Summer 2019

# The Cramdown

*The Newsletter of the Tampa Bay Bankruptcy Bar Association*

Editor-in-chief,
Nicole Noel, Kass Shuler, P.A.

## PRESIDENT'S MESSAGE

*by Lori V. Vaughan*
*Trenam Law*

It is hard to believe that summer is nearly upon us, but the rising temperatures leave no doubt that school will soon be in recess and we will all once again complain about the short walk to the courthouse in our full suit. Or is just me? Perhaps the E scooters coming soon to Tampa will make it easier to get around in the heat, or at least more entertaining.

This year has been full of ups and downs. The passing of our friend and colleague Don Stichter was a somber moment for all of us. Even those who did not practice with Don know him from his reputation and service to the community. Don was not just a great lawyer, but a great person. This Association and our community owe a great deal to Don for his leadership and selflessness. Don will be missed.

I'm sure Don would have approved of the exciting events and changes we have had so far this year. I was so pleased to have a great turnout for our First Annual Broken Bench and Busted Clays Tournament raising money for the Ryan Nece Foundation. We had such positive feedback that we are already planning for next year's event. Let's make it even bigger and raise more money for the Foundation and for BLES. Even if you're new to the experience, don't be afraid to join us. It's not as difficult as it looks. The Association thanks Keith Appleby and Shelley Sharp for organizing the tournament.

Speaking of tournaments, we managed to save this year's golf tournament even though it was played on what is likely to be the very worst day for golf in 2019! It was still good fun. It's much easier to play when the results do not count and everyone managed to find their way back to the clubhouse in time for some food and drinks (and creative awarding for the trophies). If anyone touts their abilities by citing to the trophy they received in the 2019 tournament, be wary. Thanks to Mike Markham, Angelina Lim and their team for their hard work in putting this together and seeing it through despite the weather.

Our golfers probably got in more swings at our Top Golf happy hour event this year. We tried something new by using our happy hour slot to prepare for the tournament and to mingle with our colleagues from TMA and IWIRC. We had a great turnout from all of the groups and I hope we continue partnering with our sister organizations to expand our networking. In addition to the golf, we tried another new event this year in the form of a karaoke happy hour and it was another success. Thanks to all of our happy hour and tournament sponsors and to our members for showing up this year to make it all of our events a success.

If you weren't able to attend, please visit our website facebook page (tampabaybba) or our twitter account (@tampabaybba) to see all of the photos.

The year is not over yet. Registration is open for our Annual Dinner on May 30 at the Palma Ceia Golf & Country Club starting at 6 p.m. We also have our monthly luncheons in May with Judge McEwen presenting a Give the Wheel a Spin program at our May 7 consumer luncheon and Judge Williamson leading a discussion on May 14 on Social Media Evidentiary Issues. The Association is also co-hosting a retirement celebration in honor of Justice Quince on May 17 at the Floridan. Keep an eye out for additional details on this event.

Thanks again to our board members, volunteers and members for devoting their time to making this Association a success. I look forward to seeing everyone at the Annual Dinner.

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

# Case Analysis: *In re Chorba* and the Ability of Unlicensed Debt Collectors to File Proof of Claim

***By Jessica Hicks***
Kass Shuler, PA

In 2017, the United States Supreme Court held that filing a time barred proof of claim is not considered false, deceptive, misleading, unfair, or unconscionable debt collection under the Fair Debt Collection Practices Act. *See, Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017). In support of this decision, the Supreme Court explained that the definition of "claim" under 11 U.S.C. § 101(5) is a "right to repayment", and that state law is determinative of whether a creditor has a right to repayment of a debt even after the limitations period has expired. *Id.* at 1411.

Building on the holding in *Midland Funding*, Judge Michelle M. Harner, bankruptcy Judge in Maryland, recently held that an *unlicensed* debt collector may still file a proof of claim in a bankruptcy case regardless of a Maryland state law requiring collections agencies to have a license to do business in the state, and that certain aspects of state consumer protection laws are preempted by the Bankruptcy Code. *In re Chorba*, 582 B.R. 380 (Bankr. D. Md. March 8, 2018)

**Background in *In re Chorba***

The Debtor filed a petition under Chapter 13 of the bankruptcy code on March 1, 2017. After receiving notice of the bankruptcy, two unsecured Creditors filed proofs of claim that were based on defaulted debt that was purchased from Synchony Bank. Pursuant to the Debtor's Chapter 13 Plan, the general unsecured creditors would all be paid pro rata and the amount of each claim to be paid under the plan would be determined by each Creditor's proof of claim. *Id.* at 383.

The debtor commenced an adversary proceeding and named both of the unsecured creditors as defendants. In Count I of the Complaint, the Plaintiff alleged that the Defendants violated the Maryland Consumer Debt Collection Act by filing the proofs of claim. Under Maryland law, "a person must have a license whenever the person does business as a collection agency in the State." Md. Code Ann., Bus. Reg.§ 7-301(a). According to the Plaintiff, the act of filing the proofs of claim without the requisite state license was a violation of the Maryland Collection Agency Licensing Act. Count II of the Complaint sought compensatory and punitive damages, and attorneys' fees, as filing the proofs of claims was allegedly a per se violation of the Maryland Consumer Protection Act. In Count III, the Plaintiff objected to and sought disallowance of the proofs of claim. *Chorba*, 582 B.R. 380 at 383. In response, the Defendants filed a Motion to Dismiss the Complaint. Ultimately the Court granted the Defendant's Motion to Dismiss as to Counts I and II, however she did not dismiss Plaintiff's Count III seeking to disallow the claims in their entirety. *Id.* at 382.

**Whether a Claim is Enforceable Under State Law Is Not Determinative of a Creditor's Authority to File a Proof of Claim in a Bankruptcy Case**

In granting the Defendants Motion to Dismiss as to Counts I and II, the Judge compared the facts of the instant case with that of *Midland Funding*. Just like the Defendants in *Midland Funding* were found to have the right to file their proofs of claim, Judge Harner concluded that the Defendants in *Chorba* also had a right to file their proofs of claim based upon the prepetition right to payment. *Id*. at 386. Section 101(5) of the Bankruptcy Code broadly defines a claim as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). As such,

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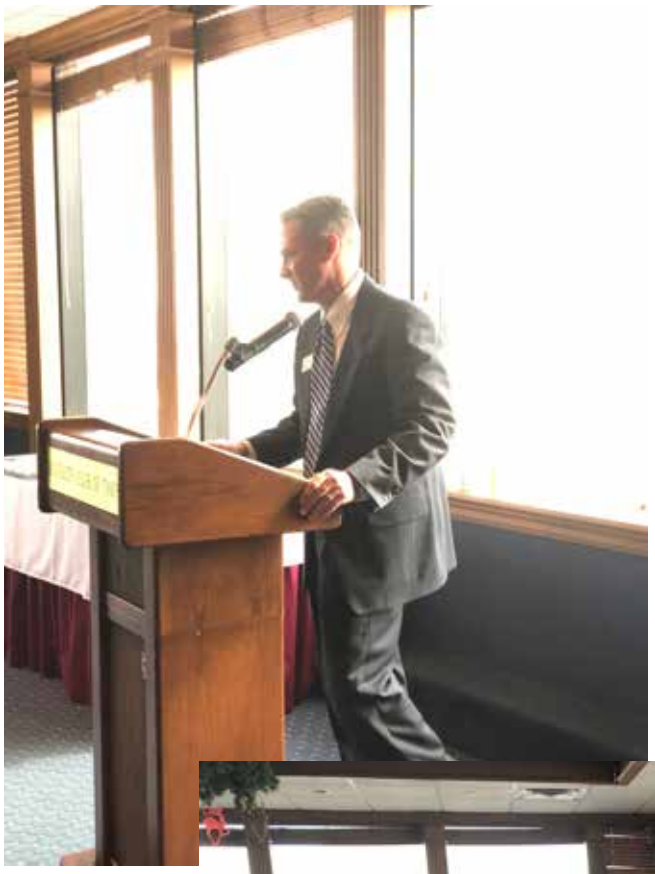
it was the plain language in the Bankruptcy Code that gave the Defendants the right to file their proofs of claim, regardless of the licensing requirement under Maryland state law. The Court, however, made it clear that allowing the Defendants to file proof of claim "does not…impeded the Plaintiff's ability to object to the Proofs of Claim on any applicable grounds, including unenforceability under 502(b) on the Code." *Chorba*, 582 B.R. 380 at 386. Just like the time-barred claim at issue in *Midland Funding*, the two claims in *Chorba* speak to the *enforceability* of a claim, not to the validity of the debt itself or the debtor's liability on the debt. Id. at 384 (emphasis added). While the Defendants ultimately may not be able to enforce their right to payment in Maryland state court due to the failure to obtain licenses in accordance with the Maryland state law, the inability to *enforce* their claims goes to the allowance of the underlying claim and not the ability to file such claim in the bankruptcy proceeding. *Id*. at 388.

