Summer 2021

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

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

PRESIDENT'S MESSAGE

by Noel R. Boeke
Holland & Knight LLP

When I initially wrote this message over a month ago, we thought Remote Reality was thankfully coming to an end. Such an extraordinary time we have lived over the last 18 months! These months in the Remote Reality have been so out of the ordinary, so strange, and so very uncommon. Uncommon times that called out for uncommon fortitude, invention and thinking. A big salute to Kathleen DiSanto and all the TBBBA board members, speakers, and other volunteers who kept the TBBBA humming along with zoom events. And thank goodness we were able to start this summer off with a happy hour in person at Ulele hosted by Anthony & Partners and then host the annual Past Presidents' reception at the Columbia. Unfortunately, in light of the rapid spread of Delta Variant, we have again postponed the already postponed Annual Dinner scheduled for August 26th. Stand by for word about future live or remote events.

These uncommon times, naturally, got me thinking about our own uncommon calling, or rather, our calling to be uncommon. I would argue that none of us are called to be average. The center of the bell curve is not our destiny. Not at all. We members of the bankruptcy bar are meant to be extraordinary, to be the outliers, to be the uncommon – though perhaps not in the most popularly coveted, or even obvious ways. It would be nice if we had a 95 mph fastball or if we were awarded Michelin stars for our cooking. Maybe that is not in the cards for us but we can be uncommon in other more important ways.

• We can be uncommonly kind. When that project comes back and it still needs a lot of work, when there are delays, or when our teammates miss the mark, we can show the utmost kindness -- taking time to teach, to mentor, to understand and to help others become better.

• We can be uncommonly gracious. We can be the person who welcomes the stranger, puts the visitor at ease, and who is always there to include the outsider, to comfort the sorrowful, and to visit with the lonely. We can make charity and compassion our most important business.

• We can be uncommonly faithful. We can do what is right when no one is watching, even if it sets us back, or if others think less of us because of it. We can do good acts solely for the benefit of the other and without consideration of personal gain or recognition. We can be the kind of friend that we would want to have.

• We can be uncommonly peaceful and professional. We can work to foster cooperation and to resolve conflict. We can embrace the fact that our lives of zealous and effective advocacy need not require acrimony. We can be the person that others turn to when a fight is brewing. We can be the peacemakers.

• We can be uncommonly positive. When others are down, when it is easy to complain, when the groupthink is trending negative, we can be the voice of hope. We can always argue for optimism, look to the bright side, and promote good spirits -- leading by example and blazing the trail towards better days.

The opportunities for the types of exceptionalism that really matter are endless. You already know this, of course, because I witness countless examples of these uncommon virtues every day. Let us all continue to nurture the extraordinary capacity for good in each of us through the end of this year, into the next, and on towards our future. And here is wishing each of you and yours uncommon happiness, joy, and blessings!

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

Susan Heath Sharp

December 17, 1954 – July 4, 2021

Susan Heath Sharp was an inspiration to those who knew her. She had an amazing drive that led her to become successful in two challenging professions, accounting and law, while never letting her professional life intrude on the more important arenas of her family and faith. Late in the evening on July 4, 2021, Susan's long, heroic and sometimes even cheerful fight with ALS came to an end.

Susan was born December 17, 1954 in Milwaukee, Wisconsin, to Neil Gilbert Raatz, a police officer, and Marlay Barbee, a banker. She attended local Milwaukee schools and then became, with her brother, the first generation of her family to obtain a higher education. She attended Drake University and then Indiana University, where she obtained her B.S in accounting with highest distinction. She passed the CPA exam in 1978 and worked in public accounting as an audit manager with a national public accounting firm, first in Texas and then in Tampa, specializing in real estate development and banking issues.

After she settled in South Tampa, she almost immediately found sense of community and fellowship that was with her until her final moments. With the birth of her children, Susan abandoned her promising career in accounting to become a full-time mother and devoted herself to raising the children for the next fifteen years. And during that time, she raised two beautiful and accomplished daughters and an extremely intelligent and handsome son. (If you didn't think so, all you had to do was ask her.) She always had pictures of her children close at hand and always smiled as she spoke about them.

When, still inspired by the Perry Mason episodes she watched as a child, and with the idea of making sure that, in her words, "justice was done," Susan began her quest for a second career in law. With her children still in school, she could be found studying her law books during breaks in her daughters' high school volleyball games and at other activities of her son and daughters. After dinner in her house, Susan and the kids had a two hour "study hall."

After graduating from Stetson University College of Law and passing the bar examination, she accepted an offer to practice insolvency and bankruptcy law with Stichter, Riedel, Blain and Postler, where she became a shareholder. Hundreds of clients benefitted from her thoughtful and compassionate advice and vigorous advocacy, and her training as an accountant made her a perfect fit as she focused her

Susan Heath Sharp

December 17, 1954 – July 4, 2021

efforts on resuscitating struggling businesses. She was held in high regard by her colleagues in the bar and by members of the judiciary, as reflected by the numerous peer-review accolades and honors that she received. She also gave back generously to the bar and community, particularly in enhancing the provision of legal services to the indigent.

Susan went through hard times, particularly the loss of her infant daughter, Jennifer, and her daughter, Allison, who died in a fatal car wreck a few years ago. Jennifer's death led to Susan's renewed search for answers to the big questions of life, death, suffering, and eternity. She was invited to Bible Study Fellowship, which she attended for many years and ultimately became an instructor herself, and she developed a faith and assurance that let her cope with the unimaginable tragedies of Allison's death and her diagnosis with ALS. When she was interviewed about the loss of Jennifer and Allison, she said she was not sad because she knew she would see them again.

And, as those who knew Susan heard many times, her standard response when asked how she was doing was, as the disease increasingly incapacitated her body - but not her spirit or her mind, "Fabulous" or "Great," was always followed by "How are you?" As was typical, she shifted the conversation from her to you. During Lou Gehrig's immortal good-bye at Yankee Stadium, he said that notwithstanding his ALS, "he was the luckiest man alive." Susan, notwithstanding the disease and her losses, felt the same way.

Susan had many interests outside of the law. She was an excellent golfer and ran multiple half-marathons. As a Wisconsin native, she had a lifelong love affair with the Green Bay Packers. Her physical vitality, her many interests, and the birth of her grandchildren made the ALS disease particularly difficult, but Susan knew that "if her earthly house, the tent that she dwelt in, were to be dismantled, she would have a building from God, a house not built by human hands, that is eternal in the heavens." Susan is no longer imprisoned by her failing body but now has a new dwelling house not built by human hands. Our loss is Heaven's gain. Her heroism in the face of suffering will be an inspiration forever to those who knew her. She will be greatly missed.

Susan leaves behind her mother, Marlay Barbee of Treasure Island; her brother Steven Raatz of Milwaukee; her daughter Amy Heath Patenaude and her husband, Jeffery Patenaude, and their children Heath and Edith (Edie), of Tampa; and her son William "Wiley" Sharp Jr. and his wife, Laura Marie Jagielski, of Fort Lauderdale. She was preceded in death by her father Neil Gilbert Raatz of Milwaukee and her daughters, Jennifer Heath Sharp and Allison Elizabeth Sharp both of Tampa.

Counterpoint to "Beware All Ye Who Practice Here": Why a Judge *Should* Require Counsel to Testify [and N.B.: Other Lessons Along the Way]

By Catherine Peek McEwen
Bankruptcy Judge, United States Bankruptcy Court of the Middle District of Florida

The Fall 2019 issue of *The Cramdown* included an analysis of an interesting decision by Bankruptcy Judge Robert Gordon (now retired) involving the judge *sua sponte* calling the debtor's lawyer to testify in an adversary proceeding involving an objection to the discharge. The case is *In re Spearman*.[1] Titled "Beware All Ye Who Enter Here," the article posits that resorting to the court's Witness Doctrine "could create a situation in which both the impartiality of the court and the efficient management of the court's resources are susceptible to close scrutiny, particularly if an appeal ensues."[2]

What follows here is a counterpoint to the earlier article in the context of what happened in round two of the *Spearman* case.

Competency is a requirement of lawyers under the Rules of Professional Conduct of the Rules Regulating The Florida Bar: "A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[3] What happens when a trial judge observes that a litigant's counsel is not competently representing the litigant — as Judge Gordon no doubt thought given the circumstances of the discharge trial in *Spearman*?

Sure, the issue can be left to be sorted out in a malpractice action, which is a meaningful remedy only when the lawyer has malpractice coverage or sufficient non-exempt assets to satisfy a judgment. You can pretty much flip a coin and get the same odds as heads or tails as to whether the lawyer has malpractice coverage, especially in consumer cases.

Or the judge can try to even the playing field as the litigation ensues. A well-reasoned commentary by Judge William Schwartzer, a former director of the Federal Judicial Center and a United States District Judge for the Northern District of California, puts it this way: "[T]rial counsel at times perform with such manifest incompetence that litigants' rights are prejudiced. When that occurs, the adversary process has effectively ceased to function. The judge then faces the choice of taking over from counsel or allowing the case to stumble toward a fortuitous result."[4]

In his essay, Judge Schwartzer debunks the utility of a malpractice suit as the answer to the choice: Will the client even recognize that he has a malpractice claim? Such an action may require another law suit and the concomitant delay. And as part of that malpractice suit, the underlying litigation is replayed, such that "the client must prove that a more favorable outcome would have resulted but for his attorney's incompetence."[5] Then, after getting by those significant hurdles, there remains the collectability issue.

In travelling the alternative path of *sua sponte* intervention, Judge Schwartzer states that the goal is fairness, but he advises caution. "The trial judge . . . has a responsibility, grounded on and tempered by the adversary process and constitutional principles and reinforced by the absence of adequate alternatives, to ensure a fair trial by maintaining minimum standards of performance by counsel. But the judge must wield the

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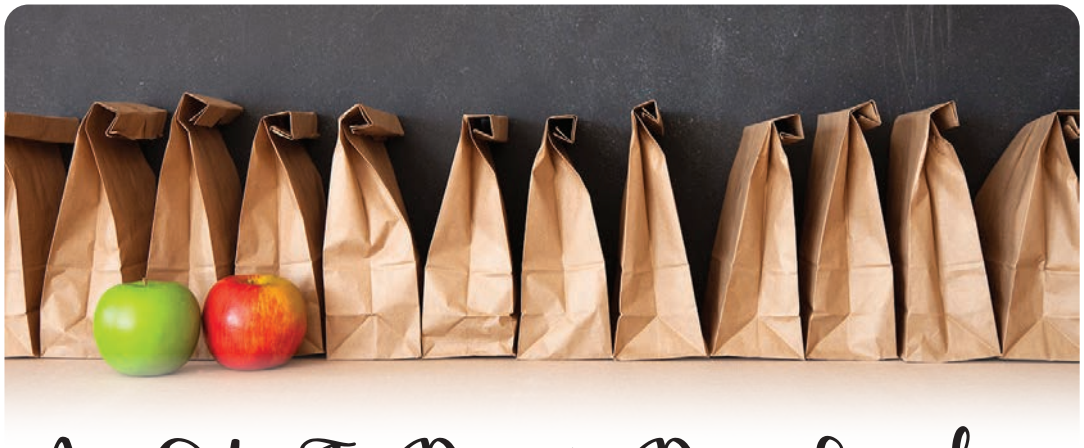
1 *Nicholson v. Spearman* (*In re Spearman)*, 2019 WL 1320550 (Bankr. D. Md. Mar. 22, 2019).
2 CRAMDOWN-11-19.pdf (tbbba.com), p. 12, 13.
3 R. Regulating Fla. Bar 4-1.1.
4 William W. Schwarzer, *Dealing with Incompetent Counsel – The Trial Judge's Role*, 93 Harv. L. Rev. 4, 633, 637 (1980).
5 *Id*. at 646-648.
6 *Id*. at 649 (citation omitted).
7 *Id.* at 650.



