Tampa Bay Bankruptcy Bar Association

The Cramdown

Fall 2022

Newsletter of the Tampa Bay Bankruptcy Association

Editor-in-Chief
Angelina Lim
Johnson, Pope, Bokor, Ruppel & Burns, LLP

PRESIDENT'S MESSAGE

by Barbara Hart
Stichter, Riedel, Blain & Postler, P.A.

As I write this message, rescue efforts following the hurricane are underway. The news is replete with haunting images of Hurricane Ian's devastation, the magnitude of which is still uncertain. By all accounts, the cost of the destruction and necessary efforts to rebuild is record breaking. Large swaths of empty space and structural skeletons sit where neighborhoods once stood and thrived. Small boats piloted by caring people cruise flooded streets to find neighbors stranded in and around homes, neighborhoods, and businesses swamped by torrential rains and storm surge. Rescue helicopters hoist people from barrier islands which are no longer connected to the mainland. Larger ships have been tossed onshore as if they weighed no more than plastic toys. Interstate 75 around Port Charlotte is shut down to both north and southbound traffic as the Myakka River crested and flooded, overtaking the road completely. It is clear that recovery is going to take a very long time. For those of us lucky enough to be spared from the worst of the storm, there will be opportunities to offer aid and support to those in need. As a long-time member of the Tampa Bay Bankruptcy Bar, I know that this community will offer that help where and when it can. We are, of course, uniquely suited to assist with the financial crisis that will certainly follow as our fellow Floridians work to rebuild their lives and communities.

As we navigate the challenges ahead, the TBBBA will continue to evolve to meet the ever-changing needs of our legal community. The TBBBA Board is working hard to provide our members with useful and substantive programming that is both easily accessible and affordable.

We are also finding new ways to connect you with opportunities to provide pro se assistance and pro bono service. Below are a few of the recent projects that the TBBBA Board has undertaken in our ongoing effort to meet the most recent needs of our membership and our community.

Pro Bono Opportunity Blasts. When the TBBBA is notified by the Bankruptcy Court or legal aid clinic of a bankruptcy case or proceeding that requires substantive pro bono assistance, we will provide notice of those opportunities to TBBBA members and other interested parties so that we may quickly find resources to assist. If you are not a member of the TBBBA and would like to receive these notices, please email your interest to info@tbbba.com.

Middle District of Florida Pro Se Assistance Clinic. The TBBBA has partnered with the Middle District of Florida Pro Se Assistance Clinic to provide virtual pro bono consultations to individuals throughout the Middle District of Florida, from Jacksonville to Fort Myers. You can volunteer from the comfort of your home or office, and you can select the dates and times you are available to provide pro bono assistance. If you are willing to support the clinic, please visit the clinic's website https://www.bankruptcyproseclinic.com/ and follow the link and instructions to register as a volunteer.

Hybrid CLE. The TBBBA's consumer-focused CLE presentations are via Zoom and are provided at no cost to TBBBA members. The TBBBA's business-focused CLE presentations have gone hybrid. We continue to meet for a networking lunch at the University Club and now offer a low-cost Zoom option for those unable to join in person.

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President's Message

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The Cramdown is Going to Electronic-Only Publication. This was a very difficult decision for the TBBBA Board. To aid in the decision-making process, we elicited the input of the TBBBA members who attended the last TBBBA CLE luncheon and received positive feedback about publishing electronically. Ultimately, the decision is driven by economics. We can electronically produce four issues for roughly the same cost as publishing and mailing one paper issue. Now that The Cramdown is published electronically, we can also reach a wider audience.

Cramdown Ad Purchases Now Online. You may now purchase advertising space in electronically published issues of The Cramdown on the TBBBA's website with a credit card. Once you make your ad purchase, you will be reminded to submit your ad content to info@tbbba.com.

TBBBA Webpage History Tab. The TBBBA recently updated its website to include a "History" tab. The History tab includes the story of the TBBBA's founding written by Judge McEwen when she was the TBBBA president, as well an archive of all past issues of The Cramdown going back to the Fall of 1991. We have also included all of our Past Presidents and our first Chairperson; the past recipients of the Judge Alexander L. Paskay Scholarship going back to 2004 (if you know of recipients prior to 2004, please reach out to me); as well as the recipients of the Douglas P. McClurg Professionalism Award and the Don M. Stichter Award for Exceptional Service. I hope that you will enjoy a stroll down the TBBBA's memory lane.

In This Issue

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

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Equity & Inclusion Leads to Innovation and Greater Results – The Case of Johnson Publishing Company*

By Luis E. Rivera II **

The benefits of diversity and inclusion in corporate America are now well-documented. Both academia and the internet alike have long been bursting with statistics evidencing the value of diversity and inclusion programs.