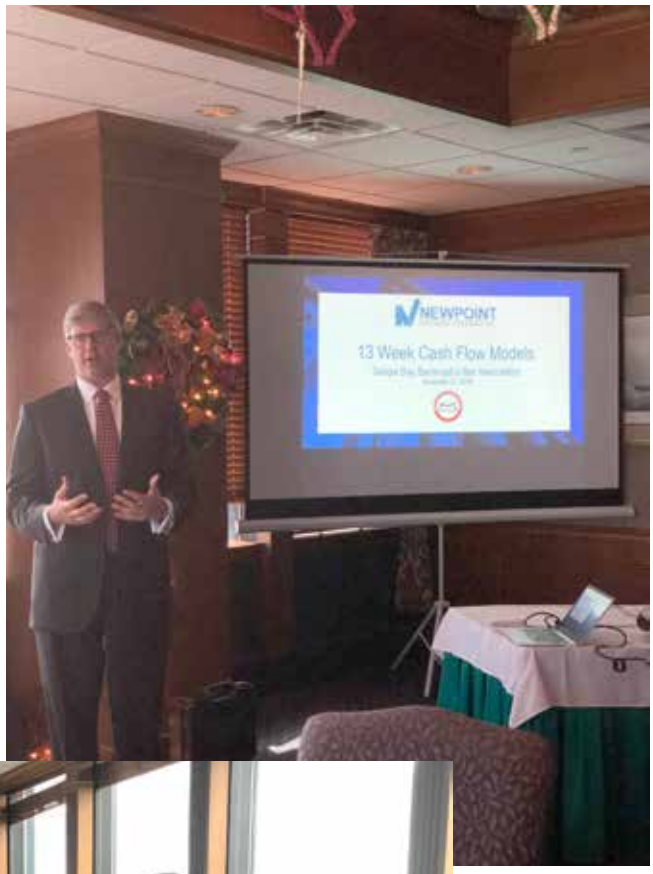
As support for her decision, Judge Harner cited to a case out of the United States District Court for the Middle District Florida. In *Townsend v. Quantum3 Group, LLC*, the Court held that a creditor need not be licensed under Florida law to file a proof of claim in a debtor's bankruptcy case. *In re Townsend*, 535 B.R. 415, 431 (M.D. Fla. 2015). The Court in *Townsend* noted that 11 U.S.C. § 101 defines "claim" and 11 U.S.C. § 501 permits any creditor to file such claim. There is no requirement that before a creditor can file a proof of claim, such creditor be licensed as a consumer collection agency in Florida. *Id*. at 429. So long as the debt itself is valid and enforceable under Florida law, every creditor has a right to file a proof of claim in a bankruptcy case. *Id*.

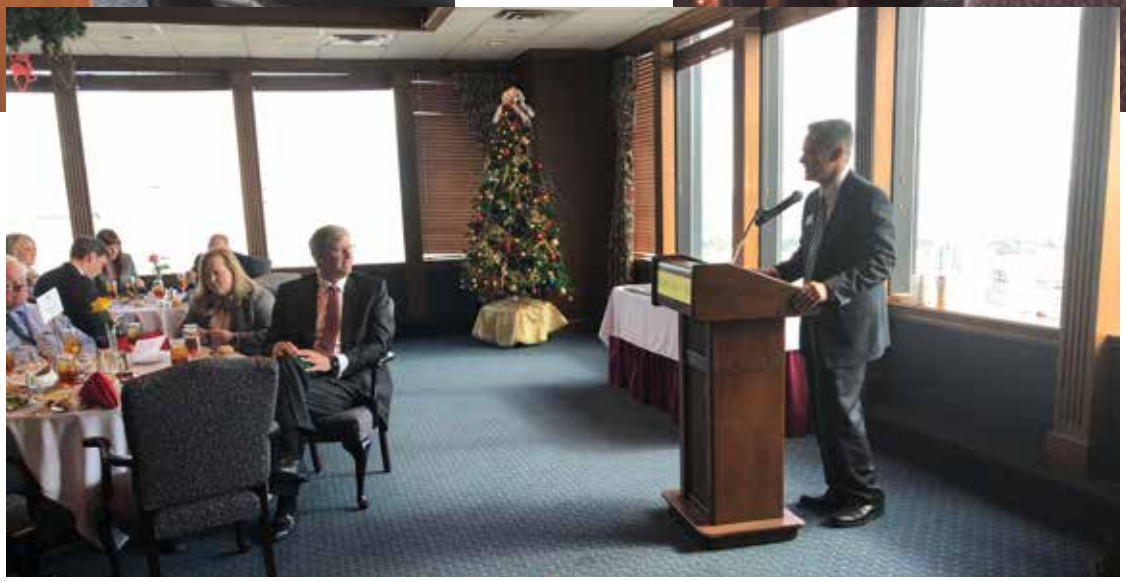
What *In re Chorba* has shown us is that courts are continuing to recognize that the broad definition of "claim" in the bankruptcy code places very little limitations on creditors' rights to file a proof of claim. Under the implied preemption doctrine, "a state law that penalizes a party for exercising a right under the Code, or otherwise makes it impossible for that party to exercise such right and comply with applicable state law, is squarely within conflict preemption." *Chorba*, 582 B.R. 380 at 390. As such, "to the extent that [creditors] possess a right to payment and thus have a right under the Code to file Proofs of Claim, that conduct cannot form the basis of liability under state law. *Id*.

The crux of the issue in Midland, Chorba, and Townsend appears to be the competing standards between debts that are unenforceable under state law (or the FDCPA as in *Midland*) versus claims that are permitted under the bankruptcy code. It is clear that a time barred claim under state law is not a time barred claim under the bankruptcy code. See *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017). Now, *Chorba* has shown us that bankruptcy courts are starting to expand upon the holding in *Midland* and are recognizing that state law licensing requirements for debt collectors do not dictate whether a proof of claim can be filed in a bankruptcy case. As this area of the law develops, it is likely that we will begin to see bankruptcy courts nationwide continue to define allowable claims in bankruptcy.

## January CLE Luncheon





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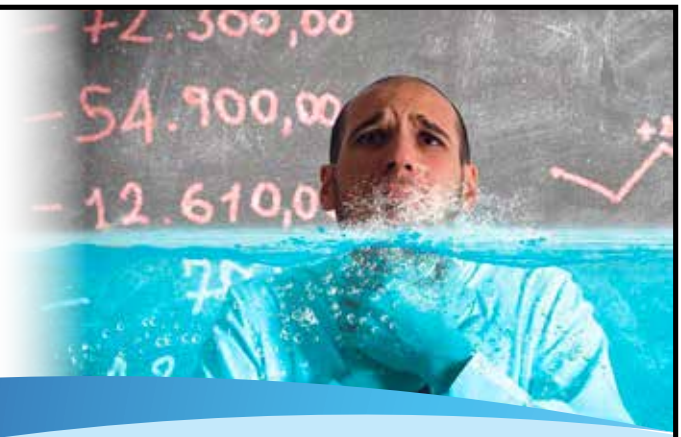
# Drowning in Student Loan Debt?

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# Secret No More: Does the Trustee Control the Debtor's Attorney-Client Privilege?

*By Alexander Zesch, Esq.*
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**Introduction**

As anyone who has ever been involved, even tangentially, in a bankruptcy case knows, the rules in bankruptcy courts can be quite different than in state courts and even in federal district courts. One such difference arises in the discovery context, where Federal Rule of Bankruptcy Procedure 2004 allows much broader inquiry than the Federal Rules of Civil Procedure or Florida Rules of Civil Procedure. Indeed, examinations under Bankruptcy Rule 2004 have been referred to as "fishing expeditions."[1] An interesting issue arises when discovery requests in individual bankruptcy cases collide with attorney-client privilege, and the bankruptcy courts have not found agreement on whether control over the privilege passes from an individual debtor-client to the trustee.

**Overview**

Generally, the attorney-privilege privilege protects communications between lawyers and their clients and presumes that full and frank communications promote the public interests of law and justice.[2] However, because the privilege results in the exclusion of relevant evidence, the party claiming the privilege must establish its applicability, and courts construe the privilege narrowly.[3] The privilege is held by the client and can be waived only by the client[4] - normally. Once that client becomes a debtor in bankruptcy, however, the bankruptcy trustee steps into the shoes of the debtor.[5] Thus, the trustee can pursue claims that belonged to the debtor pre-petition.[6] For example, insurer bad faith claims can arise when the debtor's liability insurer defended the debtor and a judgment was entered against the debtor that exceeded available coverage. In some cases, malpractice claims against the attorney the insurer retained to defend its insured may exist.[7] In such cases, the attorney's files, including communications with the client (now debtor) and the insurer can be a gold mine for the trustee. The question then becomes: Can the trustee, standing in the shoes of the debtor, waive the attorney-client privilege and gain access to the attorney's files?