An Ode To Brown Bag Lunches

An experience lawyer named Rusty
Said “my practice is getting quite musty
My last case is a ruin
With Judge McEwen
And a disaster with the U.S. Trustee”

Said Rusty “I have a hunch
Perhaps I’ll attend a lunch
A Brown Bag meeting
Where I can learn while eating
And come away absorbing a bunch”

So, off to the Brown Bags he went
It was valuable time well spent
So good for Rusty
He’s no longer musty
And his practice is on the ascent

correlative power with caution lest its exercise defeat its purpose: fairness in the administration of justice."[6] Undue caution should not thwart the main aim, however, as "judicial passivity would invite injustice. When there is a need to exercise judicial power, the fear of abuse should not be a ground for accepting the evils at which the power is aimed."[7]

Judge Schwartzer's conclusion bears repeating here to set the table for further analysis of Judge Gordon's *Spearman* decision and what ensued in his case after Judge Gordon decided to compel counsel to testify:

> [D]ifficult questions may arise when the apparent incompetence of one side seems to confer a substantive advantage on the other. . .. The judge's role in the adversary process does not include playing back-up counsel for any party. Nor does it require, however, indifference to the fairness with which the process operates. The judge has an inescapable responsibility for the maintenance of professional standards in the courtroom to ensure a fair trial. The discharge of that responsibility need not impair the adversary process; on the contrary, it should strengthen it. Promoting the vigorous and effective representation of both sides in the contest will help rather than hurt the process of finding the truth and achieving a just decision.[8]

And so it likely was that Judge Gordon resorted to the court's Witness Doctrine by requiring the debtor's counsel to testify about the various inaccuracies that were present in the debtor's filings after the debtor had testified that she had given all of her financial information to her counsel and relied on him to prepare her papers correctly.[9] The judge noted that the experienced chapter 7 trustee had no issue with the inaccuracies and that the debtor had cooperated fully with him.[10] The judge also looked favorably on the debtor's credibility and noted that he was unable to detect "any significant, or even petty, advantage that [the debtor] personally gained" from presenting the erroneous information.[11] Consequently, the judge wrote, "I could not help but wonder, again and again, what light [the debtor's counsel's] testimony could shed on the particulars of each individual omission, the overall process that led up to the commencement of the case, and its early days."[12] By stipulation, the debtor's counsel's deposition testimony was filed in lieu of resuming the trial with live testimony.

In his follow-on decision, "*Spearman II,*"[13] Judge Gordon starts with some of the basic tenets of denial-of-discharge litigation based on allegedly false statements:

1. Intent is a question of facts based on all circumstances.[14]

2. "[M]isstatements and omissions on a debtor's statement of financial affairs and schedules cannot be readily overlooked. Generally speaking, defenses such as a debtor innocently forgot to list a particular asset, did not know an asset was required to be listed, or simply did not review the schedules before filing, do not usually present a viable defense to a . . . challenge to discharge."[15]

3. However, strict liability is not the standard for such challenges, rather, intent is required, which turns on credibility calls, "with particular focus upon the debtor."[16]

Looking at this framework through the lens of a search

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8 *Id.* at 669.
9 The plaintiffs in the adversary proceeding were the debtor's and her ex-spouse's separate divorce counsel, both of whom had claims for attorney's fees incurred in the divorce case. Many of the inaccuracies in the debtor's papers were related to the divorce judgment, with which the two divorce counsel were keenly familiar.
10 *Spearman*, 2019 WL 1320550 *1.
11 *Id*. at *1.
12 *Id*. at *1.
13 *Nicholson v. Spearman (In re Spearman) ("Spearman II")*, 2020 WL 6876840 (Bankr. D. Md. June 18, 2020).
14 *Id*. at *1, *7.
15 *Id*. at *2.
16 *Id*. at *3.

People on the Go

Megan Murray has successfully completed the requirements for certification by the American Board of Certification. Ms. Murray is now Board Certified in Business Bankruptcy Law by the American Board of Certification. Congratulations Ms. Murray.

ANTHONY & PARTNERS
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Mr. Scott Stephens joins the team as Counsel where his primary focus will be on Commercial Litigation.

Prior to Anthony and Partners, Mr. Stephens served 19 years of judicial service, the last five presiding over the Complex Business Litigation Division in Tampa Florida.

He also worked as an attorney in private practice in both Baltimore, MD and Tampa, FL.

Education: Mr. Stephens holds seven advance degrees including:

- B.A., University of Maryland 1981
- J.D., University of Baltimore 1984
- LL.M., George Washington University 1986
- M.S., Johns Hopkins University 1992
- M.A., University of South Florida 1994
- M.A., University of Maryland 1996
- Ph.D., University of South Florida 1998[1]

If you look up professionalism in the dictionary, you will find a picture of Judge Glenn who was emblematic and the essence of professionalism.

This Photo was taken at the presentation of the American Inns of Court which was during the 2014 NCBJ Conference in Chicago. Giving Judge Glenn the prestigious award was Judge Judith Fitzgerald from Pittsburg.

Practice Pointers for Completing New Monthly Operating Report Form

By Kevin Riggs, MBA, CPA, EA
Renaissance Consulting & Development, LLC

Effective June 21, 2021, the United States Trustee's (UST) office requires the use of two new monthly operating reports for all non-small business debtors in possession or trustees in cases under chapter 11 of title 11. (The new forms are not for cases qualified as small business debtors or sub-V debtors). UST Form 11-MOR will be required for chapter 11 debtors each month during the PRE-effective date of the case while UST Form 11-PCR will be required quarterly during the POST-effective date of the case. The two new forms are data-enabled and data-embedded, which require special procedures to properly submit the reports electronically via the Bankruptcy Court's Case Management/Electronic Case Filing System (CM/ECF). The reports are due the 21st day of the month immediately following the reporting period.

UST Form 11-MOR contains eight parts. District 21 requires additional documentation in a separate file: Statement of Cash Receipts and Disbursements, Balance Sheet, Income Statement, and Bank Statements along with Reconciliation Reports. The additional documentation should NOT be combined with the UST Form 11-MOR. (Federal Rule 9037 regarding redactions still applies.) Combining or "flattening" of the file will destroy the data-enabled and data embedded nature of the new form and will result in a rejected submission by the UST's office.

UST Form 11-PCR contains four parts. District 21 does not have any requirements for attachments currently.

Preparers are strongly recommended to review the Guide for Opening MOR/PCR Forms before downloading. (Forms and guides should be downloaded directly from https://www.justice.gov/ust/chapter-11-operating-reports). Each field in the new UST Form 11-MOR and UST Form 11-PCR must be answered for the form to function properly. Questions or other fields with no value should either be marked "N/A" or zero ("0").

Coordination amongst attorneys and non-attorney preparers is key to a successful submission. Special attention is required to create the final submitted form. Two signatures are required: one on the cover page by person responsible for filing and one on the last page by individual authorized under applicable law to certify for filing entity. Signatures are entered by "/s/" followed by printed name on signature lines.

The UST office seeks feedback and questions from all users during the initial stages of the new filing requirements.

The Cramdown is published four times per year. Advertising rates are as follows:

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for the truth and considering the debtor's counsel's testimony, Judge Gordon concluded that the plaintiffs had failed to meet their burden. [N.B.: Aside from the lesson about achieving a just decision by resort to the court's Witness Doctrine, *Spearman II* is instructive to creditor counsel who may be overly enamored with a discharge attack theory based on overblown allegations and minor deficiencies, such as when an asset is disclosed in one place in the petition package but may not appear where it should in another. If it's there, it's there. The judge looked carefully at and addressed each of the numerous alleged deficiencies; his reaction to the specifics is good guidance to creditor counsel considering whether to file a dischargeability action based on similar alleged deficiencies.]

The debtor's counsel's portrayal of the circumstances of his rushed meetings with the debtor buttressed the debtor's testimony concerning the intake and review process. And the judge again noted the experienced trustee's lack of concern with the filings. [N.B.: Creditor counsel should beware of flying solo without the support of the trustee.] The detailed testimony of the debtor's counsel is recited in *Spearman II*. [N.B.: The detailed testimony delivers a lesson to debtor's counsel about rush jobs and when, as much as judges and the United States Trustee don't like them, a bare bones filing might be preferable for the sake of accuracy over the risks of mistakes associated with hastily-prepared schedules.] A quick summary of the testimony, as set out by Judge Gordon, suffices for the purpose of this article:

[The debtor's counsel] candidly admitted the Initial Schedules were not a paragon of perfection, although he takes great exception to the lengths to which the Plaintiffs go in their attempt to state a case . . .. Nevertheless, he took full responsibility for the lack of clarity and inaccuracies in the schedules. He admitted that the Debtor provided him with all important information and did not conceal any financial information from him. She gave him all the documents he requested and was candid in responding to his inquiries. He understood she was relying on him to prepare the filings.

[The debtor's counsel] admitted he made a mistake by not filing the case as a 'bare bones.' He is correct that a 'bare bones' filing would likely have eliminated much of the dispute in this proceeding. As he acknowledged, he and the Debtor would have then had time to review the schedules in a less unsettled, hurried manner, if that choice had been made. However, the failure to make that choice in this case should not be a death knell to [the debtor's] right to a discharge, in consideration of the totality of the circumstances.[17]

As the *Spearman* cases illustrate, a judge may resort to *sua sponte* intervention without sacrificing the appearance of impartiality. A judge's instinct that an important set of facts may be simmering below the surface and should be brought to the light of day for a merits-based decision on a fully developed record is hard to argue with if the search for truth is deemed paramount. And as we are all officers of the court with a duty to the system of justice as a whole,[18] the search for truth should be paramount. But would we even be debating the propriety of *sua sponte* intervention in *The Cramdown*'s earlier article on *Spearman* and this one if the debtor's counsel had sought to put himself on the stand and obtained special trial counsel to conduct his examination? [N.B.: Proper intake and preparation arguably would have avoided the discharge challenge altogether. But in a worst-case situation, a debtor's counsel should consider falling on the sword when warranted, obtaining permission from the client to candidly discuss counsel's shortcomings in the intake process with opposing counsel before the objection is tried.]

