Spring 2021

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-chief,
Erik Johanson, Erik Johanson PLLC

PRESIDENT'S MESSAGE

by Kathleen L. DiSanto Bush Ross, P.A.

As Women's History Month comes to a close, I thought it would be fitting to share a little history and statistical data with respect to the TBBBA. Thanks to Judge McEwen's archive, I learned that in 1990, just two years after the TBBBA's inception, the mailing list of 900 names included 117 women, at least twelve of whom are active in bankruptcy in the Middle District today! Today, 36% of the TBBBA's membership is female. I am the ninth female president of the TBBBA, following the legacy of Judge Colton, who was the organization's first female president for the 1995-96 term, and nothing makes me prouder than to know that there will be countless women to follow.

While Women's History Month may be over for the next 335 days, the importance of advancing the position of women in our society and our profession is year-long. A spontaneous buy several years ago at Fresh Market, my favorite refrigerator magnet reads: "Here's to strong women. May we know them. May we be them. May we raise them." While I try to do my part with my four daughters, I also believe I owe it to current and future female colleagues to open wider the doors of opportunity that the trailblazers who came before me cracked open for my generation. And we have our work cut out for us—while approximately 50 percent of law firm associates are female, only 20 percent of equity partners are women. As for knowing strong women, I am grateful to have many strong women of character in my life.

The first woman who comes to mind is the one who has known me the longest. For the majority of my childhood, my mother was a single mother who raised three independent and highly-motivated women. She made sure our childhood was rich with experiences—trips to the Smithsonian museums in Washington (one of the perks of growing up in Northern Virginia), an endless supply of books, and fabulous adventures in Girl Scouts. My mom made so many sacrifices to ensure that my sisters and I received a good education and she always encouraged us to aim high in both athletics and academics. My mom pushed my sisters and me to dream without limits and work tirelessly towards those dreams. As a mama of five myself and knowing how much I rely on my husband to approach parenting as a team, I am in awe of all my mom has done and continues to do for my sisters and me.

Here in the Middle District, we are fortunate to have had a strong female presence in our bankruptcy court for more than two decades, beginning with Judge Jennemann. As Ruth Bader Ginsburg famously said, "I'm sometimes asked when will there be enough [women on the Supreme Court]. And I say when there are nine, people are shocked. But there'd been nine men, and nobody's ever raised a question about that." It always makes me smile to know that of our currently sitting judges in the Middle District, more than half of them are female.

And I am a direct beneficiary of female judicial mentorship—I would not be where I am today without Chief Judge Delano, and my gratitude for her mentorship during both my clerkship and throughout the course of my career has only grown over the years. Judge Delano set an incredible example for balancing a demanding career with being a mom, and has always inspired me to strive to be my best self, as both a lawyer and mother. Judge not only provided me with an incredible foundation on which I have built my practice, but she also gave me the gentle push out of the nest by encouraging me to enter private practice when the time was right, giving me both roots and wings.

This month in particular, I am profoundly grateful for the opportunity to lead our Board, and I want to take a moment to recognize the women who have led the TBBBA, those women who lead the TBBBA today with me, and those women who will lead our organization in the future. You inspire me, and I continue to be in awe of all your accomplishments within the TBBBA and throughout not only our local bankruptcy community, but also across the nation.

Stay well, and I look forward to reconnecting in person (hopefully) in the very near future.

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

Questions and Answers with Hon. Lori V. Vaughan, United States Bankruptcy Court, Middle District of Florida, Orlando Division

By Megan Murray
Underwood Murray PC

It's hard to believe it's been almost exactly a year since Judge Lori V. Vaughan took the bench in Orlando. One could call it a homecoming, coming full circle, or better yet for Judge Vaughan, fulfilling a lifelong dream. As many readers of this publication know, Judge Vaughan served as judicial law clerk to the Honorable Karen S. Jennemann, an icon to many as the first female Bankruptcy Judge and Chief Bankruptcy Judge in Florida. Prior to clerking, Judge Vaughan graduated from Eckerd College with a degree in Political Science with high honors and received her J.D. with honors from the University of Florida Levin College of Law, and has been working towards the bench ever since. Coming up on the one year mark, I had the opportunity to sit down (virtually) with Judge Vaughan and see how the year went. Here is what I learned:

It's hard to believe it's been almost a year. How has your first year on the job been?
It is hard to believe. It certainly doesn't feel like it has been a year. This first year has been exciting, wonderful, and a little nerve wracking. I certainly did not expect to be handling all of my hearings by phone or video. I have had to learn a lot this year and am still in the process of figuring it all out, but I love my new job.

Was it what you expected?
Yes and No. No one expected COVID would change how the court operates. Even beyond COVID I could not have predicted how much my life would change with this new position.

What was not as you expected?
I clerked over 20 years ago, before CM/ECF. The processing of pleadings and orders and the calendaring system are all new to me. I was pleased and impressed at the efficiency of the system and the systems we have in the Middle District for our calendars and orders.

What has surprised you the most?
Probably the most surprising thing to date has been the quick reflexes of the bar and their adjustment to my rulings and practices. In making changes or rulings, even if it's just from the bench, the word spreads quickly and the bar adjusts. It's impressive!

What do you miss about private practice?
Certainly not timesheets! I miss seeing my friends and colleagues on nearly a daily basis. Between taking the bench and COVID restrictions, my social outlets have nearly disappeared. I look forward to the days when we can get together again and I can visit with the folks in Tampa.

How is it living in Orlando (aka, coming home). I'm sure it's changed since you were last living here. What's new?
I am loving Orlando. We recently moved into a lovely new home in Winter Park and I am thrilled to be there. Orlando seems much bigger than I remember. It is bigger in the sense of more people and busy roads, but also in the sense that there is much more available. Orlando seems to offer more to do and see and I am enjoying getting to know the area again, even if it's very limited at the moment.

Describe your judicial philosophy.
Simply put, I have no desire to run your case, but I will not hesitate to step in if I think justice requires it.

I looked for your "preferences" on the FLMB website and didn't see any. Do you have any practice preferences you'd like to share with the bar?
I expect to put out some preferences this year, but until then I will just say three things, most of which you have probably heard before. 1. Be brief. Most issues can be addressed adequately in 2-3 pages. 2. Do not expect me to have reviewed any last-minute pleadings. Most days I have several cases and simply do not have time to review a pleading filed the night before or the morning

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Q & A w/ Judge Vaughn

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of a hearing. 3. If you are making a legal argument, make sure you cite to or provide me with the case law. I will typically review the cases before the hearing and will follow along with you during the argument.