**Corporate debtors lose control**

First, in cases of corporate debtors, control over the privilege passes to the trustee as a matter of law.[8] In *Commodity Futures Trading Com. v. Weintraub*, the Supreme Court explained that the privilege for a corporation is held by its management, and that a bankruptcy trustee most closely resembles a solvent corporation's management.[9] *Id*. The Court, however, left open the question of whether control over the privilege passes to the trustee in an individual bankruptcy, stating: "If control over that privilege passes to a trustee, it must be under some theory different from the one that we embrace in this case."[10] To date, neither the Supreme Court nor any Circuit Court has taken up this question.[11]

**One extreme: privilege always passes**

At least one court answered the question with an unequivocal yes. In *In re Smith*, the Southern District of Florida held that control of the attorney-client privilege "passes by operation of law to the bankruptcy trustee" and that the debtor therefore could not assert it.[12] Notably, *In re Smith* cited three cases for its proposition, all of which are distinguishable on a crucial fact: They involved

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1 *In re Bennet Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D. N.Y. 1996).
2 *Id*.
3 *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 372 (Bankr. D. Minn. 2000).
4 *See, e.g., Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466 (D. Del. 2012); In re Hunt, 153 B.R. 445, 452 (N.D. Tex. 1992).
5 *Reid v. Wolf (In re Wolf)*, 2018 Bankr. 3679 (Bankr. N.D. Ill. Nov. 19, 2018); *Kapila v. Bennett (In re Pearlman)*, 472 B.R. 115, 122 (Bankr. M.D. Fla. 2012).
6 11 U.S.C. § 541; Ehrenberg v. Roussos (In re Roussos), 2016 Bankr. LEXIS 3454, *10 (Bankr. C.D. Cal. Sep. 22, 2016).
7 *See, e.g., Moore v. Eason (In re Bazemore)*, 216 B.R. 1020 (Bankr. S.D. Ga. 1998).
8 *Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343, 354 (1985).
9 *Id*. at 348-53.
10 *Id*. at 356-57.
11 *In Foster v. Hill (In re Foster)*, 188 F.3d 1259, 1268 (10th Cir. 1999), the Tenth Circuit applied a balancing test because the parties stipulated to using it; however, in a footnote, the court stated that "we do not adopt any rule … . We simply decline to address sua sponte the antecedent legal question whether a court should ever allow a bankruptcy trustee to control an individual debtor's attorney-client privilege." In *DeMassa, APC v. MacIntyre (In re MacIntyre)*, 1996 U.S. App. LEXIS 6518, *16 (9th Cir. 1996), the Ninth Circuit passed on the question because neither the debtors nor the trustee had waived the privilege.
12 *In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982).

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corporate, rather than individual, debtors.[13] *In re Smith* was decided some three years before *Weintraub*, so that court did not have the benefit of the Supreme Court's distinction. Nonetheless, at least one court has followed the bright-line rule pronounced in *In re Smith*,[14] and others have made similarly strong pronouncements.[15] However, the majority of decisions decline to go as far as *In re Smith*,[16] and some have attempted to narrow its meaning.[17]

**Middle ground: a balancing test**

Most bankruptcy courts[18] apply a balancing test: On one side of the scale sit the trustee's duty to maximize the value of the debtor's estate and the benefit of waiving the privilege; on the other, the harm that disclosure would cause to the debtor and to the privilege itself.[19]

In *In re Bazemore*, father and son Bazemore were sued after an accident.[20] The Bazemores' liability insurer defended them, but an excess judgment was eventually entered.[21] The Bazemores filed for bankruptcy. The trustee sought to examine under Rule 2004 the Bazemores' attorney in the accident litigation, to determine the viability of a bad faith action against the insurer and a malpractice suit against the attorney.[22] The attorney refused, claiming the attorney-client privilege.[23]

The *In re Bazemore* court determined that federal law applied, explaining that "questions concerning financial condition of a debtor; location, nature and amount of assets and liabilities; size of the estate; and information relating to how the estate may be augmented are questions of federal bankruptcy law."[24]

Next, the *In re Bazemore* court considered two opinions that held the trustee did not control the privilege: In one case, disclosure of the subject information could have exposed the debtor to criminal liability,[25] and in the other, the disclosure was thought to chill full and frank attorney-client communications.[26] The *In re Bazemore* court summarized the cases reaching the opposite conclusion as focusing on the lack of harm to the debtor when the privilege was waived. The court determined that the considerations disfavoring trustee control over the privilege did not exist in the case before it and concluded that the trustee could waive the privilege and proceed with the examination of the attorney.[27]

*In re Bazemore* has been called "a seminal case for the balancing test approach."[28] As of this writing, courts in eight federal circuits have cited *In re Bazemore* with approval.

In *French v. Miller*, the court did not allow the trustee to succeed to the debtor's attorney-client privilege.[29] In that case, the trustee, attempting to revoke the debtors' discharge sought to compel discovery from the debtors' counsel, and the debtors objected. The court found that the debtors and the trustee were in an adversarial relationship, that the trustee's purpose for the discovery was to use the information against the debtors, and that the trustee's ability to administer the estate would not be

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13 *In re O.P.M. Leasing Services, Inc.*, 13 B.R. 64 (S.D. N.Y. 1981) (corporate debtor); *Citibank, N.A. v. Andros*, 666 F. 2d 1192 (8th Cir. 1981) (same); *In re Blier Cedar Co.*, 10 B.R. 993 (Bankr. D. Me. 1981) (same).

14 *In re Cutuli*, Case No. 11-35256-BKC-AJC (Bankr. S.D. Fla. Aug. 5, 2013) (overruling objection to subpoena duces tecum based on privilege because "the Debtor's attorney-client privilege is held by the Trustee and has been waived" and citing *In re Smith*).

15 *See, e.g., Whyte v. Williams (In re Williams)*, 152 B.R. 123, 125 (Bankr. N.D. Tex. 1992) ("[U]nder the Bankruptcy Code the privilege as a rule of evidence may be invoked or waived by the person owning the related causes of action … "); see also *In re Investment Bankers, Inc.*, 30 B.R. 883, 886 (Bankr. D. Col. 1983) (citing *In re Smith* for the proposition that a "Trustee in bankruptcy succeeds to a debtor's right to assert or waive the attorney-client privilege"). However, this case involved a corporate debtor.

16 *See, e.g., In re Courtney*, 372 B.R. 519, 521 (Bankr. M.D. Fla. 2007).

17 *SEC v. Marker*, 2006 U.S. Dist. LEXIS 7233, n8 (M.D. N.C. 2006).

18 *In re Pearlman*, 381 B.R. 903, 910 (Bankr. M.D. Fla. 2007).

19 *In re Bame*, 251 B.R. at 371; *In re Bazemore*, 216 B.R. at 1024.

20 *Id*. at 1022.

21 *Id*.

22 *Id*.

23 *Id*.

24 *Id*. at 1022-23 (citing *In re Kroh*, 80 B.R. 488, 489 (Bankr. W.D. Mo. 1987) and *International Horizons, Inc. v. Committee of Unsecured Creditors (In re International Horizons, Inc.)*, 689 F.2d 996, 1003( 11th Cir. 1982).

25 *In re Silvio De Lindegg Ocean Dev., Inc.*, 27 B.R. 28 (Bankr. S.D. Fla. 1982).

26 *In re Hunt*, 153 B.R. 445.

27 *Id*. at 1025.

28 *Who's In Control?: An Overview of Control of the Attorney-Client Privilege in Corporate and Consumer Bankruptcy Proceedings*, Nathan A. Wheatley, American Bar Association, available at http://apps.americanbar.org/buslaw/committees/CL160000pub/newsletter/200908/wheatley.pdf)/ see also *French v. Miller (In re: Miller)*, 247 B.R. 704, 710 (Bankr. N.D. Ohio 2000).

29 *French v. Miller (In re: Miller)*, 247 B.R. 704, 710 (Bankr. N.D. Ohio 2000).

significantly hampered without the discovery.[30] Under these circumstances, the court found that the trustee could not waive the debtors' attorney-client privilege.[31] Other courts employing the balancing test also found that that the trustee did not control the privilege.[32]

**The other extreme: the privilege never passes**

On the other end of the spectrum are courts that have held that control over whether to waive the debtor's attorney-client privilege never passes to the bankruptcy trustee. Interestingly, another judge in the Bankruptcy Court for the Southern District of Florida disagreed with *In re Smith*, discussed above, just seven months after that decision. In *In re Silvio De Lindegg Ocean Dev., Inc.*, the court stated, without further discussion: "There is no reason why the trustee cannot waive a corporate debtor's attorney-client privilege. There is every reason, as I see it why the trustee cannot waive an individual debtor's attorney-client privilege."[34]

A thoughtful opinion in this category has come out of Florida's Middle District in *In re Behn*.[35] The debtor had caused an accident, was serving time, and had an excess judgment against him. The victim's estate also sued the debtor's insurer for bad faith in state court, which sustained objections based on the debtor's attorney-client privilege. The estate then commenced an involuntary chapter 7 against the debtor, and the trustee brought her own bad faith action. After concluding the meeting of creditors, the trustee moved to waive the debtor's attorney client privilege so she could obtain the records of the attorney who had represented the debtor in the civil wrongful death action. In essence, the trustee in that case sought discovery in the bankruptcy court to which the state court had already determined she was not entitled.

The *In re Behn* court first determined that Florida law, rather than federal common law, governed the issue.[38] The court reasoned that Section 542(e) of the Bankruptcy Code, under which a court may order information turned over to the trustee, was "subject to any applicable privilege," including the attorney-client privilege. Whether a privilege applied, the court explained, is determined pursuant to Federal Rule of Evidence 501, which provides that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." The court determined that Florida statutory law governed the insurance bad faith action; therefore, Florida law also governed the debtor's attorney-client privilege.