17 *Id*. at *10.
18 *Sahyers v. Prugh, Holiday & Karatinos*, 560 F.3d 1241, 1244 n.7 (11th Cir. 2009).

Florida Adopts the Federal Summary Judgment Standard

By Kristina E. Feher, Esq.
Feher Law, PLLC

Introduction

On April 29, 2021, the Florida Supreme Court entered its opinion regarding the amended Florida Rule of Civil Procedure 1.510 and "align[ed] Florida's summary judgment standard with that of the federal courts and the supermajority of states that have already adopted the federal summary judgment standard." *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 309 So. 3d 192, 192 (Fla. 2020) (per curiam) (Labarga, J., dissenting). The amendments adopted essentially replace Fla. R. Civ. P. 1.510 with the text of Federal Rule of Civil Procedure 56. The Florida Supreme Court adopted the federal summary judgment standard as articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Florida Supreme Court stated that textual overlap "between the Florida and federal rules will provide greater certainty and eliminate unproductive speculation and litigation over differences between those rules. And Florida litigants and judges will get the full benefit of the large body of case law interpreting and applying federal rule 56."

Prior Standard

The Florida Supreme Court addressed three key points and substantive changes in applying the new rule. First, those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 251 (noting that "the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." Id., at 251-52.

Second, those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under *Celotex* and therefore under the new rule, such a movant can satisfy its initial burden of production in one of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.*, 915 F.3d 987, 997 (5th Cir. 2019).

Finally, those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

New Standard

Where federal rule 56(a) says that the court *should* state on the record its reasons for granting or denying a summary judgment motion, new rule 1.510(a) says that the court *shall* do so (emphasis added). The wording of the new rule makes clear that the court's obligation in this regard is mandatory. To comply with this requirement, it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact. The court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review. On a systemic level, we agree with the commenters who said that this requirement is critical to ensuring that Florida courts embrace the federal summary judgment standard in practice and not just on paper.

New rule 1.510 therefore says that a summary judgment motion must be filed at least 40 days before the time fixed for a hearing. The new rule further says that the nonmovant must respond with its supporting factual position at least 20 days before the hearing. The new rule 1.510 went into effect on May 1, 2021. This means that the new rule governs the adjudication of any summary judgment motion decided on or after that date, including in pending cases. *Cf. Love v. State*, 286 So. 3d 177, 187-88 (Fla. 2019).

Conclusion

The Florida Supreme Court's notes on the 2021 amendment stated that "[t]he rule is amended to adopt almost all the text of Federal Rule of Civil Procedure 56. The "federal summary judgment standard" refers to the principles announced in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and more generally to case law interpreting Federal Rule of Civil Procedure 56. Now that the state court and federal standards are aligned, the expectation of a faster resolution for cases seems possible. The Florida Supreme Court believes the new rule will also reduce gamesmanship and surprise, which in turn would allow for more deliberative considerations of summary judgment motions.

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Let's compare

Florida's Summary Judgment Standard

Old Rule	New Rule
judgment must be rendered if evidence on file shows that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law	now "mirrors" the easier-to-satisfy federal standard and the standard for directed verdict
moving party must "disprove the nonmovant's theory of the case in order to eliminate any issue of fact"	no requirement that the moving party negate the opponent's claims
motions must be filed 20 days prior to a hearing; response must be filed 2 days prior to a hearing	party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts
	motions must be filed 40 days prior to a hearing; response must be filed 20 days prior to a hearing
	a trial court shall state on the record its reasons for granting or denying summary judgment

Displacement: Consideration of Removal and Reinstatement of a Debtor in Possession Under Section 1104 and Section 1185

By Bridget Dennis
Shutts & Bowen, LLP

In the case of *In re Breland*, a creditor moved to dismiss the debtor's individual Chapter 11 case, or alternatively, to have a Chapter 11 trustee appointed. 570 B.R. 643, 661 (Bankr. S.D. Ala. 2017), *aff'd*, 610 B.R. 389 (S.D. Ala. 2019), *rev'd*, 989 F.3d 919 (11th Cir. 2021). The bankruptcy court held that under Section 1104(a)(1), cause existed to appoint a Chapter 11 trustee. *Id.* The debtor appealed this finding on constitutional grounds, whereby the district court held the debtor lacked standing to raise its challenge, and the Eleventh Circuit thereafter reversed and remanded for the district court to consider the merits of debtor's claim. *In re Breland*, 989 F.3d at 920–21. The court's holding in *Breland* made us consider how Section 1104's counterpart, Section 1185, would apply to a similar set of facts involving a Subchapter V debtor.

Section 1104 applies to Chapter 11 generally while Section 1185 applies to Subchapter V cases. Subchapter V was enacted to expedite the process for small business debtors to "reorganize quickly, inexpensively, and efficiently." *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333, 336 (Bankr. S.D. Fla. 2020). While the mechanisms for reorganizing under Subchapter V are similar to those available under Chapter 11, Subchapter V differs from Chapter 11 in a few notable respects regarding displacement of the debtor in possession.

First, there is a temporal requirement applicable to ordinary Chapter 11 cases under Section 1104(a), which restricts the time in which the court may appoint a trustee to before confirmation of a Chapter 11 plan. In contrast, in Subchapter V cases, Section 1183(c)(1) expands this temporal requirement and permits the court to appoint a trustee (the Subchapter V trustee) as needed, even after plan confirmation.

Second, in Subchapter V cases, the court has additional discretion to reinstate a debtor in possession who has previously been removed from control. Pursuant to Section 1105, the court may restore a Chapter 11 debtor to operate its business only prior to confirmation of a plan. However, under Subchapter V, if the court removes a debtor in possession for cause under Section 1185(a), the debtor may be reinstated even after plan confirmation, as there is no time limitation set out in Section 1185(b).

Third, there is a clear contrast regarding how courts will handle the removal of a Subchapter V debtor depending on whether the business is still in operation. Upon finding cause under Section 1185(a) to remove a Subchapter V debtor, courts have not hesitated to convert a case to Chapter 7 where the debtor is no longer operating. To illustrate, in a recent Subchapter V case, a nonoperating debtor fraudulently obtained PPP loans prior to voluntarily filing its Subchapter V case and failed to disclose such funds to the bankruptcy court. *In re GMS Diner Corp.*, No. 20-16721 (SLM) (Bankr. D.N.J. 2020). Rather than appoint a Subchapter V trustee to take control of a non-operating business under Section 1183(b)(5), the court instead converted the case to Chapter 7 under Section 1112. *Id.*

As illustrated by *GMS Diner*, conversion may provide a superior mechanism to remove nonoperating debtors. However, one may question whether the result in *GMS Diner* would be the same if the business was still in operation – most likely not. Notably, Section 721 curbs the length of time a Chapter 7 trustee is permitted to operate a debtor's business to "a limited period" when a debtor in possession is displaced by conversion, which leads us to believe the appointment of the Subchapter V trustee is best used in operating scenarios. Consequently, it is possible to envision an alternate universe of *Breland* under Subchapter V where the debtor is displaced by a Subchapter V trustee for cause, and later put back in control, after confirmation of a plan.

Accountant-Client Privilege "Workaround" for Federal Claims

By Alexander Maza
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Do communications with an accountant acting as an agent of a client or attorney fall under the attorney-client privilege under federal law for federal law claims? The short answer is that certain accountant-client communications may be protected under the attorney-client privilege if the communications are used to further the legal advice given by counsel to the client.

Federal common law provides the applicable law regarding privilege in general unless the U.S. Constitution, a federal statute, or a Supreme Court decision state otherwise.[1] The Federal Rules of Evidence provide that attorney-client privilege is "the protection that applicable law provides for confidential attorney-client communications."[2] The Supreme Court has held that the accountant-client privilege does not exist under federal law.[3] However, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."[4] The Florida Evidence Code provides for the accountant-client privilege.[5] Therefore, while the accountant-client privilege does not apply to a federal claim tried in federal court, it does apply to a claim under Florida law tried in federal court.[6]

But there may be another way to protect accountant communications in the trial of a federal claim in federal court. In *United States v. Kovel*,[7] the Second Circuit held that an accountant working with a lawyer and a client to interpret accounting concepts so the lawyer may provide more effective legal advice does not destroy attorney-client privilege. "The attorney-client privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice."[8] "'The privilege must include all the persons who act as the attorney's agents.'"[9]

"[*Kovel*] recognized that the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client."[10] "Attorney-client privilege may also extend to third party communications if said party is "'acting as agent' of the client."[11]

With these principles in mind, although there is no accountant-client privilege for federal claims, it appears that under limited circumstances an accountant and client communications might be protected under attorney-client privilege. In *Kovel*, the Second Circuit seemed to limit this extension to an accountant interpreting accounting concepts to the attorney for the purpose of better communication between an attorney and their common client. Absent a provision explicitly stating the accountant-interpreting concept in the federal Constitution, a federal statute, or in a Supreme Court decision, the Federal Rules of Evidence establish that federal common law governs. Because federal common law governs, some Circuit Courts of Appeals have interpreted that third party communications in furtherance of legal advice or acting as an agent of the client or attorney are protected by attorney-client privilege.[12]

At first glance, the principal of account-client communications falling under attorney-client privilege seems to contradict the precept that there is no accountant-client privilege under federal law for federal claims. However, a third-party communication in furtherance of legal advice appears to provide a workaround or exception. If an attorney's agent or a client's agent is an accountant who fosters communication between the attorney and the client, then whatever the accountant does for legal advice purposes is arguably protected under the attorney-client privilege.

1 Fed. R. Evid. 501
2 Fed. R. Evid. 502(g)(1).
3 *Couch v. U.S.*, 409 U.S. 322, 335 (1973).
4 *Id.*
5 *See* §90.5055, Fla. Stat.
6 See, e.g., *Gatti v. Goodman*, No. 2:16-cv-728-FtM-29CM, 2017 WL 9613963 at *3 (M.D. Fla. Nov. 13, 2017).
7 [6] *United States v. Kovel*, 296 F.2d 918, 922-923 (2d Cir. 1961).
8 *U.S. v. Richey*, 632 F. 3d 559, 566 (9th Cir. 2011); *accord Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 24 (1st Cir. 2011) (citing *United States v. Kovel*, 296 F. 2d 918 (2d Cir. 1961).
9 *Von Bulow by Auersberg v. von Bulow*, 811 F. 2d 136, 146 (2d Cir. 1987) (quoting 8 Wigmore, Evidence § 2301 (McNaughton rev. 1961).
10 *U.S. v. Ackert*, 169 F. 3d 136, 139 (2d Cir. 1999); *See also Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, 162 F. Supp. 3d 145, 151 (E.D. N.Y. 2016) ("Communications from a client to a third-party accountant or foreign-language translator hired to assist a lawyer in providing legal advice to that client are protected under [attorney-client] privilege.")
11 *U.S. v. Sanmina Corp.*, 968 F. 3d 1107, 1116 (9th Cir. 2020) (quoting *Richey*, 632 F. 3d at 566 (citation omitted)).
12 *Kovel* 296 F. 2d at 922-923; *Richey* 632 F. 3d at 566; *Lluberes* 663 F. 3d at 24; *von Bulow* 811 F. 2d at 146; *Samina Corp.* 968 F. 3d at 1116.