What is your biggest "pet peeve"?
Counsel who do not communicated with opposing counsel before the hearing. Counsel should always reach out to see if they can settle or narrow their disputes.

What makes your job easier?
Counsel who are prepared and who address the issues in their pleadings.

What makes it harder?
Unprepared counsel.

What is the funniest thing that's happened in your courtroom so far?
We frequently have uninvited guests in our video hearings. The funniest was when counsel's husband peaked through the doors behind her and then proceeded to come into the room with her frantically pushing him out the door. Recently, one attorney's cats decided to have a fight in the background of a hearing.

When COVID is no longer a concern, what are you looking forward to the most?
I look forward to seeing more people, attorneys, colleagues and friends. I also look forward to going to a theater and traveling.

ZOOMing Along... How to get the most out of your next virtual mediation

By Roy Kobert
GrayRobinson

Even after the pandemic is well under control, virtual mediations will remain a viable platform. The associated savings in third-party costs (airfare and hotel) and the reduction of professional downtime reduces the overall economic burden of the process. Here are some practical tips to put you and your client in the best procedural light at your next virtual mediation.

Speed is everything
Consider hardwiring your home computer with an ethernet cable directly connected to the modem. There are online services which test your internet speed for free.[1] Bear in mind that others doing online homework or playing video games are competing for available bandwidth. A simple way for you to incrementally increase speed is to close unnecessary windows on your device.

Make your bed!
Studies have shown that if you make your bed each morning, the rest of your day will be more organized and productive.[2] Making your bed will give you a sense of accomplishment and provide you momentum for the next task. Besides, an unmade bed in the background reflects poorly on your professional image!

The shoreline and the deep woods
Virtual backgrounds are distracting. Though we all would rather be at the beach or in the forest, the focus should be squarely on you. Most virtual backgrounds will frame you with a halo. If you move too quickly, you will disappear into the virtual background. Moreover, virtual backgrounds take up much-needed bandwidth.

Put your best foot forward
When using a non-virtual background, make sure there isn't a mirror behind you.[3] Find a background with bold and richly textured colors that pop such as pink, blue, taupe, or chocolate. A "zoomer" should also avoid a background with too much intricate detail. Avoid making "the hostage video" of your silhouette against a white wall. Add your favorite painting or a simple model depicting your hobby to break up the monotony of a boring wall.

Lean in and use your hands
For emphasis, lean in and speak slowly and clearly. The best way to underscore a salient point is with your hands. If your camera is positioned so the viewer cannot see your hands then this form of nonverbal communication is lost. Depending on the speed of your modem, there may be upwards of half a second delay. By speaking slower you're more likely to capture your listeners' attention and take command of your presentation.

Be the News Anchor and not the Weathercaster
If you stand during mediation, it is unlikely the camera will be trained on your facial features due to the distance between you and your screen. A podium could further obscure hand gestures. Besides, it's an awfully long time to remain standing during a marathon mediation. Save the podium for oral argument.

Can you hear me now?
Consider investing in Air pods or a pair of wired mic-enabled headphones. Being heard clearly is paramount. If your bandwith is compromised, Zoom will automatically prioritize your audio over your video.

Lights! Camera! Action!
Have a light aimed at you. Consider investing in a simple ring light[4] which clips on the front of your computer with different light settings. "Zoomers" can also face a window that illuminates facial features with natural lighting – but this tactic is ineffective if the mediation session runs through the evening. If you are worried about how your facial features resonate on screen, join the mediation early to test it out and make any necessary adjustments.

Give the plaid jacket to the used car salesman. Solid patterned clothing works much better than stripes, plaids, or other busy patterns which are distracting with any movement on screen.[5] Again, if in doubt, keep it simple.

The makeup chair
Via Zoom settings, you can enable "Touch Up My Appearance" to reduce under-eye baggage and mild skin blemishes giving you a polished look.

Bats in the cave[6]
Sometimes the camera angle forces the audience to look up someone's nose, at their chin, or worse, at the revolving ceiling fan. Have the camera oriented toward your face at eye level. You can purchase a monitor stand[7] or utilize a stack of books to elevate your screen.

What's in a Name?
Verify how your name appears in the lower left portion of the screen. If you are on your child's laptop his/her name could be projected on the screen. If you are utilizing a cell phone feed, typically only the cell number will appear. To fix this, move your mouse to the upper right-hand portion of the screen and click on the series of ellipses (…). Thereafter, scroll down to the "rename" feature to correct your title. It is imperative that you are easily identifiable not only to the mediator but to your client as well.

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1 See www.speedtest.net.
2 Make Your Bed: Five little things that can change your life and world. By Adm. William H. McRaven, former Navy Seal. Tip #1: Start your day off by completing a task.
3 See "Zoom with a View" The Wall Street Journal, February 20-21, 2021 page D2.
4 Radiance Selfie Ring Light priced at $15.99 available on Amazon.com.
5 "Zoom In On Style" The Wall Street Journal, February 20-21, 2021, page D1.
6 For those of you who have teenagers, you will understand the meaning of this lead-in. If not, just call me.
7 Monitor Stand Riser Adjustable Desktop Stand $20.79 available at Atumtek.com.