Diversity in the workplace has significant financial benefits. A 2018 Boston Consulting Group study found that diverse companies enjoy 19% more revenue.[1] And a study of 450 global companies by Bersin by Deloitte concluded that "inclusive" companies enjoyed 2.3 times higher cash flow per employee over a three-year period.[2]

More, the penalty for low diversity performers is growing. According to McKinsey & Company, companies in the bottom quarter for executive-team gender diversity were 19% percent more likely to underperform on profitability than their peers in the upper three quartiles.[3] This is up from 15% in 2017 and 9% in 2015.[4]

Diversity has also been reported as associated with higher law firm profits. According to the Legal Evolution blog published by Professor Bill Henderson of Indiana University's Maurer School of Law, the most diverse law firms enjoy average partner compensation of about $260,000 more than the least diverse firms.[5]

Closer to home, assembling a diverse and inclusive team can lead to greater innovation and resulting success in your case administration. The link between labor diversity and a firm's innovation is well documented. For instance, a 2014 study published in the Journal of Population Economics established a causal link between ethnic diversity and increased patenting activity.[6] But can we make a case that assembling a diverse and inclusive team can lead to greater recoveries in your case administration?

Anecdotally, the *Johnson Publishing Company* case presents an example in which a diverse and inclusive team was able produce an innovative strategy to maximize the value of the *Ebony* portfolio, while traditional and more homogenous marketing efforts proved ineffective.

In April 2019, Johnson Publishing Company, LLC filed for Chapter 7 bankruptcy in Chicago.[7] A native Chicago business, Johnson Publishing had for years published *Ebony* and Jet magazines and was once one of America's largest and most successful black-owned businesses.[8] According to the Chicago Sun-Times, Ebony began publication in November 1945, pledging to "mirror the happier side of Negro life — the positive, everyday achievements from Harlem to Hollywood. But when we talk about race as the No. 1 problem of America, we'll talk turkey."[9] Jet began publication in 1951.[10]

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*This article was written for and originally appeared in Volume 38, Issue 02, of the American Bankruptcy Trustee Journal, a publication of the National Association of Bankruptcy Trustees ("NABT"), and is being reproduced with the consent of the NABT and the author.

**Luis Rivera is a shareholder in the Fort Myers, Fla., office of GrayRobinson, P.A. Luis has served as a panel trustee in the Middle District of Florida since 2010. He is board certified in Business Bankruptcy Law and Consumer Bankruptcy Law by the American Board of Certification.

1 Rocio Lorenzo, et al., *How Diverse Leadership Teams Boost Innovation* (Boston Consulting Group Jan. 23, 2018), https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation.

2 Josh Bersin, *Why Diversity and Inclusion Has Becomes a Business Priority* (Bersin by Deloite March 16, 2019), https://joshbersin.com/2015/12/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/.

3 McKinsey & Company, *Diversity Wins: How Inclusion Matters 4* (May 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters#.

4 *Id*.

5 Yvone Nath & Evan Parker, *Nothing Not to Like: Diversity and Law Firm Profitability*, Legal Evolution (June 27, 2021), https://www.legalevolution.org/2021/06/nothing-not-to-like-diversity-and-law-firm-profitability-238/.

6 Pierpaolo Parrotta, et al., *The Nexus Between Labor and Diversity and Firm's Innovation*, 27 J Pop. Econs. 303 (2014)

7 *In re Johnson Pub. Co., LLC*, Case No. 1:19-bk-10236 (Bankr. N.D. Ill. Filed April 9, 2019).

8 Rachel Siegel, *Johnson Publishing Company, the Ex-Publisher of Ebony and Jet Magazines, Files for Bankruptcy*, Wash. Post (April 10, 2019), https://www.washingtonpost.com/business/2019/04/10/johnson-publishing-company-which-produced-ebony-jet-magazines-files-bankruptcy/.

9 Jon Seidel, *Johnson Publishing Co., the Ex- Publisher of Ebony and Jet, Files for Bankruptcy*, Chicago Sun-Times (April 10, 2019), https://chicago.suntimes.com/business/johnson-publishing-company-files-bankruptcy/.

10 Siegel, *supra* note 8.

Johnson Publishing Company

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Shortly after the filing of the case, Miriam "Mimi" Stein was appointed trustee and tasked with the very routine duty of maximizing the value of Johnson Publishing's assets for the benefit of all of its creditors. What made the case unique was that among the assets of Johnson Publishing was what the New York Times called a treasure chest of black history – "the most significant collection of photographs depicting-American life in the 20th century."[11]

But the Archive was pledged to secure a $12 million loan from Capital Holdings V, LLC, which company was owned by Mellody Hobson and her husband George Lucas.[12] The loan had been in default for about 3 years, during which time Johnson Publishing's attempts to restructure, obtain alternative financing, or sell the company as a going concern had failed.[13] And the trustee had a less than three-month window to liquidate the Archive, while past efforts to sell the Archive through traditional auction houses like Chrisie's and Sotheby's had proved unsuccessful.