After finding that Florida law required an express waiver of the attorney-client privilege by the client, and that none had occurred in the case before it, the court determined that the trustee could not waive the debtor's attorney-client privilege.[39]

Arguably, *In re Bazemore* and *In re Behn* can be harmonized. As noted above, *In re Bazemore* and its progeny applied federal common law (or failed to state which law applied), whereas the court in *In re Behn* applied Florida law. At first blush, the distinction makes sense: In *In re Bazemore*, the trustee sought to determine "whether the bankruptcy estates of the debtors have a cause of action against the attorney and insurance company for bad faith malpractice."[40] Thus, the trustee was operating under Federal Rule of Bankruptcy Procedure 2004 in her quest to determine and maximize the assets of the estate, and federal procedural law supplied the rule of decision to the question whether she controlled the privilege. Conversely, in *In re Behn*, the trustee had already determined that the insurance bad faith action was viable and commenced litigation in state court. The allegations against the insurer arose out of Florida statutory law; therefore, Florida law supplied the rule of decision.[41] In

continued on p. 12

30 *Id.* at 710-11.
31 *Id.* at 710.
32 *In re Wilkerson*, 2007 Bankr. LEXIS 4673, *20 (Bankr. D. Col. Aug. 20, 2007).
33 *In re Silvio*, 27 B.R. 28.
34 *Id.*
35 *In re Behn*, 2013 Bankr. LEXIS 5820, 2013 WL 12377690 (Bankr. M.D. Fla. April 17, 2013).
36 *Id.* at *4.
37 *Id.* at *5-6.
38 *Id.* at *7-17.
39 *Id.* at *17.
40 *In re Bazemore*, 216 B.R. at 1022.
41 *In re Behn*, 2013 Bankr. LEXIS 5820, *19.

## Trustee Control

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practice, however, this distinction is meaningless because a cautious trustee would simply hold off on pursuing the claims while gathering privileged information in the bankruptcy case. Thus, one debtor could lose her privilege because her bankruptcy trustee decided not to sue yet, while an otherwise identically situated debtor could keep control over her privileged attorney-client communications simply because the trustee decided to file suit before conducting Rule 2004 discovery.

**A definitive answer?**

The bankruptcy court for the Central District of California considered this question in *Gottlieb v. Fayerman (In re Ginzburg,)*, holding that "federal common law simply prohibits the balancing of the trustee's duties and need for the information with the debtor's attorney client privilege."[42] In that case, the debtor moved for reconsideration after the court, persuaded by the reasoning in *In re Foster*, had applied the balancing test described above and found that the trustee succeeded to the debtor's attorney-client privilege.[43] In his motion, the debtor, for the first time, cited the Supreme Court's 1998 decision in *Swidler & Berlin v. U.S.*

In *Swidler*, the Supreme Court considered whether a grand jury investigating misconduct in the Clinton White House was entitled to notes an attorney had taken during a meeting with Vincent Foster nine days before Mr. Foster's suicide.[44] The government's special counsel argued, among other things, that the importance of the privileged information should be balanced against the interests of the client.[45] The Supreme Court rejected this argument, explaining that such balancing "introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing

continued on p. 13

42 *Gottlieb v. Fayerman (In re Ginzburg)*, 517 B.R. 175 (Bankr. C.D. Cal. 2014).
43 *In re Ginzburg*, 517 B.R. at 178.
44 *Swidler v. Berlin*, 524 U.S. 399 (1998).
45 *Swidler*, 524 U.S. at 408-9.

continued from p. 12

test in defining the contours of the privilege."[46]

The *In re Ginzburg* court likened "the need for a bankruptcy trustee to marshal assets and properly investigate the affairs of a debtor" to the need for more information in the investigation in *Swidler*.[47] Recognizing that "the Supreme Court has clearly prohibited such a 'one more exception,'" the court concluded that federal common law prohibits the application of a balancing test to determine whether a bankruptcy trustee controls the debtor's attorney-client privilege.[48]

Even though *In re Ginzburg* was decided in 2014, no cases appear to have followed it.[49] Instead, another bankruptcy court, perhaps unaware of *In re Ginzburg*, has stated that "there is no controlling precedent on that issue," [50] a direct contradiction of *In re Ginzburg*'s reliance on *Swidler*.

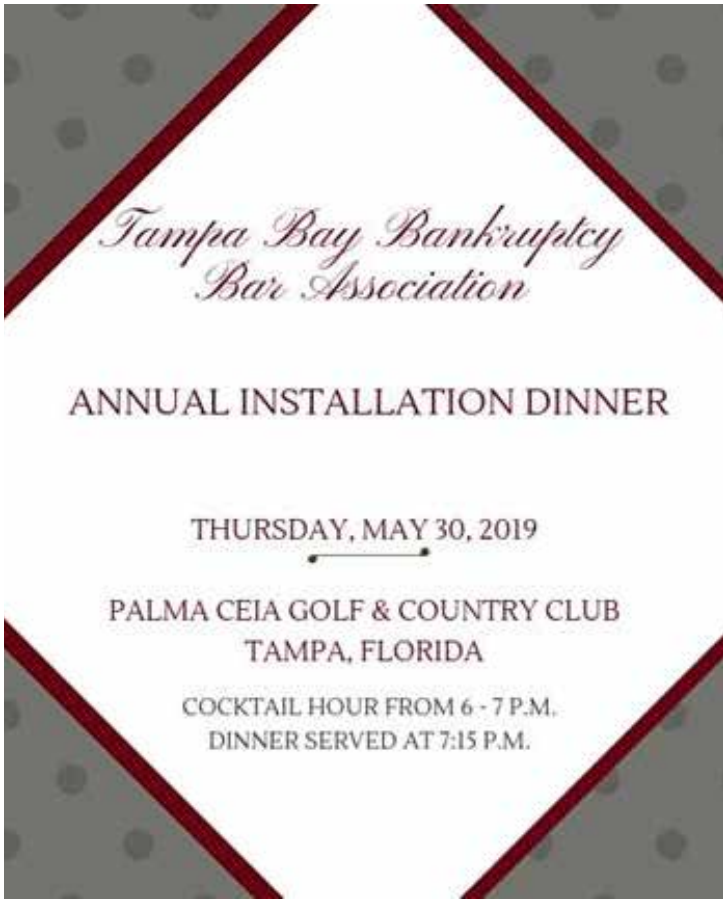
**Conclusion**

In this writer's opinion, *In re Ginzburg* was decided correctly. It would add certainty to the bankruptcy process if the bankruptcy courts abandoned the balancing test, and only such a bright-line rule ensures the comfort the privilege is meant to provide a client.

Furthermore, it should be remembered that such a rule leaves a trustee far from powerless. In addition to the trustee's powers under the Bankruptcy Code and the debtor's obligation to cooperate with the trustee, the attorney-client privilege does not provide as big a shield as one may fear. After all, the burden to establish that the privilege applies would be on the debtor[51], and the privilege, due its "derogation of the search for truth," is construed narrowly.[52]

In short, the attorney-client privilege is not so broad that it will frustrate a trustee's efforts to meet his or her obligations under the Bankruptcy Code in most cases.

46 *Id*. at 409.
47 *In re Ginzburg*, 517 B.R. at 182.
48 *Id*. at 182.
49 *But see In re Gaime*, 8:18-bk-05198-RCT (Bankr. M.D. Fla. Dec. 18, 2018) (quoting *In re Ginzburg*'s pronouncement that federal common law prohibits the balancing test in a footnote); and *Whatley v. Meyer Wilson Co., LPA (In re Chandar)*, 2017 Bankr. LEXIS 3903, *3 (Bankr. E.D. Cal. 2017) (recognizing *In re Ginzburg*'s rejection of the balancing test in a footnote).
50 *Coyle v. Coyle (In re Coyle)*, 538 B.R. 753, 764, (Bankr. C.D. Ill. 2015).
51 *In re Grand Jury Subpoena*, 831 F.2d 225, 227 (11th Cir. 1987).
52 *Lindley v. Life Investors Ins. Co. of Am.*, 267 F.R.D. 382, 391 (N.D. Okla. 2010).