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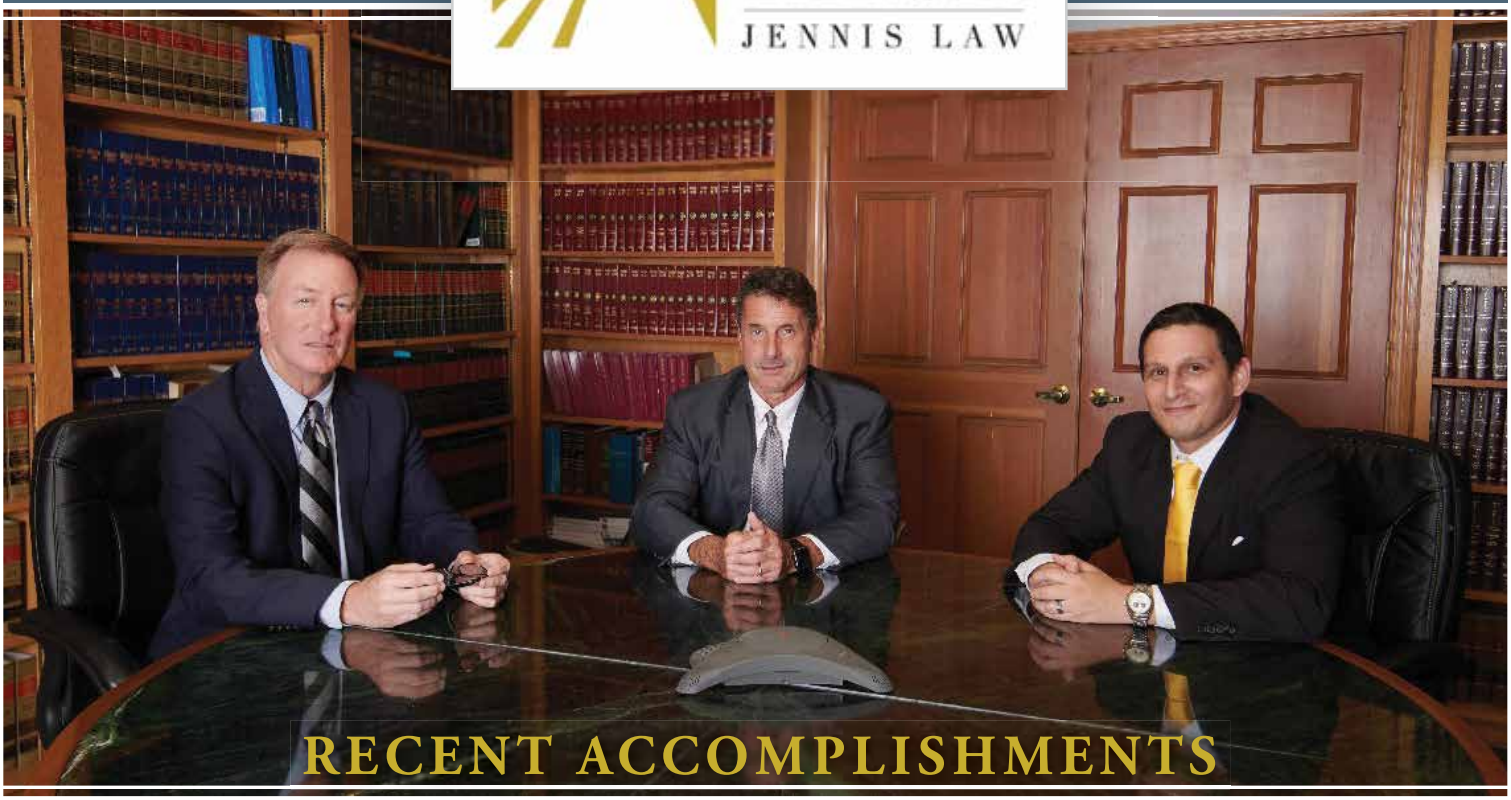

RECENT ACCOMPLISHMENTS

- Presenting on the "Business Law Update" at the 2021 Alexander L. Paskay Memorial Bankruptcy Seminar.
- Participated in the "The Many Perspectives of the Small Business Restructuring Act" hosted by the CFBLA/JBBA.
- Guest Lectured on the "Procedural Issues Including Withdrawal of the Reference, Jurisdiction (Stern and Safe Harbor Issues), Venue and Abstention" at Stetson University.
- Featured in the "Re-Imagine Your Future Under Subchapter V: A Chapter 11 Survival Tool for Small Businesses" at St. Leo University.
- Conferred AVVO, Martindale and Super Lawyer's Highest Honors.
- Published Per Plan vs. Per Debtor (Fall 2020) and It's a Trap! Small Business Confirmation Requirements (Spring 2020) in THE CRAMDOWN.
- Opened Sarasota Office at 50 Central Avenue.
- Confirmed the first Subchapter V bankruptcy case in the Middle District of Florida.
- Presented on "Everything You Need to Know About Attorneys' Fees and Sanctions in Bankruptcy" at the 2020 Alexander L. Paskay Memorial Bankruptcy Seminar.

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ZOOMing Along

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Background theater
When not speaking, place yourself on mute to avoid distracting background noises. There are numerous ways to unmute yourself, the easiest of which is to hold down the spacebar when speaking.

Prior to rising to stretch your legs or use the facilities, turn off your video. The less distractions the better for the process. When you disable your camera, you can establish settings for the screen to typically broadcast your name or your professional headshot.

"Private chat" may not mean "private chat"
When you are placed in private caucus with your client, you may be tempted to utilize the private chat feature. Why? You can see your client in private caucus so elect to speak to them directly. Why would you ever want to potentially memorialize what you are saying in a private chat. If for any reason the session is being recorded (and it shouldn't be), then the private chat would be recorded as well. Just as the delete feature on an email doesn't completely delete that email, you can't delete a "private chat" that was recorded.[8] In the general session, everyone can see what you've submitted via the chat function, so don't use it.

Passing Notes
Exchange cell phone numbers with your client. This will allow you to receive and send text messages and communicate privately as warranted.

Raise your hand
When in caucus, there is a button on the bottom tray to ask for help. This lets the mediator know that you want her to return to your caucus room. If the mediator is not responsive, consider texting the mediator to rejoin your caucus session.

Steve Jobs vs. Bill Gates
For greater functionality, PC's typically work better than Macs, iPads, tablets, or cell phones. If you are participating in a virtual mediation through a tablet or smart phone, keep it plugged in. The Zoom app is an energy hog.

Gang Mediation
There are pros and cons of having your client in the same physical conference room with you during a virtual mediation. The positive benefits are obvious. Conversely, if you don't have a set up with a large TV screen for all participants to be seen simultaneously, two or more laptops in close proximity generate feedback, making it difficult to decipher speech. Go ahead and have a laptop per participant, but remember, laptops require, similar to COVID-19 social distancing, six feet of separation.

Audiovisual aids
If you will be using media during your opening statement (i.e. an excerpt of a document, spreadsheet, organizational chart, or PowerPoint) let the mediator and opposing counsel know in advance. Have the visual aid uploaded before the mediation starts so it is queued up when utilizing the "Share Screen" feature. Be careful! Before you pull up your document, everyone will be able to see the open tabs on your laptop, so close any attorney-client items.

Pack a lunch
"Momentum" is a critical component of any mediation, live or virtual. There is nothing worse than the mediator returning to your caucus room but not everyone is present to make a decision and momentum is lost. Plan in advance to bring a lunch or secure delivery via Uber Eats or Door Dash.