Yet with only three months to close the sale, Mimi Stein assembled a diverse and inclusive team who worked collaboratively to develop an innovative marketing strategy for the sale of the Archive. And, according to Mimi Stein,

> What brought the eventual buyer to the table was the nature of the diverse assets and the marketing efforts developed by the diverse team.

Ultimately, the Archive was sold to a consortium of foundations—the Ford Foundation, the Mellon

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11 Julie Bosman, *Selling Treasure Chest of Black History*, N.Y. Times, July 17, 2019, at B4.
12 Robert Channick, *Bankrupt Johnson Publishing is set to auction off its Ebony photo archives, but it still faces $5 million defamation lawsuit over gym-mat death coverage*, Chicago Tribune (July 12, 2019), https://www.chicagotribune.com/business/ct-biz-johnson-publishing-ebony-defamation-lawsuit-20190712-nhykejaxu5fjrm2kjaahgg5rse-story.html.
13 Press Release, Johnson Publishing Company, LLC, Johnson Publishing Company Filed for Bankruptcy (April 9, 2019), https://www.prnewswire.com/news-releases/johnson-publishing-company-filed-for-bankruptcy-300828430.html.

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Foundation, the J. Paul Getty Trust, and the MacArthur Foundation—for $30 million. The foundations, which came together to buy the archive in just a week to keep it from disappearing into private hands, plan to donate it to the National Museum of African American History of Culture in Washington, DC; the Getty Research Institute in Los Angeles; and other cultural institutions.[14]

In the end, a team of diverse and inclusive professionals managed to produce in weeks a result – a $30 million sale of the Archive – that years of traditional [and more homogenous] marketing efforts could not. Is that enough of a link to conclude that it was diversity that led to the success of the case? No. What led to the success of the case, according to Mimi Stein, was the professionals' willingness to think outside the box. But, given the well-established link between diversity and innovation, perhaps it is safe to say that the team's diversity led to their willingness to think creatively.

14 Sarah Cascone, *Four Foundations Team Up to Buy the Historic Archives of 'Ebony' Magazine for $30 Million in a Bankruptcy Sale*, Art News (July 25, 2019), https://news.artnet.com/art-world/getty-wins-jet-ebony-archives-auction-1606687.

Returning the Undue Hardship Standard to its Rational Roots

By Nicholas Sellas
Florida State University College of Law, J.D. Candidate 2024 and 2022 Federal Judicial Intern for the Tampa Division of the United States Bankruptcy Court for the Middle District of Florida

Since March of 2020, student loan repayments have been put on pause by executive action.[1] This relief is only temporary, yet with six extensions it has proved to be a tricky policy to walk back.[2] With an estimated 43 million Americans carrying student loans that total roughly $1.566 trillion,[3] it is no surprise that the public at large is desperate for relief - relief that the bankruptcy system can provide.

Set out below is an analysis of the relevant statutory history of §523(a)(8), the long-standing majority interpretation of the undue hardship discharge, and a reform proposal that seeks to better guide the courts while also providing more reliable relief to debtors.

§ 523(a)(8) History

The initial wording of §523(a)(8) originates from the passing of the Bankruptcy Reform Act of 1978 and provides debtors with two options to discharge a student loan:

> (A) such loan first became due before five years before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . [4]

Subsection (A), the temporal discharge, allowed debtors to discharge student loans after five years. Subsection (B) allowed discharge if the debtor or the debtor's dependents faced an undue hardship due to the debtor's student loans. Naturally, debtors used the undue hardship discharge before they qualified for the simpler temporal discharge.

The first change to §523(a)(8) came from the Crime Control Act of 1990 which increased the five-year temporal discharge period to seven years.[5] This change sought to address a perceived abuse of the bankruptcy system.[6] The concern was that asset-poor graduates with disproportionate liabilities could too easily file for bankruptcy after college, encouraging students to take on loans they knew they would never repay.[7]

In 1998, Congress again amended §523(a)(8) through the Higher Education Amendments of 1998, which repealed the temporal discharge.[8] This was a monumental change as only the undue hardship discharge—the more challenging discharge—remained for debtors looking to discharge student loans. Interestingly, this change resulted from the budget wars in the late 1990s, without discussion of greater bankruptcy policy.[9] Due to the budgetary nature of this amendment, and the lack of discussion over bankruptcy policy, it provides little indication of Congress' understanding of the consequences of such a significant change to the Bankruptcy Code. The undue hardship standard, now the sole path to discharge, provides:

> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents . . .[10]

The *Brunner* Test

All but two circuits have adopted the three-part *Brunner* test[11] when considering whether a debtor faces an undue hardship sufficient to warrant a discharge of the individual's student loans. The *Brunner* test requires:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a *significant portion of the repayment period* of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[12]

