that the testimony of debtor's counsel was required to reach a just conclusion.

In Judge Gordon's memorandum opinion, he first establishes that he cannot "pinpoint any significant, or even petty, advantage that Ms. Spearman personally gained" through the errors in her papers.[3] The court took note of other relevant circumstances including a significant unidentified tragedy that befell Ms. Spearman prior to her bankruptcy and the general lack of dishonest behavior on her part. Ms. Spearman, in apparently extensive testimony, stated that she provided all of her financial information to her attorney and relied on his expertise entirely in preparing her statement of affairs. In Judge Gordon's opinion, the only way to achieve complete justice in this case is to question Ms. Spearman's counsel regarding 1) the financial information provided by Ms. Spearman and 2) the reasons why her statement of affairs was so extensively deficient.[4]

Judge Gordon cited *United States v. Karnes*[5] for the general proposition that a trial judge may call a witness before the court under Rule 614 of the Federal Rules of Evidence. In the context of Ms. Spearman's bankruptcy case, the applicability of this authority rests on debatable ground. *Karnes* addressed a traditional situation in which a judge in a criminal trial calls a witness whose testimony is critical to the prosecution's case but the prosecutor cannot vouch for the witness's credibility.[6] This situation would arise because, under prior versions of the Federal Rules of Evidence, a prosecutor was precluded from impeaching her own witness. However, because prosecutors may now impeach their own witnesses under Rule 607 of the Federal Rules of Evidence,[7] courts' witnesses have become far less common and are now typically used only when the prosecution seeks to avoid being affiliated with a witness in the psyche of the jurors.

Yet *Karnes* also recognizes that a court's witness may be appropriate when the underlying motive in calling the witness is to "get at the truth."[8] Indeed, Judge Gordon writes that his purpose in calling Ms. Spearman's counsel to the stand was in pursuit of "complete justice."[9] *Karnes* qualifies these considerations by referring to the due process clause which requires that the court remain impartial in exercising this power. Furthermore, at least one court has specifically addressed the propriety of defendant's counsel's testifying, finding that "it is clearly in the discretion of the trial court to permit counsel to testify" and highlighting the ethical considerations required of any attorney who chooses to testify.[10] Additionally, a judge benefits from a wider grant of discretion in bench trials, as in Ms. Spearman's case, than in jury trials.[11] Accepting that no legal basis exists specifically precluding a judge from calling debtor's counsel in this context, legal scholars and practitioners alike should be pragmatically concerned with such a practice.

Many attorneys may instantly spot the potential for a violation of attorney-client privilege when a defendant's attorney is called to testify on communications between herself and her client. However, a substantial body of authority establishes that a defendant waives privilege when she places her reliance on the advice of counsel at issue before the court, as Ms.

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1 *In r e Spearman*, 17-12663-RAG, 2019 WL 1320550 (Bankr. D. Md. Mar. 22, 2019).
2 11 U.S.C. § 727 (2012).
3 *Id*. at 2.
4 *Id*. at 4.
5 *United States v. Karnes*, 531 F.2d 214 (4th Cir. 1976).
6 *Id*. at 217.
7 Rule 607, Fed. R. Evid. ("Any party, including the party that called the witness, may attached the witness's credibility.").
8 *Karnes* at 217.
9 *In re Spearman* at 4.
10 *Sears, Roebuck & Co. v. Am. Plumbing & Supply Co. of Green Bay*, 19 F.R.D. 329, 332 (E.D. Wis. 1954).
11 *In re* T.C., 999 A.2d 72, 83 (D.C. 2010).

Beware

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Spearman did in this case.[12] Ms. Spearman's counsel, therefore, would be precluded from claiming privilege on facts relating to the advice he provided to Ms. Spearman.

Perhaps less intuitively, there is an argument that Judge Gordon's calling of Ms. Spearman's counsel casts doubt on the court's impartiality as highlighted by additional language from *Karnes*. "[The court's] impartiality is destroyed when the court assumes the role of prosecutor and undertakes to produce evidence, essential to overcome the defendant's presumption of innocence, which the government has declined to present."[13] But when one reads Judge Gordon's opinion, it does not appear that he is attempting to assume a prosecutorial role. Rather, the opinion arguably leaves one with the idea that Judge Gordon is actively searching for a reason not to deny Ms. Spearman her discharge. While such purpose is the opposite of the purpose for which the fact finder in *Karnes* called counsel to testify (i.e., to provide evidence in aid of prosecution), Judge Gordon's purpose is no less problematic under the lens of impartiality. This is not to suggest that Judge Gordon is incapable of asking appropriate questions and remaining impartial, but rather to emphasize the advisory committee notes to Rule 614(b). "The authority [of the court to question a witness] is, of course, abused when the judge abandons his proper role and assumes that of advocate . . . ."[14]