Your autograph
If a settlement is achieved, it should be documented using the shared screen function. Bring a draft to mediation containing the salient terms most important to your client. Parties should NEVER leave a successful mediation without an executed settlement: signatures can be obtained digitally via DocuSign or similar software programs. No scanners are necessary. If your mediator does not have a software license, then execute the settlement agreement in counterparts. No ability to collect counterparts? Modify the settlement to explicitly provide that the attorneys can execute and bind their respective clients as their agents. If all else fails, all parties can execute the settlement, followed by camera phone pictures of each page of the completed document exchanged contemporaneously.

Leave the meeting
Embrace this technology, even though some mediations are more conducive to being conducted face to face. Like with all technology: practice, practice, practice. Let's help each other during these challenging times. Any questions or thoughts, just call my cell at 321-945-2888.

Roy S. Kobert has mediated all facets of bankruptcy cases, both in person and virtually. He has been Board Certified in Business Bankruptcy Law for nearly 20 years.

[Disclaimer: Roy bought Zoom stock in March, 2020.]

8 "Never email if you can call. Never speak if you can nod. Never nod if you could wink." Author: unknown.

People on the Go

NICHOLAS LAFALCE has been named as a Partner at Anthony & Partners, LLC in the firm's downtown Tampa office. Mr. Lafalce has represented various types of financial institutions, commercial banks, and other lenders in commercial litigation actions and bankruptcy matters and various types of business entities in derivative and dissolution litigations as well as real property disputes. Nicholas focuses his practice on creditors rights, commercial litigation, bankruptcy, commercial mortgage foreclosure, and collection actions.

He is a Tampa attorney who focuses on solving a diverse range of business problems throughout the state of Florida.

Nicholas received his B.A. from the University of South Florida and his J.D. from the University of Miami School of Law.

ANDREW GHEKAS has been named as a Partner at Anthony & Partners, LLC in the firm's downtown Tampa office. Mr. Ghekas has represented various types of business clients, financial institutions, and other creditors. Since joining Anthony & Partners in 2015, Andrew has represented clients in a variety of complex and highly contested commercial and business litigation cases. His experience includes representing various financial institutions, private equity lenders, corporations, and individuals in a range of noncompete litigation, fraudulent transfer litigation, commercial foreclosure litigation, contract disputes, post-judgment collection activities, and other general commercial litigation.

He is a Tampa attorney who focuses on solving a diverse range of business problems throughout the state of Florida. Mr. Ghekas received his B.A. from Florida State and received his J.D. from Stetson University College of Law – Magna Cum Laude. Mr. Ghekas has been continuously selected year after year to the Florida's Super Lawyers Rising Stars list since 2018, was previously selected to the Florida Trend's Legal Elite Up & Comers list for 2018, and most recently was selected to the Best Lawyers "Ones to Watch" Inaugural class for 2021.

TOWNSEND BELT has been named as a Partner at Anthony & Partners, LLC in the firm's downtown Tampa office. Mr. Belt has represented clients in a broad spectrum of matters including real estate litigation, commercial litigation, insurance litigation, bankruptcy, and other general civil matters in state courts, federal courts, and on appeals.

Mr. Belt is a Tampa native, and a graduate of Jesuit High School and the University of South Florida. Mr. Belt graduated cum laude from St. Thomas University School of Law and holds an LL.M in Taxation from New York University.

Mr. Belt is committed to serving the Tampa Bay community and serves on the board of directors for The Italian Club of Tampa.

Anthony and Partners' *focus is in the areas of Arbitration, Bankruptcy, Creditors Rights, Complex Litigation, Personal Injury, Community Association Litigation, Commercial Real Estate and Lending Transactions, Business Transactions, Secured Transactions, Collections, and Sophisticated Collection Activities, serving their clients statewide in both State and Federal venues. The Firm's founders have an extensive number of years of specialized experience focusing in these areas as members of the Florida Bar.*

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A Case Study on Avoiding Excessive Attorney's Fees under Section 506 of the Bankruptcy Code

Michael Barnett
Michael Barnett, PA

The amount of fees allowed to a substantially oversecured creditor, Farm Credit, in a complicated Chapter 12 case was at issue before Judge Collins in *In re Kurtenback*, 2020 Bankr. LEXIS 3336, Case No 18-01607 (Bankr. N.D. Iowa, 30 Nov 2020). The Debtor had proposed five Chapter 12 plans from April 2019 until filing a liquidating plan on October 30, 2020. The plans were unusual in that they had different options depending on the occurrence of certain circumstances. Farm credit objected both to the form and the feasibility of the plans Farm credit required its counsel to allocate the billing over five different loan files, further complicating the review of the bills. There was no dispute that Farm Credit was substantially oversecured in the case.

Judge Collins noted that the allowance of fees and costs to oversecured creditors is governed by §506 of the Bankruptcy Code. This provides that to the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose. 11 U.S.C. 506(b) (emphasis added).

Three elements are required by this section: 1) that the creditor is oversecured in excess of the fees requested; 2) that the fees are reasonable, and 3) that the agreement giving rise to the claim provides for attorney fees.[1]

The Court initially examined the reasonableness of the fees. Courts have broad discretion under the reasonableness standard to meet the purpose of §506(b) to prevent creditors from failing to exercise restraint in the fees and expenses incurred. Courts should look to see if the creditor is exhibiting excessive caution, overzealous advocacy, and hyperactive legal efforts.[2] This requires an examination of factors including the complexity of the case, the hourly rates charged and the rates in the locality, whether the services were necessary to protect the client's interests, whether attorneys were able to efficiently and competently provide the requires services, whether billing judgment was exercised to avoid duplicate or unnecessary services, the results obtained, and the amount charged in similar cases.

Addressing the complexity of the case, Judge Collins noted that the multiple plans added to the case's complexity and required additional time and effort by the parties, as did difficulties involving the debtor's participation and cooperation in the case. However, these issues appear to have caused some 'excessive caution' by Farm Credit, which §506 is intended to check. The court found that the hourly rates charged by Farm Credit were reasonable, and noted they were far below rates charged by Debtor's counsel. The Court also found that the services of Farm Credit's counsel were generally necessary to protect its $2,000,000 oversecured position. However, the Court noted a duplication of effort and lack of efficiency in the services performed. Finally, the court disallowed $6,000 for work on a motion for relief from stay which was abandoned as being unlikely to prevail given the creditor's oversecured position.

The primary concern of Judge Collins related to efficient and competent services. While finding that counsel

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1 In re White, 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001) (citing First W. Bank & Trust v. Drewes (In re Schriock Constr., Inc.), 104 F.3d 200, 201 (8th Cir. 1997)).
2 In re Jointly Administered: Fansteel, Inc., 2017 Bankr. LEXIS 1265, at *8 (Bankr. S.D. Iowa May 9, 2017).