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1 Peter Butler, *Student Loans Are Paused, but You Might Want to Make Payments Anyway*, CNET (July 13, 2020, 6:55 PM), https://www.cnet.com/personal-finance/loans/student-loans-are-paused-but-you-might-want-to-make-payments-anyway/.
2 *Id.*
3 Sean Ruddy Et Al., Bipartisan Policy Center, Student Debt and the Federal Budget, at 4 (2021).
4 Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549 (1978).
5 Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789 (1990).
6 Bruce Grohsgal, *The Long Strange Trip to A Certainty of Hopelessness: The Legislative and Political History of the Nondischarge of Student Loans in Bankruptcy*, 95 Am. Bankr. L.J. 443, 448 (2021).
7 *Id.*
8 Higher Education Amendments of 1998, Pub. L. No. 105–244, 112 Stat. 1581 (1998).
9 Grohsgal, *supra* note 3, at 473.
10 11 U.S.C. § 523(a)(8).
11 *See In re Long*, 322 F.3d 549, 553–54 (8th Cir. 2003); In re Bronsdon, 435 B.R. 791, 800 (1st Cir. BAP 2010).

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Brunner was decided in 1987 under the original 1978 language of §523(a)(8). Therefore, the court in deciding *Brunner* developed this test with both the temporal and undue hardship discharge in mind. The complete repeal of the temporal discharge in 1998 did not disturb *Brunner* or its progeny, as it stood solely on the undue hardship discharge.

The second prong of the *Brunner* test requires courts to determine if an undue hardship is "likely to persist for a significant portion of the repayment period of the student loan[]."[13] This wording makes clear that the courts are to consider a temporal element when determining if a debtor is facing undue hardship. However, the *Brunner* test, by itself, provides scant guidance as to what serves as the "repayment period." This is especially true in the modern day where income contingent repayment plans and consolidation loans are more available and lengthier than when *Brunner* was decided.

Judge Eric L. Frank in *In re Price* (rev'd on other grounds) examines what should serve as the repayment period in applying the *Brunner* test.[14] And concluded that the repayment period should be the "remaining contractual term of the debtor's loan."[15] This follows logically when one considers the government's competing interests in preventing bankruptcy abuse by recent graduates and granting debtors a fresh start after bankruptcy.[16] In *In re Price*, the court examined the creditor's proposed approach of using an available administrative remedy—an up to twenty-five-year income contingent repayment plan—as the basis for the "repayment period" of the *Brunner* test.[17] The court dismissed this approach once the implications to the debtor were considered.[18] One, poignant concern raised is that this would hold the debtor to the terms of an agreement they never made.[19] Furthermore, the creditor's concern that a debtor would avoid a feasible repayment plan in order to run out the clock on the initial plan is undercut by the fact that the third prong of the *Brunner* test requires a "good faith effort[] to repay the loan[]."[20]

Overall, the *Brunner* test is a well-crafted approach to determine undue hardship. However, the vague nature of what constitutes a repayment period can lead to overly harsh interpretations that leave debtors with disparate outcomes due solely to the jurisdiction they happen to fall under. Per the Constitution, bankruptcy law in the United States is a uniform federal law,[21] and problems of disparate outcomes like this are ripe for Congress to address directly through legislative action.

Legislative Proposal

While there are a variety of proposals for how the Bankruptcy Code should treat student loans,[22] one of the most palatable options is simply codifying the temporal element of the *Brunner* test into §523(a)(8). This new language could read as follows:

> (8) unless excepting such debt from discharge under this paragraph imposed or would impose an undue hardship on the debtor and the debtor's dependents during the initial repayment period . . .

This wording would make clear that the initial repayment period is the timeframe to consider when determining if an undue hardship exists. By providing clearer guidance within the statute, Congress would also curb any overly harsh interpretation of §523(a)(8) that utilizes the lifetime of an income-contingent repayment plan, which can last upwards of twenty years. This proposed language would grant relief to debtors currently haunted by a seemingly unyielding specter of student debt. Furthermore, the third prong of the *Brunner* test, the good faith requirement, already ensures that this change will not create additional abuse of the bankruptcy system. This proposal simply codifies and reinforces the majority view of the bankruptcy courts and should garner bipartisan support (given *Brunner's* long-established roots),[23] while alleviating the threat to debtors of falling within an extreme jurisdiction that makes undue hardship nearly impossible to demonstrate.