In a bankruptcy proceeding concerning objection to discharge, it is the objecting party's role to establish grounds for denial of the discharge by a preponderance of the evidence.[15] If the court is not satisfied that this burden has been met, as discharge exceptions are to be construed liberally against the objecting party,[16] the court may simply grant the discharge. If the plaintiff has satisfied this burden, it is not the court's role to provide the debtor with her defense by producing an additional witness. Regardless of Judge Gordon's individual ability to remain impartial in this present case, calling a court's witness to testify in situations analogous to this one will almost certainly strain the bankruptcy system as losing parties may be encouraged to challenge the court's impartiality on appeal. Indeed, the *Karnes* court found that the court's questioning of the witness was reversible error and ordered an entirely new trial.[17]

Additionally, one might also suspect that calling defendant's counsel to testify may be an exercise in futility. This would depend on how a court regards "advice of counsel" as a defense to an objection under § 727 when the debtor has claimed pure intent and complete reliance on her attorney.[18] In the bankruptcy court in Baltimore, for example, advice of counsel is not a valid defense under § 727(a)(4) "when it is self-evident that the [omitted] property should be scheduled."[19] This would suggest that regardless of what Ms. Spearman's counsel's testimony reveals about her intent, the issue in this case could be resolved with a factual finding that Ms. Spearman could not have reasonably misunderstood the requirements of the statement of financial affairs. In bankruptcy courts in Florida, one would expect a similar result as suggested by the case of *In re Collins*.[19] In that case, the debtor's counsel fell on his proverbial sword, telling the court to blame him for the errors in the debtor's schedules. The court held that it simply did not believe the debtor could have innocently misunderstood the omission and, thus, denied the discharge.[20] Accordingly, when a debtor with rampant errors and omissions in her statement of financial affairs claims pure intent and total reliance on the advice of counsel, the question of whether she should receive her discharge can be answered by simply examining the errors and omissions for reasonableness.

In conclusion, while there are no specific provisions of statutory or common law that preclude a judge from calling debtor's counsel to testify, a variety of ethical and practical considerations dictate that a judge should use caution in employing the court's witness doctrine. Resort to this doctrine could create a situation in which both the impartiality of the court and the efficient management of the court's resources are susceptible to close scrutiny, particularly if an appeal ensues. It should be an exceptional situation for the scales of justice weighing preponderance to be so evenly balanced as to require the court to take such initiative.

(*Postscript:* To avoid any chance of being called to the stand in the Middle District of Florida to testify regarding errors in MORs and QORs, please refer to Judge McEwen's recent C.L.E. program on that subject at https://pacer.flmb.uscourts.gov/cle/index.asp.)

12 § 501:22 Attorney-Client Privilege—Waiver by Client or Attorney, Bankr. Evid. Manual § 501:22 (2018 ed.).
13 *Karnes* at 217.
14 Fed. R. Evid. 614 notes of advisory committee on proposed rules to 2011 amendment.
15 Fed. R. Bankr. P. 4005; *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991).
16 *In re Jennings*, 533 F.3d 1333, 1338 (11th Cir. 2008).
17 *Karnes* found that the court's calling of a witness was prejudicial error because the court's impartiality was violated by asking specific questions to the witness and by the court's failure to advise the jury that a court's witness is not afforded greater credibility because they are a court's witness.
18 *See* Gregory E. Maggs, Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument, 69 Am. Bankr. L.J. 1, 1 (1995).
19 *In re Nazarian*, 18 B.R. 143, 146 (Bankr. D. Md. 1982).
20 *In re Collins*, 19 B.R. 874, 878 (Bankr. M.D. Fla. 1982).