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were competent, indeed some of the best attorneys to appear before the Court, he found a number of issues as to efficiency. The Court looks to efficiency with an eye toward fairly preserving the value of the bankruptcy estate, thus imposing on creditor's counsel a requirement that they exercise restraint in the fees and expenses incurred. The confirmation hearing was scheduled eight times, with only one evidentiary hearing held, requiring a one-day trial. Farm Credit did a full preparation, including a new witness and exhibit list, exhibits, witness preparation, outline of testimony, preparation of memoranda of authority, cash-flow analyses, and details on objections for each hearing, resulting in a total of 450 hours of work related to at most one full-day hearing. The time entries, such as 'continued work on objections and exhibits for Second Amended Plan hearing in Cedar Rapids; work on lengthy objections, preparation of exhibits and exhibit list; research and briefing on status of plan objections; feasibility and other objection 2.6 hours' and 'work on preparation of hearing on preliminary hearing in Cedar Rapids on Third Amended Plan; work on Exhibit List, Witness List and Memorandum of Authorities; preparation for presentation' show a pattern of repetitively billing large blocks of time for the same activities inconsistent with this efficiency requirement. As another example, between May 8, 2019 and September 4, 2020, Farm Credit's counsel billed for preparing and reviewing witness and exhibit lists over 80 times. The same type of billing practice existed as to research and briefing feasibility objections, working on trial briefs and memoranda of authorities, and working on cash flow analyses.

Judge Collins had similar issues with the requirement to consider billing judgment and avoid duplicative services. Billing judgment requires that counsel staff a file in a manner that efficiently provides the most cost-effective representation necessary to a client's interest without redundant, duplicative, and unnecessary services, as well as a final review of the bills to ensure they meet the requirements of §506. The court found substantial duplication of efforts in the billings submitted by Farm Credit, such as 66.1 hours in billing entries involving multiple counsel billing for reading, reviewing, drafting, and revising the same motions and documents. At the $300 hourly rate, these duplicative billings account for $19,830 of the total fee. While proofreading and reworking are an important aspect of diligent lawyering, such diligence must be reasonable under §506 given the circumstances. The Court also noted a large number of examples of billling in the five separate loan files for the exact same entry, in the amount of 335.7 hours. The court had insufficient evidence of whether these multiple-file entries were a fair allocation of reasonable time spread over multiple client files or was an improper multiplication of an otherwise reasonable single time entry.

The Court found that counsel obtained excellent results for Farm Credit, preserving the client's oversecured position, however, they made no showing that its positions or arguments preserved estate property in any meaningful way. There was no showing of similar cases where similar amounts of fees were charged, though this was likely a unique case. Debtor's fees for all matters in the case are anticipated to be about $160,000, thus warranting some adjustment of the Farm Credit feee application.

The Court concluded that a 30% reduction in total fees was appropriate considering the above factors above and Farm Credit's failure to meet its burden of establishing that the full amount is reasonable under §506. The Court allowed $153,613.37, and disallowed $65,834.40 in Farm Credit's counsel's fees.

Le Centre on Fourth: A Cautionary Tale

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One of the benefits of practicing in the United States Bankruptcy Court for the Middle District of Florida (the "District") is the use of conditional approval of disclosure statements in Chapter 11 cases. Conditional approval often allows for expedited consideration of the debtor's plan of reorganization, saving debtors the added expense of a separate hearing to consider approval of the disclosure statement. Generally, the Court will enter its form *Order Conditionally Approving Disclosure Statement, Fixing Time to File Objections to the Disclosure Statement, Fixing Time to File Applications for Administrative Expenses, Setting Hearing on Confirmation of the Plan, and Setting Deadlines with Respect to Confirmation Hearing* ("Order Setting Confirmation Hearing"), and instruct the plan proponent to serve the Order Setting Confirmation Hearing, which contains the notice of the hearing to consider confirmation of the plan of reorganization. However, for those plans enjoining conduct that would not otherwise be barred under the bankruptcy code, savvy practitioners should consider taking additional steps to ensure compliance with the requirements of Federal Rule of Bankruptcy Procedure 2002(c)(3).

The case of *Le Centre on Fourth LLC,*[1] should serve as a cautionary tale and as a reminder to double check the service requirements for serving the notice of hearing to consider confirmation of a plan of reorganization. In *Le Centre on Fourth LLC*, the Debtor confirmed a plan of reorganization which contained a third-party injunction, i.e., enjoining conduct that would not otherwise have been enjoined under the bankruptcy code. The plan proponent served the plan, and notice of hearing for the hearing to consider confirmation, but did not specifically include the language required by Fed. R. Bankr. P. 2002(c)(3) in the notice of hearing. Well after the plan was confirmed, a party in interest petitioned the bankruptcy court to clarify that the third-party injunction contained in the confirmed plan did not apply to the party in interest because, inter alia, the plan proponent failed to comply with Federal Rule of Bankruptcy Procedure 2002(c)(3). The bankruptcy court found that the plan proponent had given sufficient notice to comply with due process requirements, and was affirmed by the district court. This decision is currently on appeal before the Eleventh Circuit Court of Appeals.

Given the District's practice of entering its form Order Setting Confirmation Hearing, practitioners must remain vigilant to ensure compliance with Fed. R. Bankr. P. 2002(c)(3) and avoid the issue which arose in *Le Centre of Fourth LLC*. An example of a way practitioners can seek to minimize the likelihood of protracted litigation includes adding a separate notice containing the requirements of Fed. R. Bankr. P. 2002(c)(3) to their service package containing the Order Setting Confirmation Hearing whenever their plan seeks to enjoying the conduct contained in Fed. R. Bankr. P. 2002(c)(3). While not technically compliant with the precise language of Federal R. of Bankr. P. 2002(c)(3), such an approach may at least present the foundation for colorable compliance, and hopefully reduce likelihood that any technical issues related to notice will arise post confirmation.

Case No. 20-12785 pending in the United States Court of Appeals for the Eleventh Circuit.

Understanding "actual fraud" in Husky: false representation required or not?

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Introduction

As the split among circuits deepened, the United States Supreme Court took up the case of *Husky Intern. Electronics, Inc. v. Ritz, ___ U.S. ___,* 136 S. Ct. 1581 (2016) to determine whether "actual fraud" requires a false representation or whether it encompasses other traditional forms of fraud that can be accomplished without a false representation, such as a fraudulent conveyance of property made to evade payment to creditors. The Supreme Court ultimately determined that the term "actual fraud" in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation. Judge Colton had an opportunity to apply *Husky* in Darras, et. al v. Nolan (In Re Andrew Nolan and Robin Nolan *dba* McDavid Public Relations), Adversary No. 8:16-ap-00195 (Bankr. M.D. Fla. August 4, 2016).