The Impact of the Undue Hardship Standard on Racial Inequality

By Breyon Love, JD, MBA
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Since the Great Recession, student loan debt has increased by over 160%, surpassing the growth of mortgage, auto loan, and credit card debt.[1] With over $1.7 trillion in outstanding student loans, student loan debt is arguably the most significant economic problem facing the United States.[2] Yet for Black and minority families, the student loan debt crisis is in a state of emergency. According to *The Washington Post*, the fastest-growing category of student loan debt in the last 10 years are Black students and people over the age of 50. From 2003-2004, the Department of Education studied a cohort of new college students and found that 78% of Black students took out loans for their education, compared to 57% of White students.[3]

This racial disparity was driven by lower-income students who need student loans to pay for school. Alice Rivil[4], head of the Johnson administration student loan task force that created the Federal student loan program, stated the program was intended to empower minorities and the poor. Unfortunately, ~~Yet~~ the promised return on investment for student loan debt often does not materialize the same for Black students. Upon graduation, Black students are less likely to be hired into a high wage-career, and at all levels, Black graduates earn less than their White counterparts.[5]

Recent Efforts for Reform

Currently, the heightened awareness of racial inequality has refueled the conversation of systematic economic inequality, pressuring government policymakers to find a permanent solution. In April 2021, Congresswoman Ayanna Pressley (MA-07), accompanied by Senator Elizabeth Warren (D-MA) and Massachusetts Attorney General Maura Healey, held a press conference asserting that student loan debt is a racial inequality crisis and pressuring President Biden to cancel $50,000 of student loan debt per borrower.

In 2018, Federal Reserve Board Chair Jerome Powell informed Congress that the nondischargeability of student loan debt poses a significant risk to future economic growth, citing the negative impact on people who cannot pay their student loans. House Judiciary Chair Jerrold Nadler responded by introducing the Student Borrower Relief Act of 2019. This law would have repealed 11 U.S.C. § 523(a)(8) entirely, thereby allowing borrowers to discharge nonprofit, government, and private student loans in bankruptcy, just like many other forms of unsecured debt.

Recently, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which paused student loan payments and waived interest on all federally held student loans until September 30, 2021.[6] Furthermore, because there is bipartisan support for temporary student loan relief, some believe more comprehensive forms of student loan debt relief may be on the horizon.

Student Loan Debt in Bankruptcy

Under 11 U.S.C. § 523(a)(8), educational debt is excepted from the discharge unless repayment of student loan obligations imposes an undue hardship. Congress's failure to define "undue hardship" has led to a variety of interpretations (or inconsistent interpretations) by bankruptcy courts. As a result, various tests have emerged in bankruptcy courts; yet, only two tests have prevailed. The majority approach applies the *Brunner* test developed by the Second Circuit.[7] The minority approach applies a less-restrictive totality-of-the-circumstances test.[8] Currently, the First and Eighth Circuit are the only circuits to adopt the totality-of-the-circumstances test.

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1 Michael Herz, *Emerging Cracks in the Student Loan Wall*, ABI (September 10, 2019, 16:39), https://www.abi.org/committee-post/emerging-cracks-in-the-student-loan-wall#_ftn4.
2 *Id.*
3 Jen Mishory and Mark Huelsman, *How Student Debt and the Racial Wealth Gap Reinforce Each Other*, Report Higher Education (September 9, 2019), https://tcf.org/content/report/bridging-progressive-policy-debates-student-debt-racial-wealth-gap-reinforce.
4 Alice Rivil was an economist for the Johnson and Nixon administration who created the blueprint of the Higher Education Act of 1972.
5 Mishory, *supra*.
6 S.3548- CARES Act, 116th Cong., 2nd Sess. (2019-2020).
7 *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987).
8 *In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981); *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).

Undue Hardship
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Examining the Majority Approach: the *Brunner* Test

Under *Brunner*, a debtor seeking a student loan discharge must show: (1) that the debtor cannot maintain a minimal standard of living for himself or herself and his or her dependents; (2) that this state of affairs is likely to persist for a significant portion of the student loan; and (3) that the debtor has made good faith efforts to repay the loan.[9]

The *Brunner* test requires the satisfaction of all three prongs for the court to discharge student loans.[10] Courts applying *Brunner* require more than severe financial difficulty, and debtors are expected to provide evidence of extraordinary circumstances beyond financial inability.[11] Congress may have intended to provide some exception to student loan dischargeability through the undue hardship language, yet courts have strictly construed this standard leading to very little relief.

Due to the improbability of success under the *Brunner* test, most debtors fail to initiate adversary proceedings under section 523(a)(8) because such challenges are expensive and unlikely to succeed. Consequently, a debtor who challenges and fails to meet the undue hardship standard will be stuck paying the student loan debt along with any litigation fees incurred. Between 2011 and 2019, more than 200,000 debtors per year had student loan debt; however, fewer than 600 of those debtors – or less than 0.1% - tried to discharge those loans through an adversary proceeding.[12]

For Black debtors, the risk of litigation is even greater. Research shows that Black debtors are 40% less likely to receive a discharge than debtors of other races.[13] Additionally, Black debtors are twice as likely to file under chapter 13 than other races. Due to the preference towards filing under chapter 13, only 69.1% of Black debtors eventually receive a discharge, compared to 87.5% of White debtors.[14] Further, empirical data shows that chapter 13 trustees are twice as likely to file a motion to withhold the discharge against a Black debtor who completed a chapter 13 plan than against a similarly-situated White debtor.[15] In light of these findings, consumer bankruptcy attorneys, judges, and trustees should consider how implicit bias may be preventing Black debtors from obtaining the fresh start contemplated by the Bankruptcy Code.

Examining the Minority Approach: the Totality-of-the-Circumstances Test

The Eighth Circuit adopted the totality-of-the-circumstances test over the *Brunner* test because Congress did not intend to strictly diminish the bankruptcy court's discretion under section 523(a)(8). The totality-of-the-circumstances test instructs courts to evaluate factors such as: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and his or her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.[16] In sum, this test essentially provides that student loan debt should be excepted from the discharge only if the debtor's future financial resources will provide for payment of the debt and enable the debtor to achieve a minimal standard of living.[17]

The *Brunner* test and the totality-of-the-circumstances test differs in significant ~~two~~ ways. First, the totality-of-the-circumstances test is broadly construed, giving bankruptcy courts considerable flexibility which leads to more positive results.[18] Notably, if a debtor fails to satisfy any one factor, it does not automatically lead to the exception of the debt from the discharge.[19]

Additionally, when evaluating the debtor's finances, the totality-of-the-circumstances test considers more factors to ascertain a reasonable living, as opposed to *Brunner*'s

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9 *Brunner*, 831 F.2d at 396.
10 Charles J. Tabb, *Law of Bankruptcy* 995 (11th ed. 2019).
11 National Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years* 211 (1997).
12 Leslie Pappas and Daniel Gill, *Private Student Loan Debtors Win Limited Bankruptcy Reprieve (1)*, Bloomberg Law, https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bankruptcy-law.
13 Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, *Scholarly Commons at Boston University School of Law* (January 29, 2009 2:11 PM), 233-35.
14 *Id*.
15 *Id.* at 238.
16 *In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981); *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).
17 *Long*, 322 F.3d at 554.
18 Ryan Freeman, *Student-Loan Discharge- an Empirical Study of the Undue Hardship Provision of S 523(a)(8) Under Appellate Review*, 30 Emory Bankr. Dev. J. 147, 160–61 (2013).
19 *Id*.

harsh minimal standard of living approach.[20] In all, the totality-of-the-circumstances test takes a more forgiving approach compared to the *Brunner* test.[21]

For Black and minority debtors**,** the totality-of-the-circumstances test provides courts with the best opportunity to fashion equitable relief. By allowing flexibility, the court can account for individual circumstances that may call for undue hardship, rather than be tied to *Brunner's* rigid line.[22] For instance, when weighing the first factor of the totality-of-the-circumstances test, courts may consider race-specific financial factors affecting Black debtors. If more courts adopt the totality-of-the-circumstances test, we will likely see an increase of successful student loan discharges for all debtors, including those that are most impacted.

Conclusion

The purpose of the federal student loan program was to empower minorities and the poor by providing access to higher education. Yet it has evolved into the continuation of financial oppression for communities of color. Considering the looming student loan debt crisis and its disparate impact on minority communities, policymakers must take a hard look at reforming Section 523(a)(8) of the Bankruptcy Code. This can be accomplished in a variety of ways.

First, Congress should enact Representative Nadler's Student Borrower Relief Act, which would repeal Section 523(a)(8) and allow student loan debt to be discharged like other forms of unsecured debt. Second, reform to the Bankruptcy Code without corresponding student loan debt relief from Congress will likely be insufficient to afford broad relief. This is because many Black borrowers may not file for bankruptcy and may never generate wealth at the level of their non-Black counterparts. So, Congress must acknowledge and fix the inequitable impact of student loan debt on communities of color by enacting legislation that will: (1) cancel up to $50,000 of student loan debt; and (2) intentionally facilitate a fresh start for Black families encumbered with student loan debt. Intentional legislation by Congress is necessary to counteract the significant damage inflicted on minority communities by decades of predatory student loan policies. Third, all courts should adopt the Eighth Circuit's totality-of-the-circumstances test because it truly embraces the core value of bankruptcy to provide debtors a fresh start. When evaluating the debtor's reasonable financial expenses, along with the current factors, courts should require the debtor to have a safe and decent standard of living. Additionally, courts should include the racial and socioeconomic impact of student loan debt in their analysis. Adopting any of these recommendations will give equitable student loan debt relief for all Americans, particularly those affected the most: families in Black and minority communities.

20 Richard D. Burke III, *Bankruptcy-Student Loans for Life, the Discharge of Student Loans Under 11 U.S.C. S 523(a)(8)-Using the Eighth Circuit's Totality-of-the-Circumstances Test and the Partial Discharge Method*, 41 UALR L. Rev. 97, 105 (2018).
21 *Id*.
22 Sarah Edstrom Smith, *Should the Eighth Circuit Continue to Be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy*, 29 Hamline L. Rev. 601, 620 (2006).

Don't Put the Brakes on a Subchapter V

By Judge Cathy Peek McEwen
United States Bankruptcy Judge
Middle District of Florida

A subchapter V bankruptcy is designed to go fast to contain costs. In his written testimony to Congress on behalf of the National Bankruptcy Conference in support of the Small Business Reorganization Act of 2019, Bankruptcy Judge Tom Small (Ret.) affirmed that "[a] subchapter V case will move fast and that alone will reduce costs." So why aren't debtors' counsel approaching the case with as much up-front attention as possible in order to launch it on a fast path to success?