12 *Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner)*, 831 F.2d 395, 396 (2d Cir. 1987) (emphasis added).
13 *In re Brunner*, 831 F.2d at 396.
14 *See Price v. DeVos (In re Price)*, 573 B.R. 579 (Bankr. E.D. Pa. 2017), *rev'd on other grounds, Devos v. Price*, 583 B.R. 850 (E.D. Pa. 2018).
15 *In re Price*, 573 B.R. at 606.
16 *Id.* at 601.
17 *See In re Hollins*, 286 B.R. 310, 316 (Bankr. N.D. Tex. 2002) (under the *Brunner* test, the court determined that the option of a twenty-five-year income repayment plan precluded the debtors claim of undue hardship); *See also In re Long*, 292 B.R. 635, 639 (B.A.P. 8th Cir. 2003) (under the alternative totality of the circumstances test, an available twenty-five-year income repayment plan precluded debtor from demonstrating undue hardship). Other courts have adopted extreme interpretations under both the majority and minority approach which essentially block the dischargeability of student loans in all but the most dire cases.
18 *In re Price*, 573 B.R. at 606.
19 *Id.* (the court was also concerned about the excessive preclusion that a twenty or twenty-five-year repayment plan period would have on a debtor's ability to obtain a discharge and the unreliability of a financial forecast for such a long period).
20 *Id.*
21 U.S. Const. art. I, § 8, cl. 4.
22 *See* Final Report of the ABI Commission on Consumer Bankruptcy, I. Effectuating The Fresh Start, A. Discharge and Dischargeability, § 1.01 Student Loans (American Bankruptcy Institute, 2019), available at https://www.nclc.org/images/pdf/bankruptcy/rpt-abi-commission-on-consumer-bankruptcy.pdf.
23 The proposed language codifies and gives due respect to the original (1987) meaning of the second prong of Brunner.

Special Thanks! To Our Pro Bono Volunteers

The TBBBA thanks our volunteers for helping out -- whether it is in our Pro Se Assistance Clinic, in the virtual assistance clinic run by the Middle District of Florida's Pro Se Bankruptcy Assistance Clinic, or by taking a case on a pro bono basis.

Volunteers in August include:

Heather DeGrave
(took over an adversary proceeding)
Dan Fogarty
Laura Gallo
Adam Gilbert
William Joseph "Joe" Kopp
(virtual June & July volunteer)
Amy Mayer
Megan Murray
Kelly Petry
Charles Postler
Mark Robens
Tim Sierra
Scott Stichter
Katelyn Vinson
Peter Zooberg

Volunteers in September include:

Michael Barnett
Dan Fogarty
Laura Gallo
Laura Gatto
Harley Reidel
Tim Sierra
Scott Stichter
Elyssa Tenenblatt
Scott Underwood
Peter Zooberg

In this segment, the TBBBA would like to recognize one or two pro bono volunteers whose hard work and hours made a difference to those who most needed assistance. For this Fall 2022 issue, Heather DeGrave and Joe Kopp will be highlighted.

Heather DeGrave - *A bit about myself and why I do pro bono work:*
For 18 years, I have practiced business, construction, and commercial collections litigation in Tampa, and in bankruptcy courts I usually represent creditors or serve as special litigation counsel. For many of my clients (pro bono or not), the courtroom can seem like a scary place, with the lawyers and judges speaking a language only we understand. As an advocate, I see myself as a translator of sorts, making the legal lingo seem less mysterious while also making sure my clients feel heard. It is of utmost importance to our justice system that every litigant has a voice in the process, and I am delighted when I see a pro bono need in an area of the law I practice so that I can do my part to give litigants their voice in the courtroom. I am a partner at Walters Levine & DeGrave. In our spare time, my children and I love to watch movies together, go to Busch Gardens, Universal Studios and Disney World, and travel the world.

William Joseph "Joe" Kopp - *Why Pro Bono Work?*
The practice of law is difficult enough as it is. Why would anyone want to routinely dedicate a substantial amount of time to providing free representation to indigent members of our community? As someone with over

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Pro Bono Volunteers

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ten years of providing pro bono representation, I like to think that I've had the opportunity to experience almost all of its benefits. When possible, I've tried to take at least one pro bono case a month from Community Law in St. Petersburg, as that's where my practice is located. Now that most people have become comfortable with Zoom and working remotely, I can also help the TBBBA provide pro bono services to Hillsborough County residents and beyond.

Many of my pro bono cases have been routine, some have been fascinating, but all have given me opportunities to learn and grow as an attorney. I've been able to help my former pro bono bankruptcy clients with their other legal issues once they got back on their feet. As a result, I've received referrals for all types of practice areas, including personal injury cases and additional bankruptcies.

I also think that when a firm has a solid reputation for pro bono service, the court and prospective clients are more likely to view the firm's fees in other cases as reasonable. A strong record of pro bono service makes it apparent that the attorney is not simply working for a paycheck. I have no doubt that having that sort of reputation brings the right type of people to a law firm, both as clients and as employees.

Additionally, if others know that you work hard to give back to the community, you're often rewarded in other less obvious ways. Maybe a clerk sees you run in near closing time and stays open so you can file a document. Maybe a judge moves your case to the back of the calendar when your Zoom link isn't working so you don't miss a hearing. Maybe a Trustee takes something on the record rather than asking you to amend a filing. There are countless small conveniences that are only available when someone remembers that you took your valuable time to help a person in need who could not afford to pay you for it.

Finally, providing pro bono services helps to fulfill the portion of the Oath of Admission to the Florida Bar that provides that I won't reject from consideration the cause of the defenseless or oppressed. I thoroughly enjoy doing pro bono work for good people who are in desperate need and encourage all of my colleagues to do the same.