Facts

Between 2003 and 2007, Husky International Electronics, Inc. sold electronic device components to Chrysalis Manufacturing Corp. and Chrysalis incurred a debt to Husky International Electronics, Inc. of nearly $164,000. Respondent, Daniel Lee Ritz, Jr., Chrysalis' director and part owner at the time, drained Chrysalis of assets available to pay the debt by transferring large sums of money to other entities Ritz controlled. Husky sued Ritz in Texas state court to recover on the debt. Husky argued that Ritz' intercompany transfer scheme was "actual fraud" under a Texas law that allows creditors to hold shareholders responsible for corporate debt.

Ritz then filed for Chapter 7 bankruptcy. Husky filed an adversary proceeding under 11 U.S.C. § 523(a)(2)(A), seeking to hold *Ritz* personally liable. *Husky* argued that the debt was not dischargeable because *Ritz*' intercompany-transfer scheme constituted "actual fraud" under the Bankruptcy Code's discharge exceptions. The District Court held that the debt was not "obtained by... actual fraud" under §523(a)(2)(A) and thus could be discharged in bankruptcy. The Fifth Circuit affirmed, holding that a misrepresentation from a debtor to a creditor is a necessary element of "actual fraud". The Fifth Circuit found *Ritz* made no false representations to *Husky* regarding the transfer of Chrysalis' assets. The Fifth Circuit stated that *Ritz* may have hindered *Husky*'s ability to recover its debt, but that *Ritz* did not make any false representations to *Husky* regarding those assets or the transfers and therefore did not commit "actual fraud."

Historical perspective of "actual fraud"

Before 1978, the Bankruptcy Code prohibited debtors from discharging debts obtained by "false pretenses or false representations."[1] In the Bankruptcy Reform Act of 1978[2], Congress added "actual fraud" to that list. The prohibition now reads: "A discharge under [Chapters 7, 11, 12, or 13] of this title does not discharge an individual debtor from any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud."[3] The Supreme Court historically construed the terms in § 523(a)(2)(A) to contain the "elements that the common law has defined them to include."[4] "Actual fraud" has two parts: actual and fraud. The word "actual" has a simple meaning in the context of common-law fraud: It denotes any fraud that "involv[es] moral turpitude or intentional wrong."[5]

In *Husky*, the Supreme Court discussed that courts and legislatures have used the term "fraud" to describe a debtor's transfer of assets that, like *Ritz*' scheme, impairs a creditor's ability to collect the debt. Common law also indicates that fraudulent conveyances, although a "fraud," do not require a misrepresentation from a debtor to a creditor. Fraudulent conveyances are not an inducement-based fraud. Fraudulent conveyances

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1 11 U.S.C. § 35(a)(2) (1976 ed.).
2 Pub L. No. 95-598, 92 Stat. 2590.
3 11 U.S.C. § 523(a)(2)(A) (2012 ed.).
4 Field v. Mans, 516 U.S. 59, 69, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).
5 Neal v. Clark, 95 U.S. 704, 709 (1878)

Understanding "actual fraud"
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typically involve "a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration."[6] The *Husky* Court maintained that fraudulent conduct is not in dishonestly inducing a creditor to extend a debt. It is in the acts of concealment and hindrance. The opportunities for a false representation from the debtor to the creditor are limited.

As the Supreme Court explained, the famous *Twyne's Case*, which this Court relied upon in *BFP*[7], illustrates this point.[8] That principle underlies the now-common understanding that a "conveyance which hinders, delays or defrauds creditors shall be void as against [the recipient] unless... th[at] party ... received it in good faith and for consideration."[9] That principle also underscores the point that a false representation has never been a required element of "actual fraud," and the Supreme Court declined to adopt it in *Husky*.

"Actual Fraud" Analysis

The Supreme Court's interpretation of "actual fraud" in § 523(a)(2)(A) also preserves meaningful distinctions between that provision and §§ 523(a)(4), (a)(6). Section 523(a)(4) covers only debts for fraud while acting as a fiduciary, whereas § 523(a)(2)(A) has no similar limitation. Section 523(a)(2)(A) covers only fraudulent acts. Given the clear differences between the provisions, the Supreme Court declined to craft an artificial definition of "actual fraud" merely to avoid narrow redundancies in § 523 that appear unavoidable.

It is of course true that the transferor does not "obtai[n]" debts in a fraudulent conveyance. But the recipient of the transfer — who, with the requisite intent, also commits fraud — can "obtai[n]" assets "by" his or her participation in the fraud.[10] If that recipient later files for bankruptcy, any debts "traceable to" the fraudulent conveyance, will be nondischargable under § 523(a)(2)(A). Thus, at least sometimes a debt "obtained by" a fraudulent conveyance[11] scheme could be nondischargeable under § 523(a)(2)(A).

Judge Colton's Application of *Husky*

Judge Colton included a discussion of *Husky* in her Memorandum Decision and Order[12] in Darras, et. al v. Nolan. In the adversary proceeding, the Plaintiffs sought a declaration that certain unliquidated statutory and tort claims were nondischargeable under 11 U.S.C. §§1328(a)(2) and 523(a)(2), and/or §§1328(a)(4).

The Plaintiffs included Frank Darras, Natasha Marie Darra, and the Darra Law Firm, Inc. dba DarrasLaw. The Defendant in the adversary proceeding was Robin Nolan. All the Plaintiffs' claims were for unliquidated personal injury claims. The Plaintiffs hired Ms. Nolan to serve as an internet public relations consultant for DarrasLaw. Mr. Darras terminated Ms. Nolan's employment on December 3, 2014. Ms. Nolan responded with an electronic and internet campaign to defame and discredit Mr. Darras, his law firm, and his daughter Natasha Darras. Ms. Nolan allegedly refused to turnover login information and improperly accessed, tampered with, and posted to the DarrasLaw Twitter account.[13]

The Plaintiffs argued that *Husky* expanded § 523(a)(2)(A) to include claims for defamation resulting from false statements. Judge Colton disagreed and stated that *Husky* holds that "actual fraud" is separate and distinct from "false pretenses" or "false representation" as a matter of statutory construction. *Husky*, 136 S. Ct. at 1590. In essence, Judge Colton held, the Supreme Court ruled that § 523(a)(2)(A) expressly recognizes three distinct