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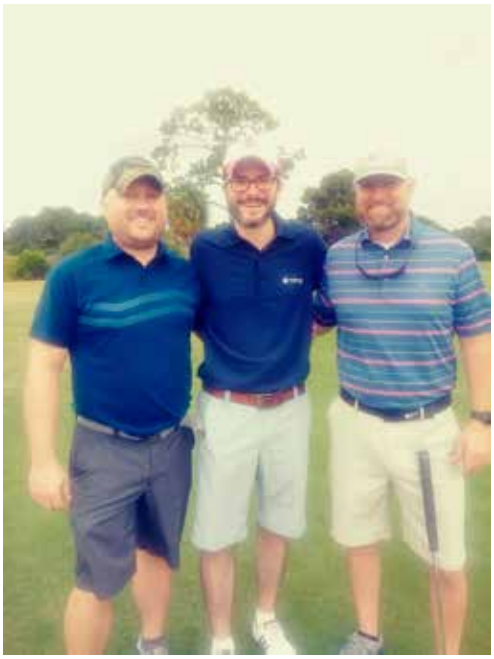
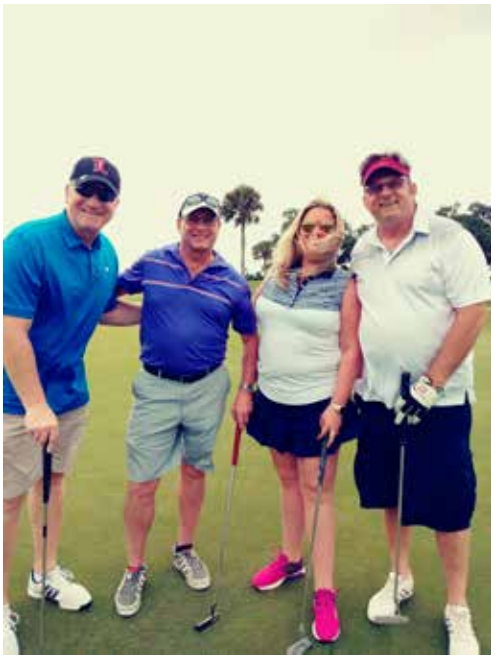
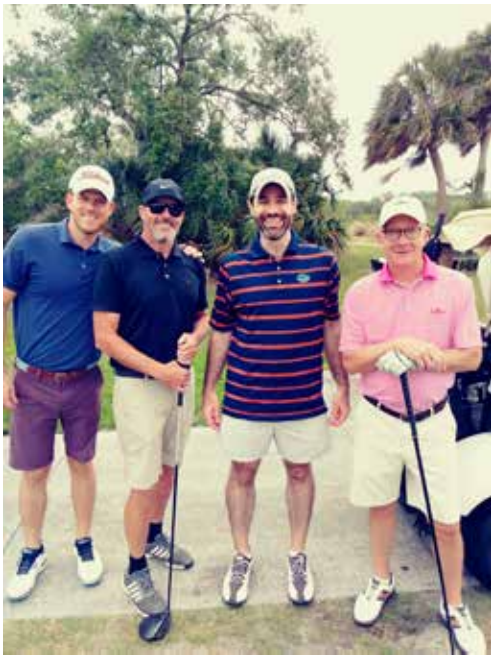
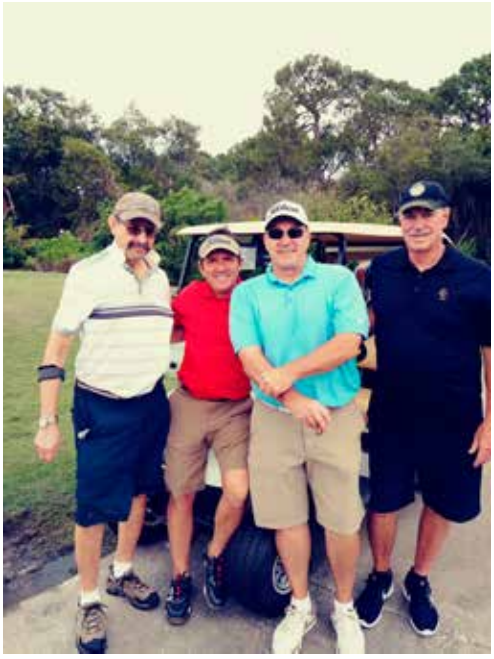
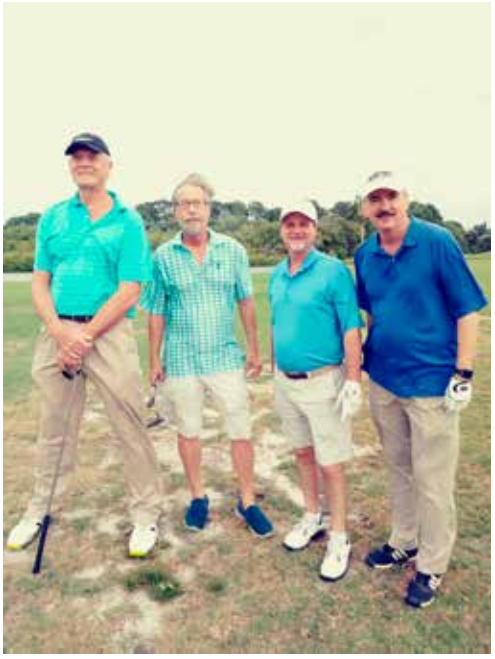
# September 2019 TBBBA Happy Hour