The Middle District of Florida Bankruptcy Pro Se Clinic

The Honorary Jacob A. Brown, chair of the Middle District of Florida Bankruptcy Court Virtual Consult Pro Bono Project, was kind enough to share the report for virtual pro se clinic for its first live month.

The Court issued 123 notices to unrepresented parties out of the 1,069 total filings in the District in September broken down per division as follows:

Ft. Myers = 6
Tampa = 48
Jacksonville = 21
Orlando = 48
Total = 123

29 unrepresented parties signed up for virtual pro se clinics and 21 were held. There were some that signed up more than once.

We also have 202 registered attorneys broken down per division as follows:

Ft. Myers = 11
Tampa = 89
Jacksonville = 30
Orlando = 72
Total = 202

Congrats to all who share in the success of the virtual clinic! Thanks to those who already volunteered.

For those who have not yet volunteered, we encourage you to sign up. We also encourage all to pass the website to those who may need pro bono assistance:

Unrepresented parties who want a virtual consult with a volunteer attorney in the Middle District can register at: www.bankruptcyproseclinic.com

Student Loan Sidebar

by: Christie Arkovich
Christie@christiearkovich.com

With everyone's eyes on the $10,000 forgiveness ball, many other revisions to programs and a new Income Driven Plan were announced that will result in much more forgiveness for borrowers in all income brackets. This student loan update is longer than usual because of all the announcements and changes recently issued as well as upcoming deadlines.

Federal Payment Pause Extended until 12/31/22. This will occur automatically as it has in the past. But there are important things that need to be done by borrowers before payments restart after that date.

With everyone's eyes on the $10,000 forgiveness ball, many other revisions to programs and a new Income Driven Plan were announced that will result in much more forgiveness for borrowers in all income brackets.

Biden 10k-20k Forgiveness:
Borrowers are eligible for $10,000 in debt cancellation for loans held by the Department of Education. Pell Grant recipients will receive an extra $10,000 for a total of $20,000 in federal student debt cancellation.
There is an income cap for eligibility so your income must have fallen below $125,000 for individuals and $250,000 for married couples or heads of households for either 2020 or 2021.

How to Obtain? 8 million people are expected to automatically receive the debt cancellation; however, that will mostly be for those who have filled out a FAFSA since 2020. Everyone else will need to fill out an application and include income information. Most borrowers have not certified their income since tax year 2019 due to the CARES Act pause. An application is expected to be available shortly and you can sign up to be notified here: https://www.ed.gov/subscriptions

What Loans Qualify for the Forgiveness?
Any form of federal loan held by the Department of Education, including Parent Plus and graduate school, loans are eligible for relief. Those who are uncertain of who actually holds their loans, should consolidate to a Direct Loan. That includes commercially held FFEL loans and Perkins Loans. It is best to consolidate to a Direct Loan before 12/31/22 so that any extended forbearances also count toward Income Driven Repayment (IDR) forgiveness for any remaining balance.

Current Students and Dependent Students: Current students are eligible for this debt relief for loans prior to July 1, 2022. Dependent students will be eligible for relief based upon their parental income rather than their own income.

Is there any Downside to the Forgiveness? In Florida, no. If you live in NC, MS, IN (and possibly WI, AR, WV and MN too) state taxes may apply. Federal taxes on ANY student loan forgiveness are waived through 12/31/25.

Is it Likely that the Forgiveness will be Challenged in Court? Only those with standing will likely have a chance to reverse this executive action. That would mean a student loan servicer, a private lender or investor if they want to oppose the current administration.

Fresh Start Initiative: This program is an opportunity for anyone with defaulted Direct, Perkins or FFEL loans to get out of default status. This is in addition to the standard "Get out of Jail cards" which are Consolidation or Rehabilitation. Consolidation is not possible

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Student Loan Sidebar continued

if you have already consolidated into a Direct Consolidation Loan. Loan Rehabilitation is a one-time opportunity for most borrowers. We have run into folks who have used both of their Get Out of Jail cards and were left with few options to stop a garnishment such as a payoff of the entire loan or perhaps curing the default in a Chapter 13 Plan. Now the Fresh Start initiative will allow someone to go directly to repayment current status by calling the Default Resolution Group at 1-800-621-3115. If this is not done, the loan will remain in default, and collection efforts will re-start in one year.

PSLF deadline and recommendations: We are nearing the deadline of October 31, 2022 to consolidate federal FFEL or Perkins Loans to the newer Direct Loans to obtain the benefits of the PSLF Waiver. The certification form should be sent to Mohela - the new PSLF servicer. This applies for those with prior public service as well as current. A PSLF Help Tool is available here to check if your employer is eligible: https://studentaid.gov/pslf/.

Practice Pointers: Besides acting before the deadline, our best advice is to consolidate not only FFEL Loans but also Direct Loans to combine payment periods and round up starting from the date of the first loan repayment. This applies for those seeking the benefits of the IDR Waiver as well.

The PSLF Waiver won't apply to Parent Plus loans but if you have another loan, you can consolidate that loan with your Parent Plus loans to obtain PSLF credit for all loans.