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6 BFP v. Resolution Trust Corporation, 511 U.S. 531, at 540-541, 114 S. Ct. 1757, 128 L.Ed.2d 556 (1994), (citing Twyne's Case, 3 Co. Rep. 80b, 76 Eng. Rep. 809 (K.B. 1601)); Orlando F. Bump, Fraudulent Conveyances: A Treatise Upon Conveyances Made by Debtors To Defraud Creditors 31-60 (3d ed. 1882)
7 BFP v. Resolution Trust Corporation, 511 U.S. 531 (1994)
8 Twyne's Case, 3 Co. Rep. 80b, 76 Eng. Rep. 809, 823 (convicting Twyne of fraud under the Statute of 13 Elizabeth, even though he was the recipient of a debtor's conveyance)
9 Garrard Glenn, Law of Fraudulent Conveyances § 233, 312 (1931)
10 McClellan v. Cantrell, 217 F.3d 890 (7th Cir. 2000)
11 Field, 516 U.S. 59, 61 (1995)
12 Memorandum Decision and Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Darras, et. al v. Nolan (In Re Andrew Nolan and Robin Nolan dba McDavid Public Relations), Adversary No. 8:16-ap-00195 (Bankr. M.D. Fla. August 4, 2016), ECF No. 28
13 Adversary Complaint, Darras, et. al v. Nolan, Adversary No. 8:16-ap-00195 (M.D. Fla. August 4, 2016), ECF No. 1, ¶¶ 37-42

ways to fraudulently obtain a debt for "money, property, services, or an extension, renewal or refinancing of credit" and, in doing so, render that debt nondischargeable. *Id*.

The Supreme Court not only remanded *Husky* for further evaluation in light of its ruling[14], but also went to great lengths to describe how assets can be "obtained" in a fraudulent transfer:

> It is of course true that the transferor does not "obtain[n]" debts in a fraudulent conveyance. But the recipient of the transfer—who, with the requisite intent, also commits fraud—can "obtain[n]" assets "by" his or her participation in the fraud. If that recipient later files for bankruptcy, and debts "traceable to" the fraudulent conveyance…will be nondischargeable under § 523(a)(2)(A). Thus, at least sometimes a debt "obtained by" a fraudulent conveyance scheme could be nondischargeable under § 523(a)(2)(A). Such circumstances may be rare because a person who receives fraudulently conveyed assets is not necessarily (or even likely to be a debtor on the verge of bankruptcy, but they make clear that fraudulent conveyances are not wholly incompatible with the "obtained by" requirement.

Id. at 1589 (citations omitted).

In contrast to the claims asserted by the Darras Parties, the fraudulent transfer scheme in *Husky* involved assets transferred by Daniel Ritz from an insolvent company to "other entities Ritz controlled."[15] Under Texas law, Ritz's fraudulent acts rendered him personally liable for the debt owed to the vendors,[16] and Ritz arguably obtained the benefit of the fraudulent transfers by way of his holdings in the transferee companies.

Another distinction in the Nolan case is that the Debtors filed a Chapter 13 bankruptcy case. The Plaintiffs did not allege that Ms. Nolan obtained anything as a result of the alleged online rants and social media hacks, other than a measure of revenge. Judge Colton held that the Adversary Complaint failed to state a claim under § 523(a)(2)(A), made applicable by § 1328(a)(2). On the other hand, Judge Colton stated that injuries to real or personal property may be discharged in a Chapter 13 case, even if the injuries are the result of willful and malicious conduct. Personal injury within the meaning of § 1328(a)(4) "should be defined in contradistinction to injury to property; the emphasis in § 1328(a)(4) is on injury to an individual."[17] Judge Colton held that although the Adversary Complaint states cognizable claims in favor of Frank and Natasha Darras, the claims of DarrasLaw, a corporation, do not satisfy the requirements of § 1328(a)(4). The claims of The Darras Law Firm, Inc. dba DarrasLaw asserted under § 1328(a)(4) failed to state a claim upon which relief may be granted and were dismissed.

Conclusion

The Supreme Court's ultimate decision interpreted "actual fraud" to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation. Debtors should be careful of any conveyance that could be deemed fraudulent and understand the implications *Husky* holds for fraudulent conveyances. Simultaneously, creditors should review the circumstances surrounding any conveyances of a debtor for determinations of dischargeability. By interpreting "actual fraud" to include fraudulent conveyance schemes, debtors may have a higher hill to climb to prove dischargeability of debts that carry even a whiff of fraud.

14 Husky 136 S. Ct. 1581, 1589 n.3
15 Husky, 136 S. Ct. 1581, 1585.
16 Id. (citing Tex. Bus. Orgs. Code § 21.223(b))
17 Adams v. Adams (In Re Adams), 478 B.R. 476, 486 (Bankr. N.D. Ga. 2012)

When Bankruptcy and Arbitration Collide

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What happens when a creditor, based on a prepetition arbitration agreement with the debtor, files a motion to compel arbitration of a debtor's claim for willful violation of the automatic stay? Will the dispute get decided by a bankruptcy judge or by an arbiter?

The Federal Arbitration Act ("FAA") was created by Congress as a response to judicial hostility against arbitration agreements. In enacting the FAA, Congress created a federal mandate that was strongly in favor of arbitration. However, prior to the Supreme Court's decision in *Epic*[1], the legal precedent provided a potential safe harbor for a bankruptcy judge to retain jurisdiction of the matter. Post *Epic* the integrity of this potential safe harbor is uncertain. Proponents of arbitration argue that *Epic* all but eradicated that safe harbor under certain circumstances, while the opposing side holds steadfast to pre-*Epic* case law and the importance of the stay to bankruptcy.

Argument Against Arbitration

Prior to *Epic*, bankruptcy courts followed the precedent established in *McMahon*[2] to determine if the FAA's mandate was incompatible with another federal statute. *McMahon* provided three avenues to determine if another federal statute displaces the FAA's mandate: (1) statutory text, (2) legislative history, and (3) if there is an inherent conflict between the FAA and the other federal statute. The bankruptcy courts that have looked at whether the stay displaces the FAA's mandate have stated that neither the text nor legislative history of the bankruptcy code are helpful to the analysis. Consequently, they have focused on the inherent conflict prong of the *McMahon* analysis. While finding an inherent conflict is a high bar, it is not insurmountable.