A subchapter V should be as pre-packaged as possible. Communication with major creditors should commence pre-petition with a view toward a consensual plan.

The initial debtor interview takes place within the first ten days after the case is filed.

And prior to the first status conference, the debtor must file and serve the report required by 11 U.S.C. § 1188(c), detailing the efforts that the debtor has undertaken and will undertake to attain a consensual plan of reorganization. The order setting the status conference requires that the debtor's report include:

a. Whether and to what extent the Debtor has communicated with the Subchapter V Trustee;

b. Whether and to what extent the Debtor has communicated with creditors; and

c. Whether the Debtor is aware of or anticipates any objections or impediments to consensual confirmation and describing the issues.

In other words, the roadmap for that fast path to success must be ready early on in the case. So, without the necessary advance preparation, the subchapter V cannot possibly work in the way envisioned by Judge Small.

Why, then, in 60 percent of our Tampa Division subchapter V cases (as of July 8) are the schedules and statement of financial affairs not filed with the petition on day one? And why is it that of those same skeletal cases, 93 percent didn't have schedules and the SOFA filed until after the cases had been on the docket for more than ten days?

We have a talented bar. Perhaps some are falling asleep at the wheel, pre-petition, and artificially pressing the brakes?

Student Loan Sidebar

by: Christie Arkovich
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Big changes are on the horizon for federal student loan borrowers. While everyone is expected to resume payments in October 2021, there may be a further extension of the forbearance.

Borrower Defense to Repayment. The Borrower Defense to Repayment program is once again a promising route to take toward forgiveness. The U.S. Department of Education has announced that it will streamline claims where institutions have already been found to have engaged in certain misconduct. The Department is rescinding the formula for calculating partial relief for those who have already been approved for partial relief. It is now likely that these 72,000 borrowers will receive full relief.

Student Loan Stimulus Cheatsheat

What is full relief? It includes 100 percent discharge of federal student loans, and even reimbursement of amounts paid where appropriate under the regulations. It also will include requests to credit bureaus to remove any negative credit reporting. And, if applicable, it will include reinstatement of federal student aid eligibility.

Of course, there are many who oppose this sort of relief arguing that taxpayers should not pay for the education of a borrower who made an ill informed choice of institutions. They oppose the "free education" when speaking of a borrower who is released of their federal loans via BDTR. However, the borrowers who were misled by these for-profit schools, are forever scarred. They've lost the opportunity, time and federal eligibility to re-do their education at an institution that will actually help them obtain higher paying employment. They've been in limbo for often more than 10 years – with the associated lost opportunity cost. I analogize the education at Corinthian or ITT Tech to the purchase of a lemon car. It is basically no different than a car up on blocks that has never left the dealership. Sure, the car (or diploma) exists, but it doesn't do anything to help the borrower. In fact, employers will often tell borrowers to omit such schools from their resume as it can only hurt their employment chances.

Anyone with clients who have attended one of these for-profit schools should advise their clients to consider filing a BDTR application immediately to avoid a possible statute of limitations bar. The borrower must have attended a school which he or she believed misled them or engaged in other misconduct. The borrower must demonstrate that the school violated a state law related to the loan, or to the educational services provided. In Florida, this may mean a violation of the Unfair and Deceptive Trade Practices Act, for instance. The Discovery rule, Fraudulent Concealment rule or Equitable Tolling rule may be argued to extend the SOL from the usual four years to twelve years here in Florida.

BDTR Claims Approved for Many ITT Tech students. On June 16, 2021, ED announced the approval of BDTR claims for 18,000 ITT

Student Loan Sidebar continued

Technical Institute borrowers (roughly $500 million). Two categories of claims were covered by this: likely employment prospects and ability to transfer credits. This is the first approval of a new category of borrower defense claims by ED since January 2017. ED found that ITT made repeated and significant misrepresentations to students related to how much they could expect to earn and the jobs they could obtain after graduation between 2005 and the institution's closure in 2016. In reality, borrowers repeatedly stated that including ITT attendance on resumes made it harder for them to find employment, and their job prospects were not improved by attending ITT. Additionally, ED found that credits rarely transferred elsewhere.

Expansion of the CARES Act to older FFEL loans. On March 30, 2021, the protections afforded to federal borrowers under the CARES Act was expanded to include the older Federal Family Education Loans known as FFEL loans. This extended the 0% interest to FFEL loans which are often commercially held, forbearance of payments, a pause in collections for those FFEL loans in default, and refund of any garnishments or tax refund seizures. All of this will occur automatically except that a borrower would have to request a refund if they wanted any monies back that they had voluntarily paid on a FFEL loan during the pandemic. It's not likely that someone who kept a job and was able to make a payment on a federal loan would want that money back, generally preferring instead to have the money applied to principal to pay down the loans. This expansion was retroactive to loans that went into default since March 13, 2020 when the CARES Act became effective. The intent was to return any delinquent or defaulted FFEL loan to good standing, with no record of default and removal of any negative credit reporting. This will do a lot toward easing the confusion of federal loan borrowers who have different loan types.

Tax Forgiveness. The American Rescue Plan signed into law on March 11, 2021, provides that all student loan forgiveness whether federal or private is tax free for loans forgiven through December 31, 2025.

PPP amendment. On March 30, 2021, ED issued a press release that it had worked with the SBA to waive the limitation that a federal Direct student loan delinquency or default would preclude Paycheck Protection funds under the PPP.

Total and Permanent Disability Discharge. ED also suspended for the Covid period, a requirement that borrower provide updated income documentation following an administrative disability discharge. It is unknown when this suspension will cease.

Employers Can Help Pay Student Loans. Employers can pay student loan payments, up to $5,250, tax-free through December 31, 2025.

Rulemaking Hearings. Public hearings are taking place starting June 21 regarding rulemaking on borrower defense, total and permanent disability discharges and other items.

Student Loan Sidebar continued

What can be done to help your clients?

• Try to target forgiveness on federal or private loans to occur before the end of 2025. For example, Borrowers who are repaying their student loans under the Income-Contingent Repayment Plan (ICR), can switch into the Revised Pay-As-You-Earn Repayment plan (REPAYE) to reduce the 25 year repayment period to 20 years for undergrad loans and qualify for tax free forgiveness if that 20 years will end before December 31, 2025.

• Discourage a payoff/settlement prior to a potential $10,000 -$50,000 blanket forgiveness that may be passed later this summer.

• File a BDTR application asap if applicable.

• If you encounter someone who was denied a BDTR application under Secretary DeVos, you might want to have your client request a reconsideration by email to: BorrowerDefense@ed.gov with Request for Reconsideration in the subject line. You can also send this by mail to U.S. Department of Education, P.O. Box 1854, Monticello, KY 42633. Since the application does not have a section for a state law to be named, nor does it mention an applicable statute of limitations, I believe these omissions may have been the basis why Secretary DeVos denied the vast majority of claims for failure to state a claim. Re-opening the file to preserve the date filed, may be better than re-filing and facing a SOL that has passed.

• In a request for reconsideration, a client should address:

o What you think was decided incorrectly;

o Why you believe the decision was incorrect; and

o Any evidence that you believe establishes that you are eligible for a different decision.

o ED has stated it will not accept a request for reconsideration that includes new allegations of school misconduct – this would require a new application.

Landlords Beware: Bankruptcy Court Litigation Could Come at a Cost

By Lynne Xerras, Kathleen St. John
Holland & Knight, LLP

Those who lease commercial property may find themselves unwilling participants in complex proceedings before the U.S. bankruptcy courts when a tenant files bankruptcy. Meanwhile, the lease becomes an asset among the "property of the estate" of the debtor, and the automatic stay imposed by U.S. Bankruptcy Code[1] serves to halt all collection and eviction activity in their tracks.

In light of the fast-pace of many Chapter 11 reorganizations, often involving going-concern sales, it is imperative that a landlord be vigilant in monitoring the case and asserting lease and Bankruptcy Code-provided rights timely and effectively. In any Chapter 11 case, the debtor must make the decision to either reject or assume each of its executory contracts and unexpired leases, with notice and opportunity to be heard.[2] If a debtor rejects a contract deemed burdensome, the debtor will be relieved of its obligation to perform, and the non-debtor party is left with a pre-petition claim for damages for breach of contract.[3] In the alternative, the debtor can seek to assume an executory contract or lease and affirmatively elect to be bound by its terms, burdens and benefits.[4] The debtor cannot assume a contract, however, without first meeting certain statutory conditions delineated in Section 365 of the Bankruptcy Code. The debtor must, among other things, "cure" outstanding defaults under the contract or "provide adequate assurance" that it will do so; and "provide adequate assurance of future performance" after the contract is assumed.[5]

Since assumption may represent the only mechanism for a creditor to recover the prepetition arrearage owed under a contract, assumption is generally favored over rejection in ordinary market conditions.[6] There may be circumstances, however, when the landlord has determined that it prefers instead that the tenancy terminate. In that instance, the landlord could file an objection to the debtor's motion to assume the lease, arguing, for instance, that the debtor's proposed "cure" payment is not sufficient or that other statutory requirements for assumption are not met.

A recent decision from the U.S. Bankruptcy Court for the Central District of California in the *In re Hawkeye Entertainment LLC* (*Hawkeye*) bankruptcy case[7] is a good reminder to review the subject lease terms and factual record carefully to assess if the cost of achieving the desired result outweighs any corresponding benefit.

The *In re Hawkeye Entertainment LLC* Decision

When litigation is initiated in the United States, it is well-settled that each party must typically bear the cost of hiring legal counsel, even in victory, under a principle not coincidentally referred to as the American Rule.[8] However, the American Rule has exceptions.[9] For instance, if the dispute centers around a contract, a party that prevails in litigation *may* be entitled to recover its attorneys' fees from the losing opponent if 1) the parties have entered into a contract that shifts attorney's fees to a prevailing party or 2) a statute provides for fee shifting.[10] These same concepts govern the allocation of attorneys' fees in disputes that find their way to the U.S. bankruptcy

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1 11 U.S.C. § 101, *et. seq*.
2 11 U.S.C. § 365(b)(1). With certain exceptions, in a Chapter 11 reorganization, the debtor may assume or reject an executory contract or unexpired lease at any time prior to the confirmation of a plan of reorganization, or pursuant to a plan. 11 U.S.C. § 365(d)(1).
3 11 U.S.C. § 365(g).
4 11 U.S.C. § 365(a).
5 11 U.S.C. § 365(b).
6 Once the debtor has satisfied the Bankruptcy Code provisions relating to assumption and obtained authority of the bankruptcy court to assume a contract or a lease, the debtor may seek to assign that contract for value to a third-party. To accomplish assignment, a debtor must demonstrate to the non-debtor party adequate assurance of future performance under the contract by the potential assignee. A debtor may take these steps even though a provision of the contract purports to limit or restrict such assignment. 11 U.S.C. § 365(f).
7 *See In re Hawkeye Entm't, LLC*, No. 1:19-bk-12102-MT, 2021 WL 665734 (Bankr. C.D. Cal. Feb. 19, 2021).
8 *See Baker Botts L.L.P. v. Asarco LLC*, 576 U.S. 121, 135 S. Ct. 2158, 2164, 192 L.Ed.2d 208 (2015) (*quoting Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010)).
9 For instance, a presiding trial court has the ability to award attorneys' fees to one party as a sanction for unscrupulous behavior or for advancing frivolous claims. *See*, e.g., Fed. R. Bankr. P. 9011 (court may award sanctions if claims or defenses presented by a party are, for instance, presented for an "improper purposes, such as harassment or delay" or "lack evidentiary support."); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-56 (1991); Fed. R. Bankr. P. 8020 (court may award damages and costs to appellee in connection with frivolous appeal).
10 *See, e.g. In re Kittel See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 257–59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1237–38 (10th Cir. 1999).