If you have not received approval of your Consolidation Application by mid-October, send in your PSLF certification as the Department of Education has indicated it will consider pending consolidation applications if the certification form is submitted before 10/31/22. The certification form may be denied if it is reviewed before the consolidation is completed, but it can be resubmitted. The key here is don't delay.

New IDR Proposed for July 2023: For those who will have trouble making even an IDR payment because certain medical expenses or other unusual expenses don't count to reduce the income driven payment, the Department has announced a new lower IDR plan for next Summer. Undergrad borrowers would pay 5% of discretionary income rather than the current lowest IDR (Payee or Re-payee of 10%). If you have both undergrad and grad loans, then it's a weighted average. The calculation for discretionary income will be revised to deduce 225% of poverty line rather than 150% which is the test used by IBR, Payee and Re-payee). Reducing the percentage of income and including more expenses will drastically drop the IDR payment. This will matter most for those with large families.

The biggest question about the new IDR plan is whether it will allow married couples to file separate tax returns to exclude their spouse's income.

Additional changes: Other revisions to existing programs are underway as well including a larger interest subsidy, removal of many of the capitalization events to lower interest accrual, waiver of remaining loans for those who graduated with a $12,000 or less balance. Also, the IDR Waiver will permit an audit of someone's account and provide full forgiveness if payments or allowed forbearances have gone on for 20-25 years.

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Student Loan Sidebar continued

IDR Waiver and Audit: As was covered in detail in the Summer issue of the Student Loan Sidebar, the deadline for those with FFEL Loans or Perkins Loans to consolidate to Direct Loans to obtain a one-time account adjustment to include extended periods of forbearance, credit for 10 to 25 year repayment histories etc. is December 31, 2022.

BDTR program and Sweet v. Cardano class settlement: Please see our updates on our blog or You Tube Channel "The Student Loan Sidebar" – the new deadline is Nov. 3, 2022 to be included as a post-class member for the Sweet v. Cardano settlement and the list of eligible schools has changed a bit. https://predatorystudentlending.org/wp-content/uploads/2022/06/Sweet-Settlement-Agreement.pdf. A list of schools included within the settlement can be found here: https://static1.squarespace.com/static/62d6e418e8d8517940207135/t/62fd549d7990e6153e306e7a/1660769437231/UPDATED_PPSL+Sweet+Flowchart_FINAL.pdf

Full Loan Forgiveness will occur for all Westwood, Corinthian and ITT Students. We will put out a blog or video shortly on this and whether anything needs to be done for eligibility – it should be automatic without the need to file a Borrower Defense or other application.

Joint Spousal Consolidation Loan Update: We are expecting President Biden to sign this bill before the midterm elections to allow de-consolidation or separation of previously combined loans between spouses to take advantage of the newer programs. There is the possibility that the Act will not be passed in time for PSLF credit, so we suggest that anyone in public service should send in a PSLF certification form before October 31, 2022 in the hopes that the Department will allow relief for pending applications.

Free Florida Bar Webinar – Student Loan Update: Planning Your Next Play is available here: https://flayld.org/2022/08/student-loan-update-planning-your-next-play-in-light-of-the-department-of-eds-recent-moves/

The information provided in this Sidebar does not, and is not intended to, constitute legal advice. For a 1-on-1 consultation, please email info@christiearkovich.com.

Painful Lessons I Learned at Mediation

By Roy S. Kobert
Certified Mediator

After two decades of mediating cases, below are musings of what I wish somebody would have shared with me prior to my first trip to the mediation table.

1. Opening remarks are not "opening statements." I was simply not going to convince the other side during my opening to immediately write my client a check. This was not my Perry Mason moment. However, it was my moment to speak directly to the party sitting across from me—without my opposing counsel acting as a filter. For the first time I could personalize my client and their case. I could indicate why I was here – not just because a Judge ordered me to participate, but in a concerted effort to reach a consensus. Be a counselor at law and leave your role as an attorney at law temporarily on the wayside.

2. Pre-mediation submissions should ideally not be just for the eyes of the mediator. Seriously consider sharing a version of the pre-mediation submission with your opposing counsel. Allow opposing counsel to digest what you see as case weaknesses so they have an opportunity to truly reflect on them in private and expound on them with their client prior to mediation.

3. Don't make opposing counsel your enemy. Dislike amongst counsel just exacerbates the overall mediation process. If your opposing counsel is a bully, kill him/her with kindness and play to their ego. This is not about you—it's about what is best for your client. Clients typically don't want to try the case, they want to make a deal.

4. Motion practice filings on the eve of mediation generally have the opposite impact by rendering settlement more challenging. If you have a killer pleading, give a DRAFT privately to opposing counsel. Don't embarrass opposing counsel.

5. Secondary parties: In a typical secured lender/debtor mediation; what about the participation by the creditor's committee, the carrier or others? Talk (not via text or email—but by telephone) with these secondary parties to explore common ground and to know where the land mines lie.