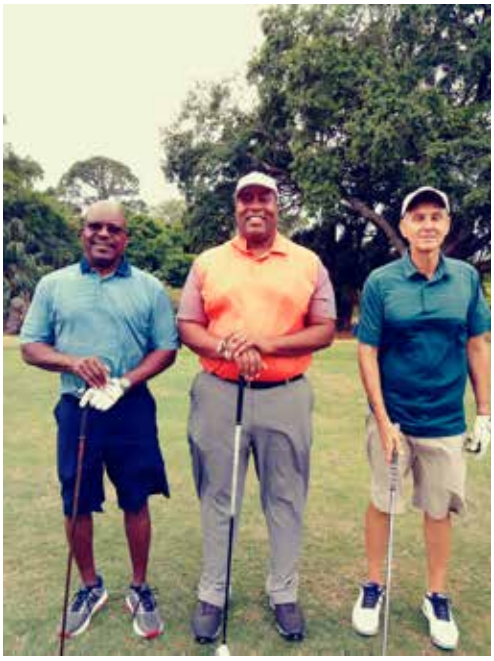


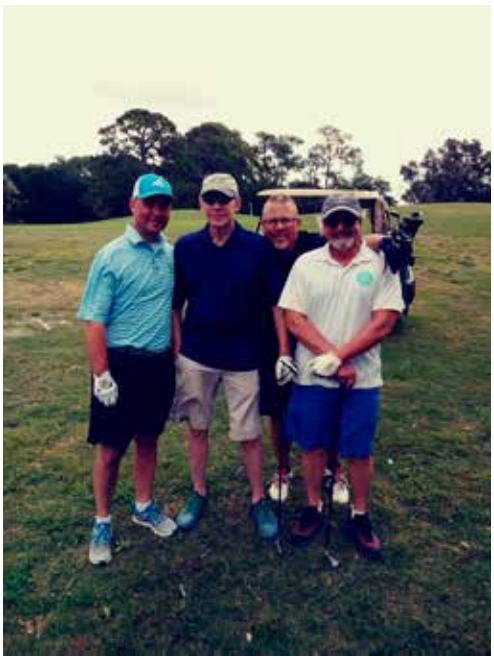


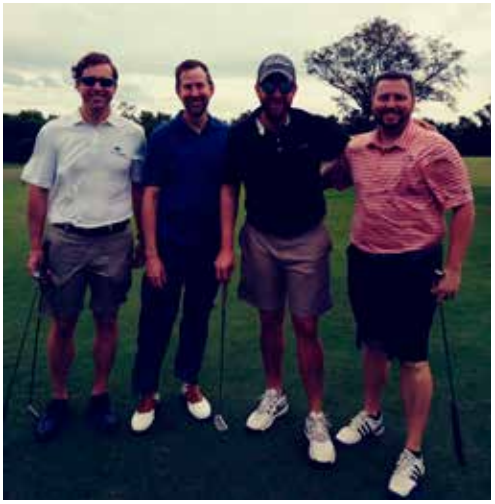


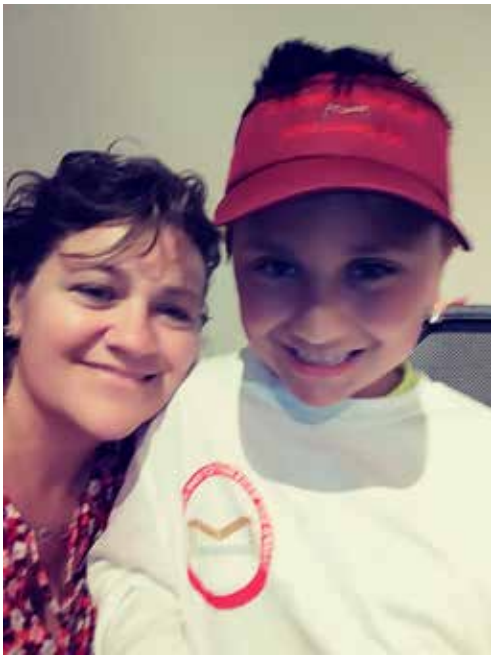












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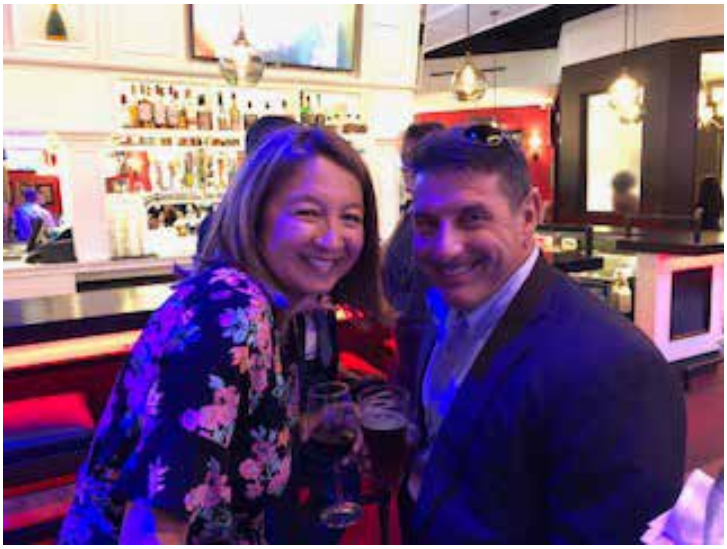
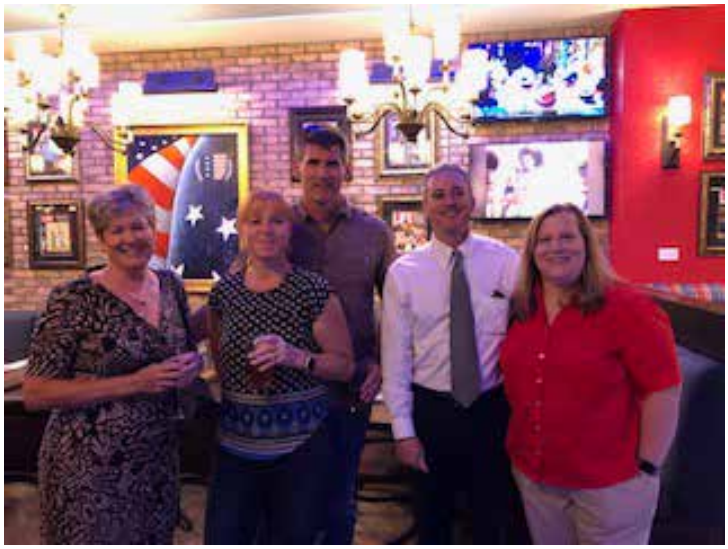
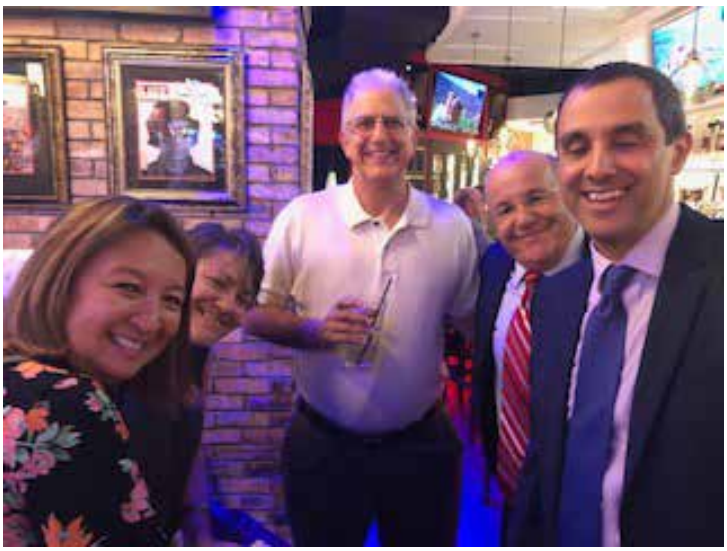
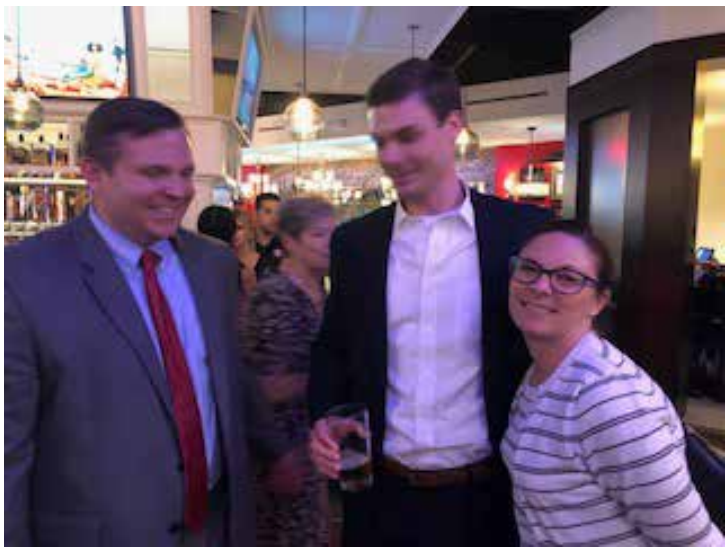








# Student Loan Sidebar

by: Christie Arkovich
cdalaw@tampabay.rr.com

Ignoring your debtor's federal student loans in their Chapter 13 bankruptcy can have catastrophic circumstances. While fixing vehicle, credit card and mortgage debt, you may have inadvertently allowed a debtor's $100,000 federal student loan to balloon into nearly $150,000 by doing nothing. This is because the standard procedure of the Department of Education is to place these loans into forbearance during a bankruptcy. However, now in Tampa, we are permitted to use the following Non-Conforming Provision in Chapter 13 Plans to permit our clients to enroll in Income Driven Plans and even Public Service Loan Forgiveness whenever eligible.

**On January 5, 2018, Trustee John Waage and Judge Catherine McEwen agreed to the following Non-Conforming language in In re Hyland, 8-17-bk-01564-CPM that now allows for Income Driven Repayment Plans concurrently with a Chapter 13.**

*On January 5, 2018, Trustee John Waage and Judge Catherine McEwen agreed to the following Non-Conforming language in In re Hyland, 8-17-bk-01564-CPM that now allows for Income Driven Repayment Plans concurrently with a Chapter 13.*

**The permitted language:**
The Debtor(s) shall be permitted to pay her Federal Student Loan(s)/U.S. Department of Education Loans outside of the plan. Claim(s) XX shall be allowed, however, claimant shall not receive any distributions by the Chapter 13 Trustee under the confirmed plan. The Debtor(s) shall not be entitled to discharge in whole or in part of any student loans. The Debtor(s), is/are currently in an Income-Dependent Repayment Program ("IDRP"). The Debtor(s) shall continue to pay his/her Federal Student Loan(s)/U.S. Department of Education Loans pursuant to the IDRP separately and outside of the Plan without disqualification due to the bankruptcy. Federal Student Loan(s)/U.S. Department of Education Loans shall not place the student loans into a deferment or forbearance because of the filing of the Chapter 13 bankruptcy case. For so long as the student loans are paid outside of the plan, it shall not be a violation of 11 U.S.C. 362 or any other applicable law or regulation for the Federal Student Loan(s)/U.S. Department of Education Loans to communicate directly with the Debtor by mail, telephone or email. In the event that a different IDRP is offered by Federal Student Loan(s)/U.S. Department of Education Loans, which offers more favorable repayment options, the Debtor(s) shall be permitted to seek participation in such IDRP without disqualification due to this bankruptcy and without further permission of the court. Debtor(s) may recertify under the applicable IDRP annually or as otherwise required and shall within thirty (30) days following a determination of her monthly payment due pursuant to such recertification file an amended budget to reflect such change. Federal Student Loan(s)/U.S. Department of Education Loans shall not be required to enroll Debtor(s) in any IDRP unless Debtor(s) otherwise qualifies for such IDRP.

* * * *

Our thanks go out to Robert Geller and Tim Sierra for assisting in these efforts. They each have obtained misc. orders allowing for IDRP and separate classification. I have a depository of these documents and case numbers. If you would like copies, please feel free to send me an email.

**Borrower Defense to Repayment Program Is Stalled**
For those with federal loans where fraud is alleged, the news is not so good. The BDTR program that came out under President Obama's watch in November 2016 has been placed on hold by Secretary DeVos. Steps are underway now to re-write the program. While the approval rates under BDTR initially looked very promising

# Student Loan Sidebar continued

at nearly 60%, it is unknown what will happen under the new administration.. A December 8, 2017 Report by the Inspector General's office resulted in several news stories declaring the end of the program. While that is not completely accurate, often justice delayed is justice denied and with new rules being delayed until July 2019, the ability to forgive federal loans for fraudulent representations by the school is not looking very promising.

**Tax on Death and Disability Discharges is Gone . . . For Now.**

One lesser discussed provision of the new tax bill passed at the end of 2017 provides great news for student loan borrowers. Borrowers who have their loans canceled due to death or disability are no longer taxed for the forgiveness. This also applies to those parents who have taken out Parent Plus loans for their children and their child dies (there is no forgiveness of a Parent Plus loan if the child becomes disabled, it is the parent who must be disabled). The new law takes effect January 1, 2018. Those with loans discharged prior to 2018 are still potentially taxable. However, those with disability discharges should be able to argue that the loan is not actually discharged for tax purposes until the three-year monitoring period has ended – this is also when the 1099-C is sent.

This tax relief for student loan borrowers is set to expire at the end of 2025.

**Two Florida Class Actions Underway For Servicer Misrepresentations under PSLF**

Navient and Great Lakes are Defendants in Florida based class actions under the Public Service Loan Forgiveness program. Over the summer, we noticed that many clients were reporting that they were being told they were in the PSLF program and accruing time toward the ten-year forgiveness, only to now find out that they did not even have the correct loan type (Direct) or were not in the correct repayment plan (Income Based or Ten Year Standard).