Salute to our Veterans

Noel Boeke

Jeff Warren

Thank you for your service

Bench Bar Conference

From left Christie Arkovich, Judge McEwen,
Judge Isicoff, Judge Delano and Tammy Branson

Calendar of Events

DECEMBER 3, 2019	CLE LUNCH
DECEMBER 5, 2019	HOLIDAY PARTY
DECEMBER 17, 2019	JUDGE MCEWEN'S MENTORING PROGRAM FOR NEW BANKRUPTCY LAWYERS
JANUARY 7, 2020	CONSUMER LUNCH
JANUARY 14, 2020	CLE LUNCH
JANUARY 15-17, 2020	ABI PASKAY SEMINAR
FEBRUARY 4, 2020	CONSUMER LUNCH
FEBRUARY 7, 2020	2ND ANNUAL BROKEN BENCH AND BUSTED CLAY CHARITY SPORTING CLAYS TOURNAMENT
FEBRUARY 11, 2020	CLE LUNCH
MARCH 3, 2020	CONSUMER LUNCH
MARCH 10, 2020	CLE LUNCH
APRIL 7, 2020	CONSUMER LUNCH
APRIL 14, 2020	CLE LUNCH
MAY 5, 2020	CONSUMER LUNCH
MAY 12, 2020	CLE LUNCH
JUNE TBD, 2020	ANNUAL DINNER

View From the Bench and Pro Bono Project

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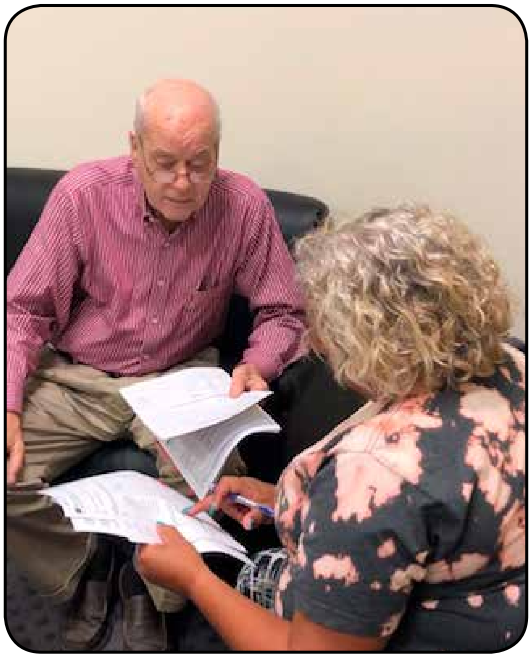
People on the Go

Chuck Kilcoyne, our retired long-time Deputy in Charge of the Tampa Division. He is helping out as an administrator for the Tampa courthouse clinic. On Mondays, he will help with client intake, create a database of clients to track frequency and issues, and ensure the supplies and forms are kept up to date.



Margaret "Molly" Virginia DiSanto made a dramatic entry into the world on July 29, 2019 at 9:45 pm. In true (and efficient) Kathleen style, labor was less than 2 hours, after a full day of work.

View from the Bench Reception

TBBBA Happy hour - Frankies on Franklin 9-16-19

On September 10, 2019, Susan M. Smith of GlassRatner, Donald Kirk of Carlton Fields, and Matthew Detzel of Holland & Knight kicked off the TBBBA CLE season with “How to Catch a Fraud.” The panel discussed some of the prevalent frauds circulating in the medical field as addiction centers and sober homes have sprung up to handle the opioid crisis. Frauds include insurance billing, kickbacks and payments for referrals and “medically necessary” procedures. If you would like additional information on this topic, please reach out to one of the panelists who can help answer questions discussed, such as:

Does the slide below relate to your case?

What are your initial steps?

Should the Treatment Center file for bankruptcy protection, receivership, ABC or other proceeding?

What are sources of recovery other than litigation?