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courts, albeit, again, with nuances and exceptions.[11] While a party involved in a dispute before a bankruptcy court does not hold a general right to recover attorneys' fees incurred in litigating purely bankruptcy law issues, a bankruptcy court may award fees and costs where there is a specific statutory[12] or contractual basis to do so.[13]

Against this general backdrop, the bankruptcy court had the opportunity in the *Hawkeye* bankruptcy to consider whether to award attorneys' fees to a debtor as the "prevailing party" in a contested matter under California fee-shifting statutes. Hawkeye Entertainment LLC (Debtor), had leased commercial space in Los Angeles from Smart Capital LLC, as landlord (Lessor), pursuant to a written lease agreement (Lease). The Debtor also had entered into a sublease for the leased premises (Sublease). By the time the *Hawkeye* Chapter 11 case was filed in 2019, the Debtor had already expended a substantial sum to preserve its tenancy through an earlier Chapter 11 bankruptcy case filed to prevent forfeiture of the Lease. Those disputes were ultimately resolved and the Lease was assumed, although the relationship remained contentious thereafter. After the conclusion of the first bankruptcy case, the landlord again attempted to terminate the Lease, culminating in the filing by the Debtor of a second Chapter 11 case and a motion to assume the Lease and Sublease (Assumption Motion) over objection by the landlord. After extensive discovery, the bankruptcy court conducted a five-day trial to determine if the Assumption Motion had merit, focusing in large part on whether the Debtor had defaulted under the express provisions of the Lease as the landlord had alleged. The bankruptcy court ultimately held that the record demonstrated that no events of default had occurred and entered an order granting the Assumption Motion (Assumption Order). The landlord appealed the Assumption Order to the U.S. District Court for the Central District of California, an action that is pending.

Having prevailed before the bankruptcy court, the Debtor filed a motion pursuant to Federal Rule of Bankruptcy Procedure 7054(d)[14] for an award of attorneys' fees totaling more than $815,000 (Fee Motion) from the landlord, an effort the landlord challenged. In considering the merits of the Fee Motion, the bankruptcy court looked to California law as the Lease required to determine if an exception to the American Rule supported the Debtor's requested relief. The bankruptcy court observed that California law unequivocally provides that parties may agree to allocation of attorneys' fees between them in their agreements and that fee shifting is enforceable by the "prevailing party" under California Code of Civil Procedure (CCP) § 1021 and 1032.[15] Separately, in an action "on a contract," California Civil Code (CCC) § 1717 authorizes an award of attorneys' fees and costs to a prevailing party if "the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party." The Lease expressly and broadly provided that if either party instituted an "action or proceeding against the other relating to the provisions of [the] Lease," the "party not prevailing" was obligated to reimburse the "prevailing party" for its attorneys' fees and costs incurred in connection with that action or proceeding.

In considering the Fee Motion, the bankruptcy court first undertook to determine if each of the disputes that had been intertwined with the Assumption Motion constituted the Lease-required "action or proceeding" under contract interpretation principles. In doing so, the bankruptcy court held that the litigation involving the Assumption Motion – a proceeding required to protect the Debtor's

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11 For instance, in *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007), the Supreme Court held that if a prepetition contract allocating attorneys' fees is enforceable under non-bankruptcy law, that contract may support a claim against a debtor to recover the value of attorneys' fees incurred by a creditor enforcing its rights during the bankruptcy case, unless the Bankruptcy Code expressly provides otherwise. Separately, Bankruptcy Code Section 506 authorizes over-secured creditors to include reasonable amounts for attorneys' fees and costs in the balance of their secured claims as provided for by the underlying loan agreement or State statute.

12 Section 523(d) mandates that the bankruptcy court award attorneys' fees and costs to a prevailing debtor if a creditor requests a determination of dischargeability under § 523(a)(2) as to consumer debt, "without substantial justification." 11 U.S.C. § 523(d). In addition, an individual injured by a willful violation of the automatic stay may recover attorneys' fees. *See* 11 U.S.C. § 362(h).

13 *See, generally, In re Circle Star Center Assoc., L.P.*, 147 Cal.App.4th 1203 (2007); *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997) (debtor was entitled to attorneys' fees under agreement's provision and state law after defeating Section 523(a) claim based on fraud); *In re Parsons*, 272 B.R. 735, 756 (D. Colo. 2001) (bankruptcy court may award attorneys' fees where there is statutory or contractual basis authorizing award; *see also In re Shangra–La, Inc.*, 167 F.3d 843, 847–49 (4th Cir. 1999) (under § 365(b), attorneys' fees can be part of damages paid to cure default and assume lease, if recoverable under contract and state law); *In re Crown Books Corp.*, 269 B.R. 12, 15–18 (Bankr. D.Del. 2001) (same).

14 Fed. R. Bankr. P. 9014 (c) makes Fed. R. Bankr. P. 7054(d) applicable to contested matters, and in turn, Fed. R. Civ. P. 54(d) establishes a procedure for moving to recover attorneys' fees.

15 California Code of Civil Procedure ("CCP") § 1021 allows recovery of attorney's fees by "the agreement, express or implied, of the parties." CCP § 1032(b) entitles a "prevailing party" to "recover costs" as a matter of right "in any action or proceeding." Costs may include attorney's fees when authorized by the parties in their respective contract, even when the action is not "on a contract." *See* CCP § 1033.5(a)(10). CCP § 1032(a)(4) defines a "prevailing party" to include (a) the party with a net monetary recovery; (b) a defendant in whose favor a dismissal is entered; (c) a defendant where neither plaintiff nor defendant obtains any relief; and (d) a defendant as against those plaintiffs who do not recover any relief against that defendant."

Landlords Beware

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contractual rights – was that action. (See *Hawkeye,* 2021 WL 665734, at *7-*8). With the contractual prerequisite to recovery of fees in place, the bankruptcy court next considered whether the Assumption Motion involved an action "on a contract" in order to invoke CCC § 1717 in favor of the Debtor (See *Id.* at *8-*9). The bankruptcy court found that since the "terms and rights of the parties under the [Lease] were central to every aspect of the Assumption Motion," the associated litigation was indeed "on a contract."[16] Finally, the bankruptcy court determined the Debtor to be the "prevailing party" for purposes of CCC § 1717, since it was the party that had "recovered a greater relief in the action on the contract" (See *Id.* at *10 (*citing* CCC § 1717(b)(2))). With these findings in the Debtor's favor, the bankruptcy court issued its Final Order and Judgment for an Award of Attorneys' Fees (Fee Order) on March 8, 2021, awarding the Debtor attorneys' fees of nearly $606,000 against the landlord.[17] The landlord since filed a motion seeking reconsideration of the Fee Order in order to delay effectiveness of the Fee Order until the appeal has concluded. After a hearing regarding that request, the bankruptcy court determined that a slight reduction in the fee award was warranted for fees incurred in October, 2020, but denied the landlord's request for a stay. This order has also been appealed by the landlord.

Conclusion, Trends and Takeaway

Since issuance of the *Hawkeye* decision, the U.S. Bankruptcy Court for the District of Nevada ordered a debt-collection agency to pay a debtor's attorneys' fees under Nevada's fee-shifting statute[18] after the debtor prevailed on an objection to several time-barred proofs of claim filed by the claimant.[19] Similarly, the U.S. Bankruptcy for the Central District of California recently awarded attorneys' fees to a debtor as plaintiff in litigation involving enforcement of a contract.[20] On the other hand, the U.S. Bankruptcy Court for the Eastern District of Louisiana denied a landlord's motion for an award of attorneys' fees, although it had successfully defended the debtor's action for breach, finding that the requested fee shifting was not actually permissible under the language chosen by the parties in the underlying lease.[21]

Given the seeming trend in application of state-law fee shifting statutes in bankruptcy court contract-based litigation where there is a "prevailing party," landlords are cautioned to conduct an assessment of the risk of losing a particular dispute versus the associated benefit of advancing a position, particularly when the underlying agreement includes fee shifting provisions.[22] The parties' choice of law will certainly play an important role in the analysis regarding whether the American Rule should or should not apply. Apart from California and Nevada, reciprocal fee statutes applicable to contract and other disputes are in effect in Delaware, Florida, Montana, New York, Oregon, Utah and Washington.[23]

In light of recent precedent, landlords may also want to revisit the language of their standard fee-shifting provisions to provide clarity or perhaps certain exceptions. Consulting with an experienced bankruptcy practitioner at every step in the lease origination and enforcement process is one way to place the landlord in the strongest position available in good financial times and in bad. This step should provide a benefit that far outweighs the cost.

16 *See also In re Mac-Go Corp.*, 541 B.R. 706, 715 (Bankr. N.D. Cal. 2015) (trustee's avoidance and Section 549 claims were "on a contract" under C.C.C. § 1717(a) as involving rights arising under guaranty). *Compare In re Davison*, 289 B.R. 716, 724 (9th Cir. 2003) (nondischargeability claim based on fraud not covered by C.C.P. § 1717 is not applicable); *In re Smith*, 605 B.R. 538 (Bankr. D. Utah 2019) (request for attorneys' fees denied in dischargeability action involving tort, as not recoverable under Utah's reciprocal fee statute); *Johnson v. Righetti*, 756 F.2d 738, 741–42 (9th Cir. 1985) (because creditor's request for relief from the automatic stay pursuant to Section 362(d) was not an "action on the contract," debtor was not entitled to attorneys' fees for defense against the request under C.C.P. § 1717.).

17 Similarly, the U.S. Bankruptcy Court for the Central District of California recently awarded attorneys' fees to the debtor as plaintiff in litigation involving enforcement of a contract, but denied the debtor recovery of fees relating to the bankruptcy case itself. *In re Crescent Assoc. LLC,* Adv No: 18-01310-WB, *Memorandum of Decision* dated March 30, 2021.