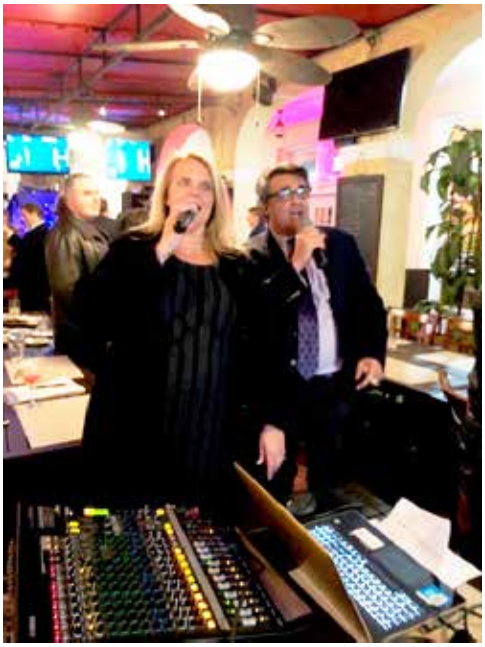
**Similar to Bankruptcy, Planning is Necessary to Keep the Debtor's Tax Refund if They are in Default on Federal Student Loans**

After a federal student loan defaults, which occurs once the debt is delinquent more than 270 days, a tax interception order is entered. The borrower will need to cure the default to receive his tax refund. There are two methods to cure a federal student loan default: consolidation and rehabilitation.

Consolidation is faster. A new Direct loan replaces the old loan in approximately 45 days. It will also convert an older FFEL loan to a Direct loan for eligibility for better repayment terms under Repaye (10% of discretionary earnings), PSLF for public service workers and an Income Contingent Repayment Plan for those with Parent Plus loans.

A rehabilitation is the second method to cure a default, but it takes nine months, during which a tax refund can be seized. It is important to have the borrower file an extension to get beyond the nine months. Once the nine months of rehab payments are made, the tax interception order is lifted as the default is now cured.

# TBBBA Karaoke 2019



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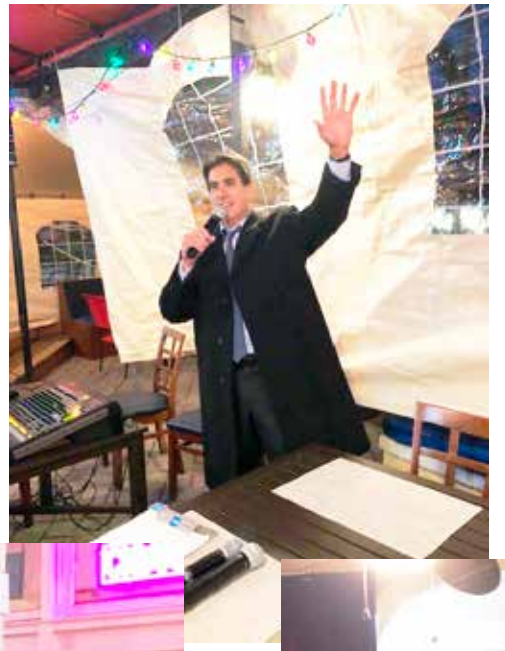

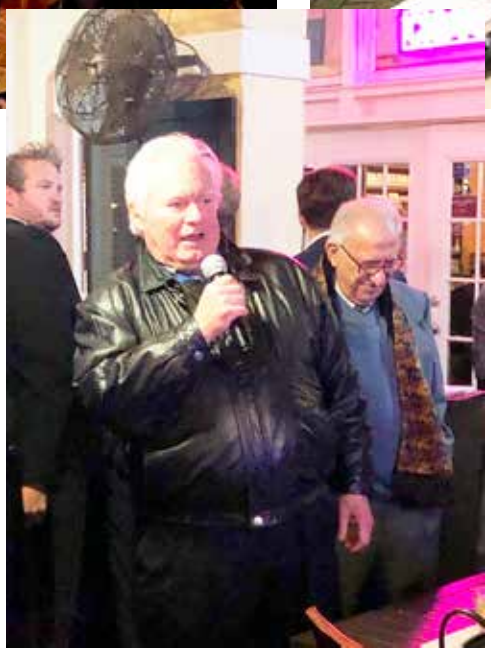

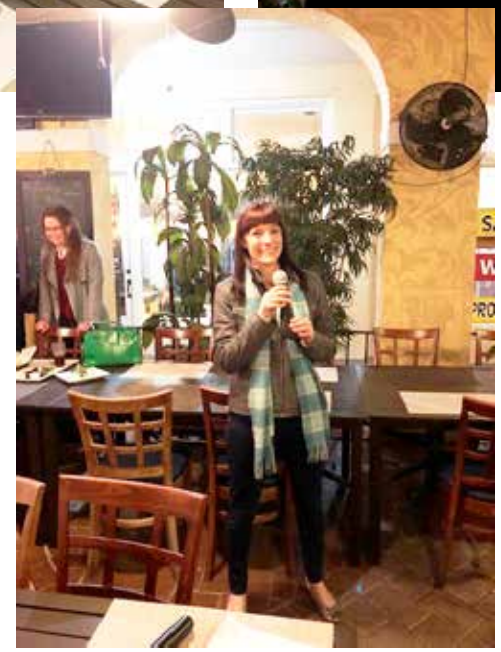

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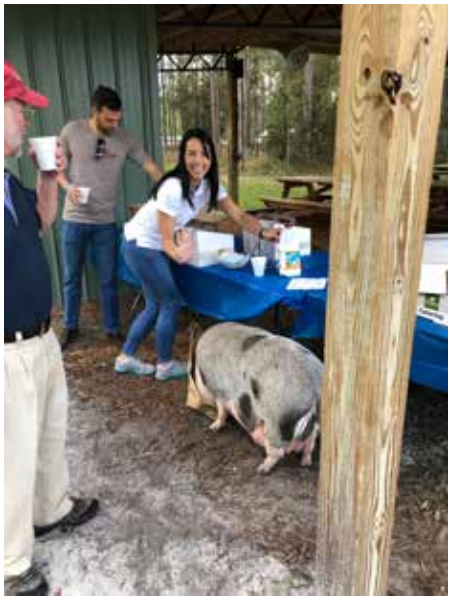