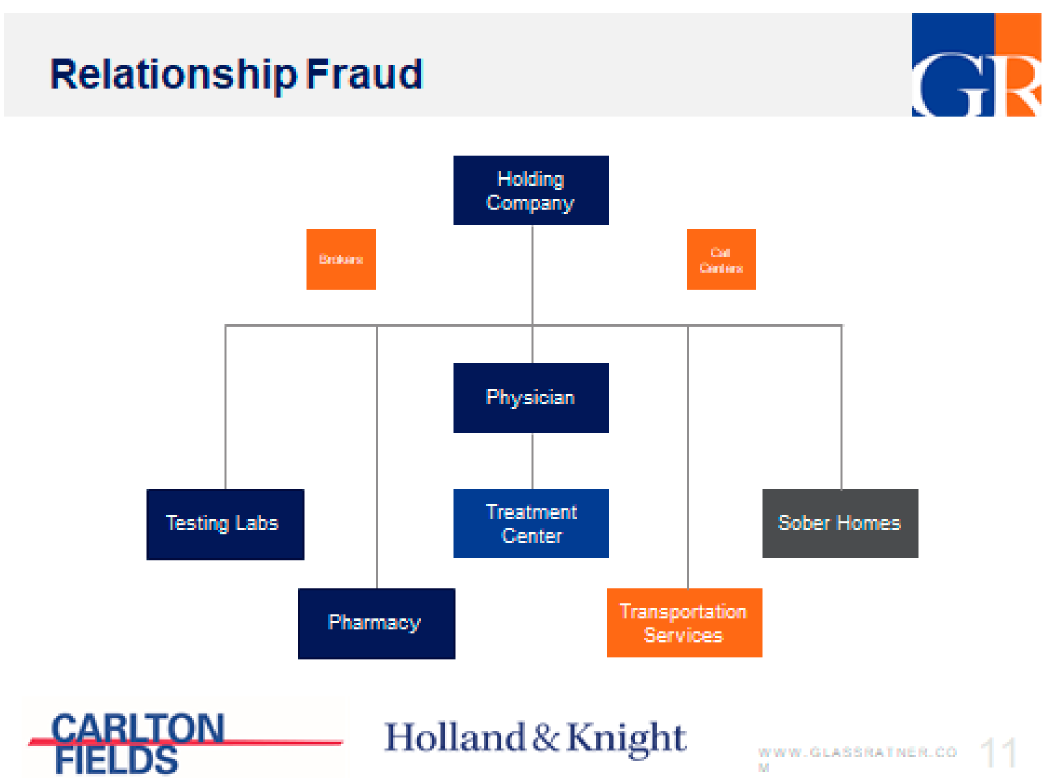
How does the Treatment Center identify and prepare for litigation?

How do you identify and proceed against the perpetrators of the frauds?

How does the Treatment Center handle the Relationship Frauds?

If you attended, don’t forget to register your 2 CLE credit hours. If you missed it, we missed you. Make sure you sign up for the next CLE Lunch!

If you have suggestion for a topic, please reach out to Ryan Reinert rreinert@shutts.com or Dan Fogarty dfogarty@srbp.com.



New Bankruptcy Acts

Small Business Reorganization Act of 2019 (H.R. 3311)

On August 23, 2019, the President signed the **Small Business Reorganization Act** of 2019 into law. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended the Bankruptcy Code and Title 28 of the U.S. Code to provide special rules and procedures for "small business debtors." Subchapter V applies in any Chapter 11 case of a small business debtor that elects to have it apply. The Small Business Reorganization Act of 2019 also amends or otherwise affects many other provisions of the Bankruptcy Code, including declaring about two dozen sections and subsections of Chapter 11 to be inapplicable in Subchapter V cases unless they become re-applicable if the court so orders "for cause." The Small Business Reorganization Act of 2019 includes, among other things, the appointment of a trustee, case-related deadlines, provisions regarding who file a plan and the ability to "cram down" certain mortgage holders. The law will take effect in February 2020.

The HAVEN Act (H.R. 2938)

On Aug. 23, 2019, the President also signed the **Honoring American Veterans in Extreme Need Act** of 2019 (HAVEN Act) into law. Prior to the passage of the HAVEN Act, federal Department of Veterans Affairs and Department of Defense disability payments were included when calculating a debtor's disposable income when in bankruptcy. The HAVEN Act provides disabled military veterans with greater protections in bankruptcy proceedings by exempting Social Security disability benefits from a debtor's disposable income. The HAVEN Act also protects a number of other veteran benefits. This Act is effective upon enactment.

The Family Farmer Relief Act of 2019 (H.R. 2336)

On Aug. 23, 2019, the President also signed **The Family Farmer Relief Act** of 2019 into law to increase the debt limit for chapter 12 farm bankruptcies to $10 million from $4.2 million. Its purpose is to enable many more farmers to file bankruptcy under chapter 12 of the Bankruptcy Code. This Act is effective upon enactment.

The National Guard and Reservists Debt Relief Extension Act of 2019 (H.R. 3304)

On Aug. 23, 2019, the President also signed **The National Guard and Reservists Debt Relief Extension Act** of 2019 into law. This law extends (for four years, through December 18, 2023) the exemption from the means test presumption provided to qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days. Like the HAVEN Act, it enables more people to file chapter 7 rather than having to seek bankruptcy relief under chapter 13. This Act is effective upon enactment.

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