18 NRS 18.010

sets forth specific parameters under which attorney's fees may be awarded to a party who has

prevailed in a contested legal matter. As

19 *In re Antonia Andrade-Garcia*, U.S. Bankr. Ct, District of Nev., Case No. 17-15277-abl, Memorandum of Decision Dated March 31, 2021 (Docket No. 113).

20 *In re Crescent Assoc. LLC,* Adv No: 18-01310-WB, *Memorandum of Decision* dated March 30, 2021.

21 *In re Cella III, LLC*, No. 19-11528, 2021 WL 810246 (Bankr. E.D. La. Mar. 2, 2021).

22 It is important to note that if a landlord "prevails" in preventing assumption of its lease, it is not likely to recover its attorney fees in full; rather, those costs, to the extent recoverable under the lease, will likely become part of the "rejection damages" claim.

23 Fla. Stat. Ann. § 57.105(7); Mont. Code Ann. § 28-3-704; Or. Rev. Stat. Ann. § 20.096; Utah Code Ann. § 78b-5-826; Wash. Rev. Code. Ann. § 4.84.330; Del. Code Ann. Tit. 6, §§ 4344, 7613; Tex. Civ. Prac. & Rem. Code Ann. § 38.001.

Tribute to Judge Joseph Woodrow Hatchett

By Joseline Hardrick, Esq.
Professor, Western Michigan University Cooley Law School: Founder and President, Journey to Esquire®

The First of Many, But Not the Last (1932-2021)

The death of Judge Joseph Woodrow Hatchett on April 30, 2021, came as a shock to many. Indeed, to those whose lives he touched impacted, his 88 years spent on this earth seemed like a relatively short time for a man of such widespread impact. Judge Monte Richardson posed this question at Judge Hatchett's funeral, which I now ask myself as I write this article: "What do you say about someone who was so impactful in so many lives?" Although I only met Judge Hatchett once at an event several years ago in Tampa, I have felt the effect of his work in numerous ways. So much has been written about his legal career and many accomplishments. I aim to honor his impact on the individual lives he touched and highlight some lesser-known facts about his life. I only hope these few words can do justice to such a great man and legacy. Judge Hatchett served as the first African American on the Eleventh Circuit Court of Appeals, which was established in 1981 when Congress split the Fifth Circuit. While on the circuit court bench, he trained dozens of new lawyers as law clerks and interns. After serving as the chief judge for the Eleventh Circuit, he retired from the bench in 1999. To date, he is the only African American to ever serve as chief judge of the Eleventh Circuit.Judge Hatchett's many accomplishments are described in the previous Judicial Profile in the August/ September Edition of the *Federal Lawyer Magazine*, but he continued to break new ground since then.

Throughout his career, Judge Hatchett continued to inspire many. Eleventh Circuit Judge Charles Wilson stated,

Those of us who had the privilege of serving as his law clerk, whether it's on the [federal] Court of Appeals or the Florida Supreme Court, we sort of consider ourselves as members of a very special group because we began our careers under the tutelage of one of America's most admired and respected judges. He's a legend.

Judge Hatchett was Judge Wilson's predecessor on the Eleventh Circuit Court of Appeals. In his own right, Judge Wilson is a very accomplished jurist who credits Judge Hatchett with his career and marriage—he met his wife while clerking for Judge Hatchett. He stated that he would lean on Judge Hatchett for guidance and assistance for over 40 years, even as a federal judge.

Judge Wilson described Judge Hatchett as having "remarkable intellect and sound judgment, deep compassion for people, the less fortunate and oppressed." He noted that he never lost sight of the role the courts play in protecting the rights of people.

In paying his respects to Judge Hatchett, Chief U.S. District Judge Mark Walker stated that "he was a great judge, but more importantly a great man. It's important that we study his history as a lawyer and as a judge. It reminds us of the importance of the role of the judiciary and the rule of law."

He was a mentor for many Black lawyers who followed him. He will continue to be an inspiration for all lawyers who will serve as pioneers for their particular community in paving the way for new entrants into the legal field.

Federal judges receive compensation even after retirement. Thus, many do not continue to work full time. But never one to sit idle, Judge Hatchett decided to join a private firm, Akerman LLP, after leaving the bench. He helped the firm develop its appellate practice and was the department chair for many years. Former

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Judge Hatchett Tribute

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partner Kathi Giddings described Judge Hatchett as "the calm in the storm" and "unflappable." She noted that he always made you feel good about yourself and brought out the best in everybody despite overcoming so many obstacles, including being called racial epithets, even while on the bench.

As part of Akerman's appellate practice section, Judge Hatchett began holding court again, offering mock appellate arguments to attorneys scheduled to appear before the federal circuit court as a way to allow them to practice and receive a valuable critique of their arguments. The program was so popular that it was offered it to attorneys from outside the firm with much success. Akerman continues that practice to this day in what it calls the "Akerman Bench."

Judge Hatchett also continued his fight for justice and equality. He worked with the NAACP as a lead attorney and fought to preserve statewide preference programs that benefitted minorities and women in Florida. In April 2018, he retired from the practice of law.

He always made time for his family throughout his career, ensuring that they knew they were loved and appreciated. He did not "bring work home," so to speak. He was just "Papa." He also was a musician, fisherman, and winemaker.

So, what do you say about someone who was so impactful to so many lives? As one of his former law clerks, Ted Smalls, succinctly stated, "he gave us all gifts; it's up to us now to carry it on."

Finally, Judge Hatchett's grandson Rashad Green, who has followed in his footsteps as a civil rights lawyer, offered this message on behalf of his family:

Papa was a great man who walked in humility. He rarely, if ever, spoke of his life achievements. His concern was always for us and not him. He lived to serve God and others. He valued and respected the sanctity of life and human dignity. He loved to fish and spend time on the farm. He loved his family with all that he had in him. That is Papa to us. Our family will miss him forever.

Judge Hatchett is survived by his friend and partner, Delores Grayson; his children, Cheryl Clark and Brenda Hatchett; eight grandchildren; and nine great-grandchildren. His wife, Betty Hatchett, preceded him in death in 2019.

Subchapter V and the 3-year Plan

By Nathan Reneau
Summer 2021 Intern at Jennis, Morse, Etlinger and J.D. Candidate at Stetson University College of Law

Subchapter V of Chapter 11 of the U.S. Bankruptcy Code, as enacted by the Small Business Reorganization Act (SBRA), significantly impacted the Chapter 11 practice in the Middle District of Florida. As active as Subchapter V's have been in Florida, decisional law on Subchapter V has yet to flush out all the ambiguities present in the SBRA and its amendments to the Bankruptcy Code. One such issue, which has yet to be ruled upon, is the language of Sections 1191 and 1192 which include a reference to "the" three-year period of a plan in Chapter 11.[1] Taking into consideration Section 1181, which states that Section 1129(b) and its absolute priority rule do not apply to Subchapter V cases, a reference to 1129(b)(2)(A) in Section 1191's rules of construction leaves us with Section 1129(b)(2)(A)'s fair and equitable language applying to secured creditors only. Sections 1129(b)(2)(B) and (C) are not applicable to Subchapter Vs, so what is an unsecured creditor or equity interest to do, and how does that affect the plan?

The absolute priority rule is a judicially-constructed concept based in "twentieth century railroad cases".[2] Rising from the old statutory requirements of the Bankruptcy Code and case law, the absolute priority rule is now codified in 11 U.S.C. Section 1129(b)(2) mandating reorganization plans must be "fair and equitable" to each class of creditors. The rule was adopted by the Supreme Court then later codified, "and was incorporated into Chapter 11 of the Bankruptcy Code adopted in 1978."[3] The rule was widely considered to be that "no Chapter 11 reorganization plan can be confirmed over the creditors' legitimate objections… if it fails to comply with the absolute priority rule."[4] This only arises when we have dissenting unsecured creditors, but that's precisely when Section 1191(b)(2)(B) would apply. If "each class of claims or interests… has accepted the plan; or… is not impaired under the plan" then the court "shall confirm" the plan.[5] If there is a dissenting class, the plan can only be confirmed under Section 1191(b) and that brings in the stipulations of the discharge requirements.[6] In order to obtain a discharge, the debtor must make all payments of the plan for the first three years and then the debtor may receive a discharge except for any debts which are provided for in the plan with payments after the first three years of the plan, unpaid administrative fees, and tax debts.[7]

So far, in the Middle District of Florida, the standard Chapter 11 five-year plans have been favored and have been utilized and approved in nearly every Subchapter V plan. The Subchapter V section which discusses confirmation of the plan, Section 1191, only outlines two options for confirmation.[8] In a Section 1191(a) consensual plan, confirmation requires all of Section 1129(a) to be met except subsection (15) requiring the five-year length of the plan for individuals. In a Section 1191(b) nonconsensual plan, confirmation requires all of Section 1129(a) to be met except subsection (8) consensus of the plan, subsection (10) no impaired classes, and subsection (15) requiring the five-year length of the plan

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1 The language referring to a three to five-year period seems to be borrowed from Chapter 13 which envisions a scenario where a debtor could reorganize in a 3-year period.
2 *Friedman v P+P, LLC (In re Friedman)*, 466 B.R. 471 at 478 (9th Cir. BAP 2012)
3 *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (quoting *In re Ahlers*, 794 F.2d 388, 401 (8th Cir. 1986)).
4 *Id*.
5 11 U.S.C. §1191
6 *Id.* at §1192
7 *Id*.
8 *Id.* at §1191 (identifying a confirmation difference between consensual and nonconsensual plans with the majority of plans in the Middle District being consensual 5-year plans)

for individuals. Section 1191(b) requires the court to confirm the plan "if" the plan is "fair and equitable" to dissenting impaired classes utilizing Section 1129(b)(2)(A) for secured claims and the disposable income test over a "3 year period, or such longer period not to exceed 5 years as the court may fix," for all other claims.[9]

With the disposable income test for unsecured creditors set to a three-year period, why don't we see more three-year plans? Especially with the requirements for discharge under a Section 1191(b) Subchapter V allows for discharge at the 3-year mark.[10] Unfortunately, we still have to wait and see if the Middle District will approve a discharge at the three-year mark of a five-year plan, or if every nonconsensual Subchapter V will have to wait the full five years of their plan for discharge.[11] There is no requirement for any plan to follow the lead of a plan before it. We could see Subchapter V plans with any length that seems most fitting for the debtor, so long as it is between three and five years. The language of Section 1191 itself has three-years being the default and requiring the court to fix a longer period of time not to exceed five-years. The purpose of the SBRA and Subchapter V is to make available to individuals and small businesses an opportunity to confirm a plan that is unique to them and will likely succeed.[12] In one Middle District of Florida Subchapter V case, a debtor with regular income had been hired under a three-year contract and did not know if there would be any income after the contract's expiration. Being able to have a three-year plan allowed the debtor to settle the debts, and successfully reorganize during the employment contract period. Flexibility and customization were essential to confirmation of a plan likely to succeed.