Generally, courts applying the *McMahon* test have done so in a two-part analysis. Courts first look to see if a bankruptcy judge has discretion to reject the FAA's mandate based on whether the claim is core and derivative of the Code. If the claim is both core and derivative of the Code a bankruptcy judge must then consider whether compelling arbitration would undermine the policy goals of bankruptcy.

In the context of the stay, one of the factors that greatly leans towards showing an inherent conflict is if the bankruptcy is ongoing and the stay is in force. This is because the stay is designed to protect not only the debtor but also creditors; when a bankruptcy is ongoing the protections provided by the stay are at their highest. Accordingly, claims for a violation of the stay cannot be arbitrated because the rights of other creditors are at risk and cannot be vindicated in a two-party arbitral forum. Thus, these courts have held that the policy goals of bankruptcy are harmed because an arbiter cannot protect the interests of other creditors in arbitration. Another interesting approach is that under 11 U.S.C. § 1109 any party in interest to the bankruptcy has a right to be heard on any issue under the code.

Argument in Favor of Arbitration

The Supreme Court has stated that, upon a finding of a valid arbitration agreement between the parties, the FAA mandates district courts to send the parties to arbitration. Moreover, the FAA requires district courts to compel arbitration even when doing so could result in piecemeal litigation. The FAA's mandate permeates to bankruptcy courts since their jurisdiction is a function of the district court's reference.

In light of this Congressional mandate, the party refusing arbitration of a claim for willful violation of the stay bears the burden of showing that 11 U.S.C. § 362 of the code displaces the FAA. *Epic* arguably raised the burden higher than what it already was under *McMahon*. While under *McMahon* a showing of an inherent conflict between the FAA and another federal statute such as § 362 was sufficient to reject arbitration, under *Epic*, the party refusing arbitration must show that conflict is *irreconcilable*. Although the stay is undoubtedly a cornerstone of bankruptcy, it is nonetheless, simply a self-executing injunction arising by operation of a federal statute. An arbiter deciding a claim for violation of the stay is tasked with interpreting a federal statute. For over fifty years, the Supreme Court has consistently seen arbitration as a presumptively appropriate and competent approach to federal statutory interpretation[3]. In fact, the presumption that an arbiter has the competency to handle the most factually and legally complex cases is unassailable.

Given that an arbiter is presumed competent to render a decision on a claim for violation of the stay, theoretically, whether the claim is decided by an arbiter or by a bankruptcy judge, the two should reach the same conclusion. Both individuals would run the same legal analysis looking at three elements: (1) whether a party's actions constitute violation of the stay, (2) whether that party knew the stay was in effect, and (3) whether that party—who's actions were determined to violate the stay—intended to violate the stay. Thus, the legal analysis does not involve considering the impact of the decision on other parties, such as other creditors. Legally speaking, a claim for violation of the stay is a two-party dispute (debtor versus a creditor). If factually speaking the case is also a two-party dispute, then there can hardly be a conflict that rises to the level of irreconcilable.

Conclusion

It is unclear to what extent if any the *Epic* decision has abrogated the *McMahon* precedent and its progeny. However, the few bankruptcy courts that have faced this issue post *Epic* have not clearly drawn a substantive distinction between an "inherent" as opposed to "irreconcilable" conflict.[4] Instead, most have continued to apply the *McMahon* test providing that Epic merely reinforced the idea that the party opposing arbitration bears a heavy burden to override the FAA's mandate.

1 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)
2 Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987)
3 To date, the Supreme Court has rejected every effort to find a conflict between the FAA and another federal statute.
4 See e.g., Matter of Henry, 944 F.3d 587, 592 (5th Cir. 2019); In re Roth, 594 B.R. 672, 676 (Bankr. S.D. Ind. 2018). But see In re Trevino, 599 B.R. 526, 549 (Bankr. S.D. Tex. 2019).

Student Loan Sidebar

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On January 20, 2021, President Biden signed an executive order extending pandemic-related student loan relief to September 30, 2021. That relief was originally set to expire on January 31, 2021.

Here's what you need to know:

• All payments, interest, and collections on government-held federal student loans will continue to be suspended through September 30, 2021.

• The relief only applies to government-held student loans — not commercially-held FFEL loans, Perkins loans, or private student loans.

Pandemic inspired student loan relief options

• The U.S. Department of Education confirmed that the months of suspended student loan payments will continue to count towards loan rehabilitation and loan forgiveness programs, including Public Service Loan Forgiveness, for those who are otherwise meeting all eligibility criteria.

• President Biden suggested that the moratorium could be extended further, although a decision on that would be unlikely until much closer to September 30, and will likely depend on economic and pandemic conditions at that time.

• Additional student loan relief measures have, so far, not been included in new federal stimulus proposals. That could change as work on a new stimulus package continues in Congress. In addition, lawmakers could introduce new student loan reform measures through separate legislation, a prospect that the Biden administration has suggested.

My thoughts are that support for a Congressionally approved $10,000 across-the-board forgiveness for federal Direct Loans is quite high. This would zero out approximately a third of federal borrowers with one fell swoop. This would result in approximately $429 billion of student debt being cancelled. Up to thirty percent of those owing $10,000 or less are delinquent or in default – drastically hurting their credit scores and cost of credit elsewhere. These are also the borrowers most likely to default on their loans. Over half of those who default have less than $10,000 of federal undergraduate debt according to an analysis of federal data by The Institute for College Access and Success. It would also help

Student Loan Sidebar continued

to decrease the balances of other federal student loans if done across the board.

I would also really like to see an across-the-board interest rate reduction to 3%. This would help everyone, and in particular, help those with larger balances. The average for federal loans is 6.8% which is quite high nowadays and it is up to an astonishing 8.5% for graduate student loans. Most people who reach out to us for help are fighting the rising tide of interest and getting nowhere. A cut to 3% would be fair and help everyone with federal student loans. Even if it were 3%, and 4.5% for Grad and Parent Plus loans, that would be far better than the national average is now.

That and fixing the Public Service Loan Forgiveness Program by at least assuring that those with the older federal FFEL loans are eligible for forgiveness would fairly and easily address most of the inequities in the current system.

What is the best advice you can give someone with federal student loans right now?

Consolidate all older FFEL loans to Direct loans. This way they will

1) have zero interest and forbearance through September 30, 2021;

2) be set up for the lowest income-driven plan when payments restart;

3) be set for PSLF if working public service; and

4) be ready in case of any further forgiveness approved by Congress. As always, consult with a student loan advocate to be sure to avoid any pitfalls of consolidation such as not combining Parent Plus loans, and preventing someone from starting over on an existing Income Driven Plan.

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