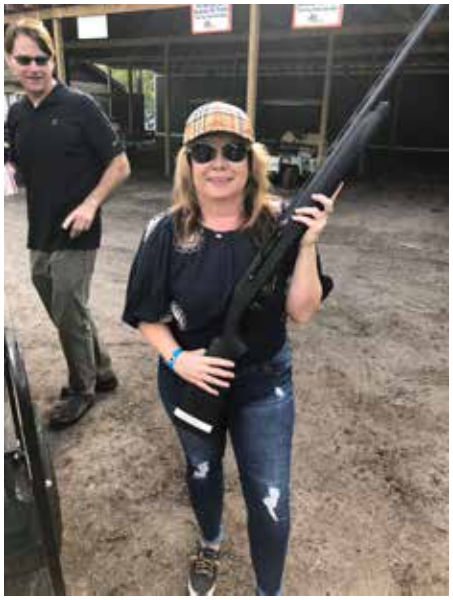

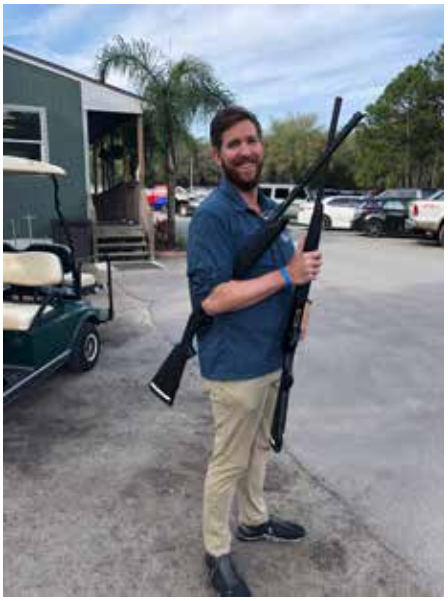

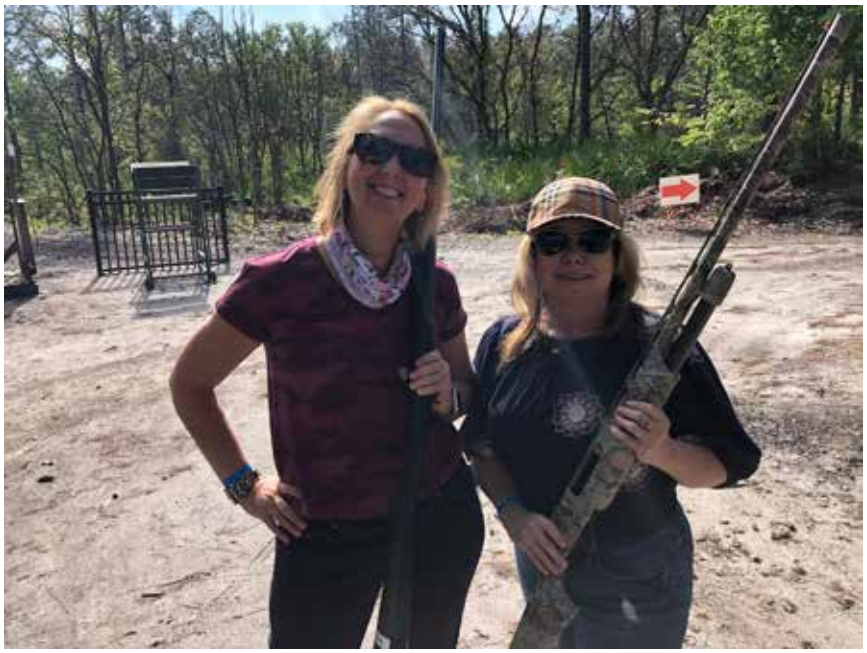

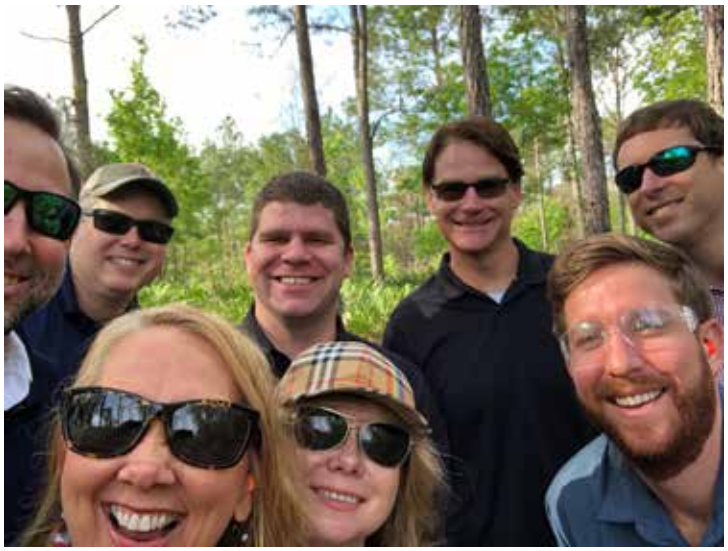

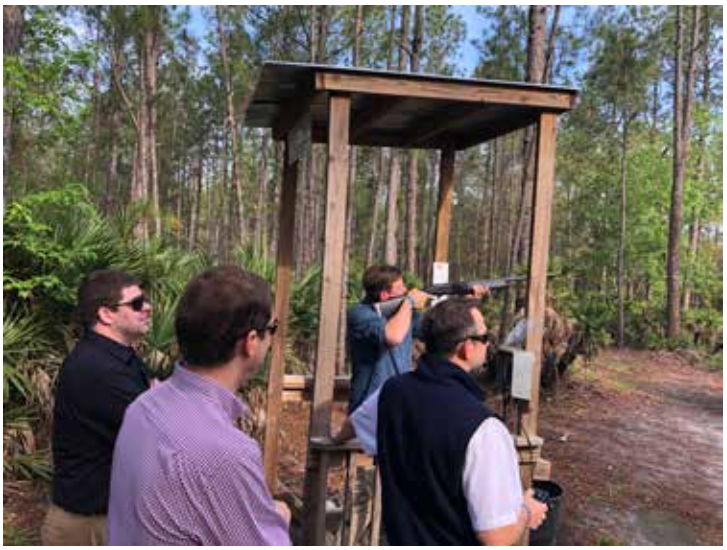

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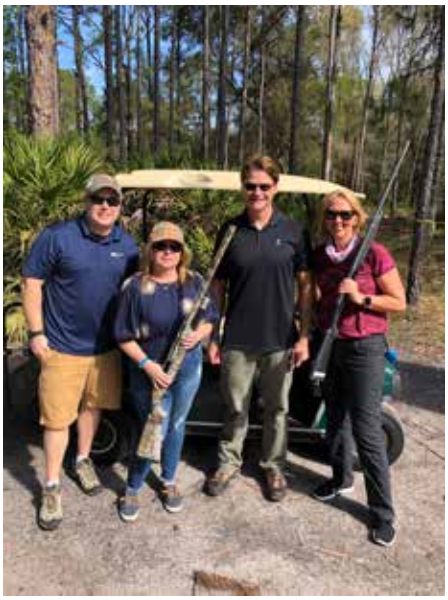

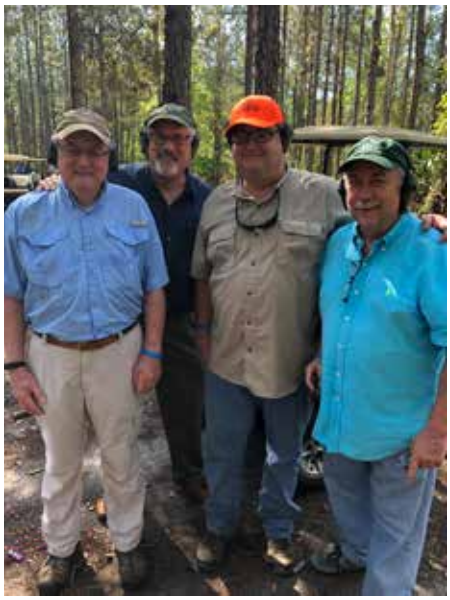

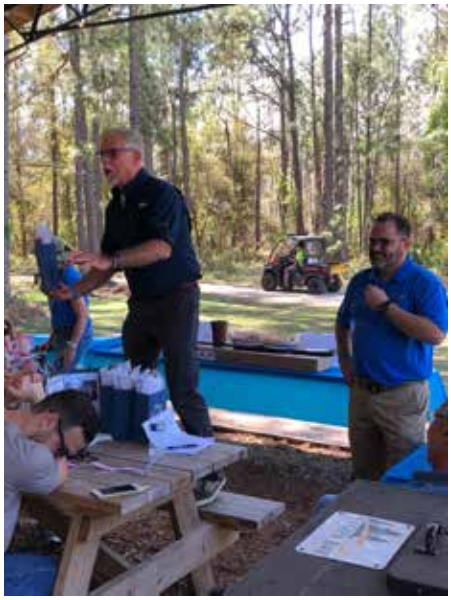

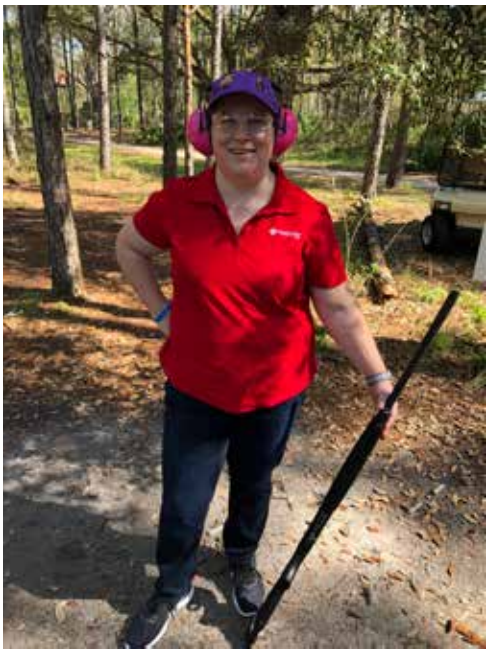

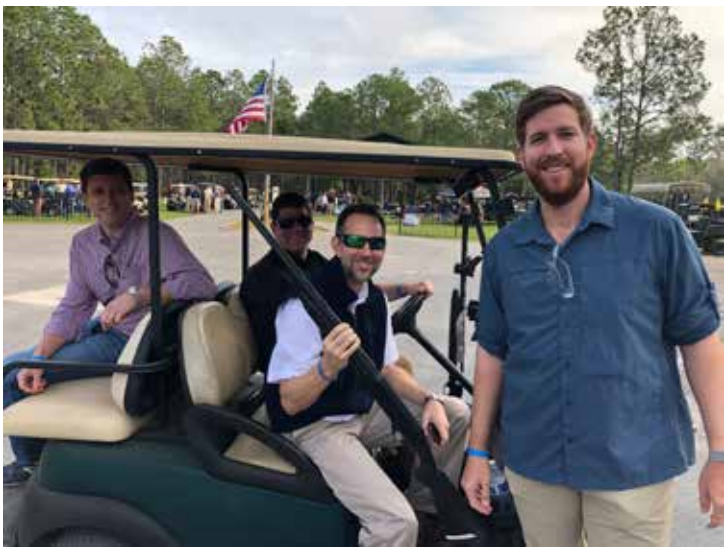

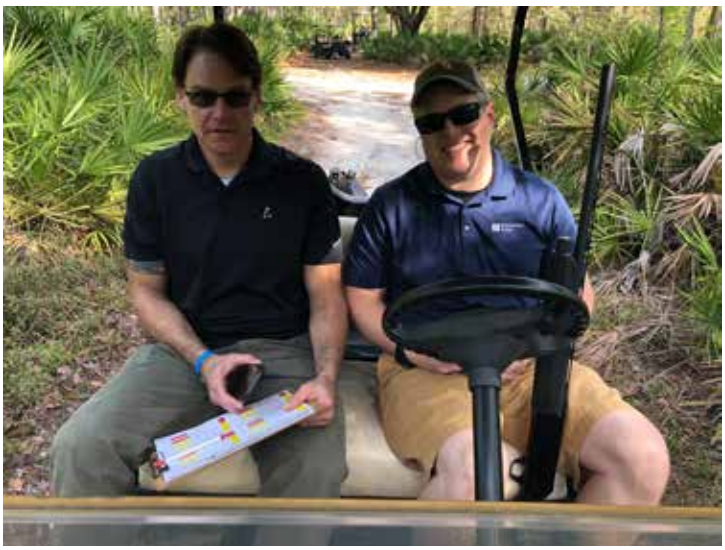

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