Prior to 2019, small business reorganizations were difficult and costly with only 6.5% of small business debtors confirming and completing reorganization in 1992.[13] In the years between BAPCPA and the SBRA, less than a quarter of small businesses which filed for chapter 11 were able to confirm a plan, and most of those failed to complete performance.[14] Subchapter V was added specifically to combat those statistics and having more options for debtors is key to tailoring a successful plan to a specific client. Since implementation, Subchapter V's have been confirmed at a rate six-times higher than traditional Chapter 11s.[15] It also allows bankruptcy attorneys to have more tools in their toolbox when aiding their client. As the saying goes, you need to right tool for the right job, and Subchapter V the right tool for a small business client.

9 *Id*.
10 *Id.* at §1192
11 Subchapter V and the SBRA have not been in effect long enough for the 3-year language of §1192 to ripen.
12 H.R. Rep 116-117 at 3 (2019)
13 *Id*. at 2 (2019) referencing H.R. Rep. No 109-31, at 3 (2005); see, e.g., Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate?* The results of a Study and Analysis of the Law, 97 Com. L.J. 297, 325 (1992)
14 Charles J. Tabb, *Law of Bankruptcy* 1046-49 (5th ed. 2020), H.R. Rep 116-171 at 2 (2019)
15 Small Business Reorganization Act: Implementation and Trends, ABI Journal, January 2021

Save the Date

TBBBA's 2021-2022 CLE Luncheons:

September 14, 2021
October 12, 2021
November 9, 2021
December 7, 2021
January 11, 2022
February 8, 2022
March 8, 2022
April 19, 2022
May 10, 2022

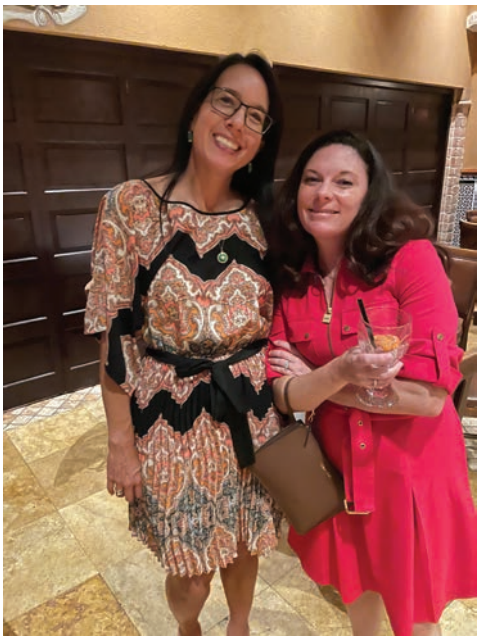
View From the Bench:

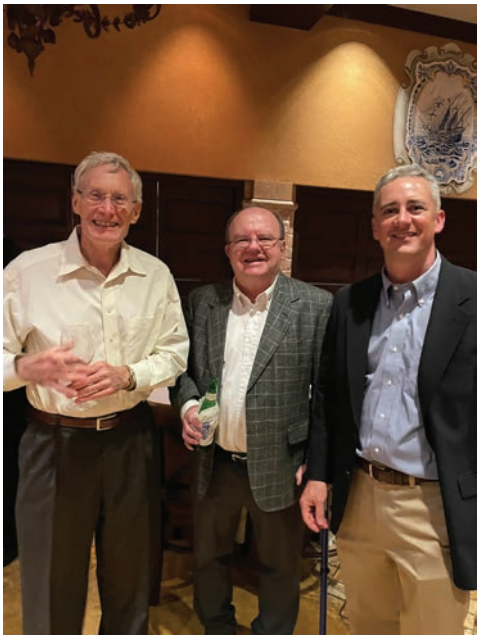
October 28, 2021 (Tampa Panel)
October 29, 2021 (Miami Panel)

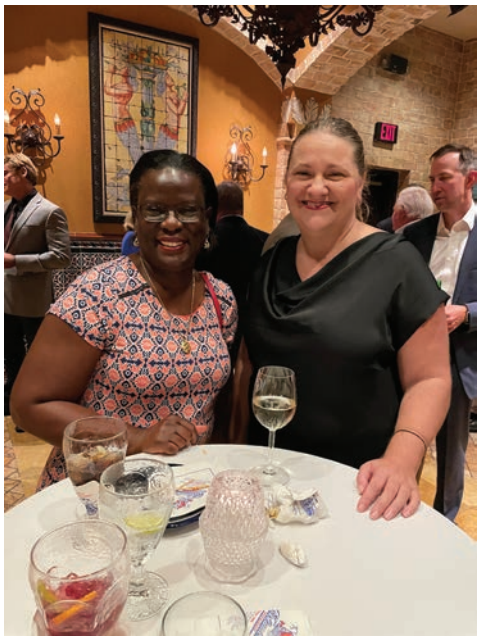
Paul M. Glenn Memorial Golf Tournament:

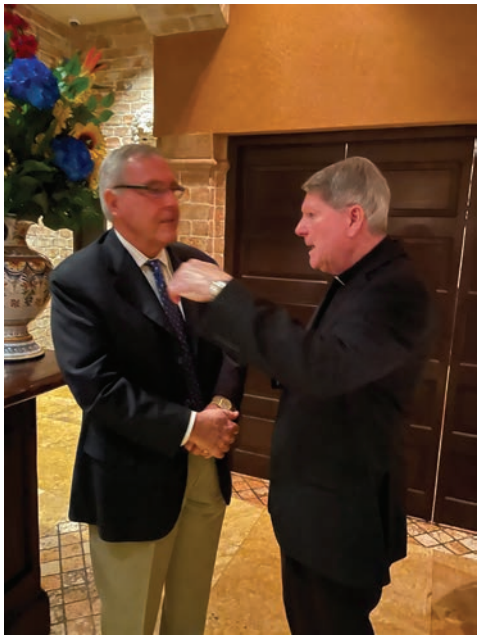
April 22, 2022

2021 Past Presidents' Reception at the Columbia Restaurant

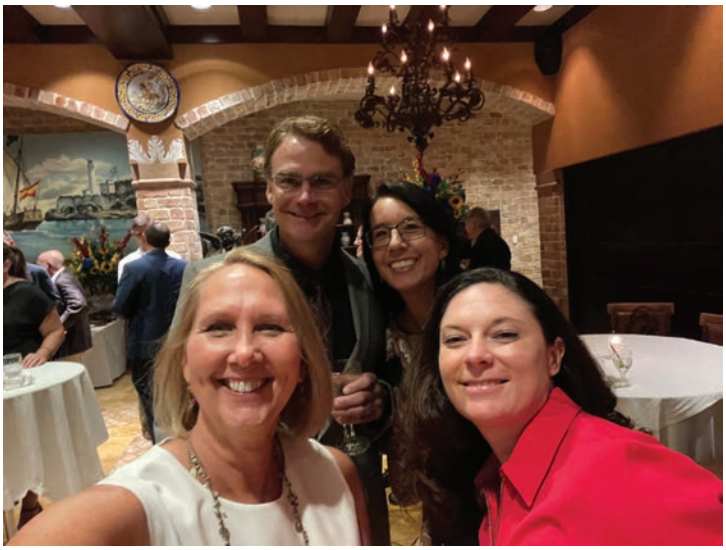


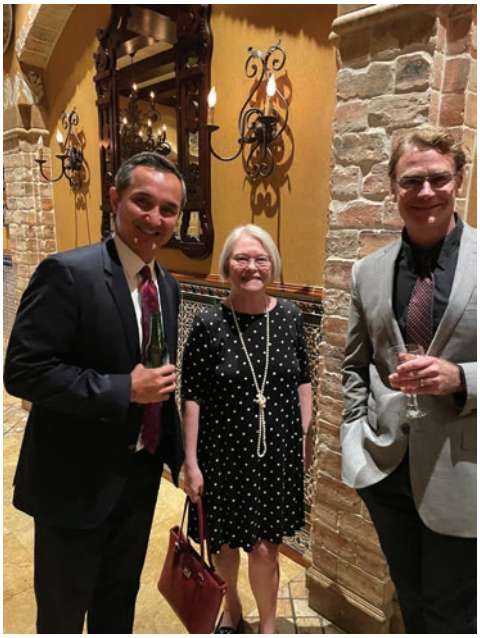






2021 Past Presidents' Reception at the Columbia Restaurant





NOTICE REGARDING THE UNITED STATES TRUSTEE PROGRAM'S NEW CHAPTER 11 PERIODIC REPORTS (28 C.F.R. § 58.8) (Effective June 21, 2021)

On December 21, 2020, the U.S. Trustee Program (USTP) promulgated a final rule, "Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11" (hereinafter referred to as the "Final Rule").[1] The Final Rule, which is authorized by 28 U.S.C. § 589b, requires that chapter 11 debtors in possession and trustees — other than small business debtors[2] — file monthly operating reports (MORs) and post-confirmation reports (PCRs) using streamlined, data-embedded, uniform forms in every case in every judicial district where the USTP operates.

The Final Rule will become effective for all reports filed on or after June 21, 2021. Before the effective date, the USTP encourages bankruptcy professionals to engage with their local USTP offices to learn more about the Final Rule and forms and to be ready to file data-embedded MORs and PCRs after June 21, 2021. Local USTP offices will make training available for bankruptcy professionals about completing, filing, and serving the new uniform MOR and PCR forms.

The uniform forms, and instructions for their use and filing, which may be periodically updated prior to the effective date, are available on the USTP's website: https://www.justice.gov/ust/chapter-11-operating-reports.

In addition to familiarizing themselves with the forms, practitioners should understand potential changes to applicable filing and service requirements. Unless otherwise provided by local rule, each report must be filed with the bankruptcy court no later than the 21st day of the month immediately following the covered reporting period.

Debtors in possession (DIP) should confer with local USTP representatives early in the case, whether at the initial debtor interview or some other initial meeting, to discuss the DIP's reporting capabilities and the supplemental documentation that the DIP may be required to file in conjunction with the reports.

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[1] 28 C.F.R. § 58.8.

[2] Small business and subchapter V debtors (including those covered by the temporarily expanded debt limits) file MORs on official forms promulgated by the Judicial Conference of the United States. *See* 11 U.S.C. §§ 308, 1187; Fed. R. Bankr. P. 2015 (a)(6); Official Bankruptcy Form 425C. Contact the U.S. Trustee in the district in which the case is pending for further instructions regarding post-confirmation reporting requirements in small business and subchapter V cases.

POSTPONED

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Cordially invites you to the Investiture Ceremony of

LORI VIRGINIA VAUGHAN

as United States Bankruptcy Judge

Thursday, September 9, 2021
4:00 p.m.

Sam M. Gibbons United States Courthouse
Ceremonial Courtroom, Seventeenth Floor
801 North Florida Avenue
Tampa, Florida

Reception
Immediately following Ceremony
The Vault
611 North Franklin Street
Tampa, Florida
RSVP by Friday, August 27, 2021
RSVP_Investiture@flmb.uscourts.gov

The Cramdown
PO Box 1438
Tampa, FL 33601