6. Don't keep the complicated...complicated. Lawyers, especially bankruptcy lawyers, talk "in code" 1111b; 1129 standards; 523/727 issues. Make sure the client understands their case in non-legalese. The true gift is to make the complicated simple.

7.Get client involved and invested early on in the pre-mediation process. What are the realistic ranges of possible settlement. Time for a candid reality check of the case with your client so they don't arrive with irrational expectations. Don't just wing it when you arrive.

8. If you don't settle, what is the budget to complete discovery and actually try the case? In addition, provide an accurate assessment of collectability and make sure client buys in.

9. Non-monetary issues. Client may need some non-monetary asks from the opposing side. Explore those in advance. Cooperation as to a 3rd party. A release. Information how to operate a unique piece of machinery. An apology. Actively explore something you can offer to the other side which is of inconsequential value to your client. The extent of this laundry list is limited only by your imagination.

10. Listen, Listen, Stop Talking and Listen. Don't be afraid of silence. People have an inert response to silence, a desire to fill it and volunteer information.

11. Use the mediator to your advantage. Typically settlement proposals will resonate better if reframed as coming as a mediator's proposal.

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Just the Facts: Consumer Bankruptcy Trends, 2005-2021

Published on August 9, 2022, in USCourts.gov

Background

The bankruptcy process can provide a fresh financial start for consumers who cannot pay their debts, either because of insolvency or insufficient income to meet creditor demands. Personal bankruptcy generally works in one of two ways: liquidating assets to pay one's debts under Chapter 7 of the U.S. Bankruptcy Code or establishing a repayment plan under Chapter 13 of the code.[1]

Under a Chapter 7 liquidation, a debtor generally can achieve a fresh financial start more quickly than under a Chapter 13 repayment plan, which can last up to five years.[2] However, under Chapter 13, a debtor may be able to save a home from foreclosure, reschedule secured debts and extend them over the life of a Chapter 13 plan (possibly lowering the payments or interest rates), and consolidate debt payments to a trustee who then handles distribution to creditors.

Both nonbusiness and business bankruptcies are available. This article focuses solely on nonbusiness filings as nonbusiness bankruptcies accounted for 97 percent of bankruptcies during the 12-month reporting periods ending Sept. 30, 2006, through Sept. 30, 2021.

Facts and Figures

• In the 16-year span from Oct. 1, 2005, to Sept. 30, 2021, about 15.3 million nonbusiness bankruptcy petitions were filed in the federal courts (i.e., filings involving mainly consumer debt). Of those, 10.3 million – 67 percent of total nonbusiness filings – were filed under Chapter 7, and 5 million – 32 percent of total nonbusiness filings – were filed under Chapter 13 (Table 1).[3]

• In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which among other things, instituted a means test to move some filers away from filing for bankruptcy under Chapter 7 and toward filing under Chapter 13. An individual or couple filing jointly may file for bankruptcy under Chapter 7 only if their debts are primarily consumer debt and their monthly income over six months prior to filing for bankruptcy is below the state median for a similar household, or if the debtor's monthly disposable income falls below a threshold established by a statutory means test.

• The capacity for debt is often driven by recessionary periods. For example, after the Great Recession, which lasted from December 2007 to June 2009, overall bankruptcy filings accelerated. As the economy regained strength and consumer spending patterns remained in check, Chapter 7 and Chapter 13 consumer bankruptcy filings declined steadily through 2019 (Figure 1 and Figure 2).

• However, bankruptcy filing patterns have yet to mimic past patterns during the current period of economic stress caused by the COVID-19 pandemic. Such economic stress caused by the pandemic includes, but is not limited to, periods of record high unemployment, negative gross domestic product (GDP) growth, and an increased demand for health and fiscal responses from government entities. At the onset of the pandemic, during the first half of 2020, Chapter 7 and Chapter 13 consumer bankruptcy filings declined markedly, with the decline in Chapter 13 filings being the more pronounced (Figure 2).

• The percentage of total filings that Chapter 7 filings represented consistently declined from 2010 to 2019, whereas the percentage of filings under Chapter 13

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1 Other types of bankruptcy include: Chapter 11 (Reorganization/Individual/Small Business), Chapter 12 (Family Farmers or Fishermen), Chapter 15 (Cross-Border Cases), Chapter 9 (Municipalities). Some individuals use Chapter 11 to obtain relief.
2 CARES Act (subsequently extended by the COVID-19 Bankruptcy Relief Extension Act) permitted debtors in plans confirmed prior to March 27, 2021, experiencing COVID-19-related hardship could move to extend their plans to up to 7 years. See Section 1113(b)(1)(C) of the CARES Act.
3 The remaining 1 percent of Nonbusiness filings were petitions under Chapter 11.

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increased within the same period. Since the start of the pandemic in 2020, the reverse trend is observed as the percentage of total filings that Chapter 7 filings represented began to increase while the percentage of filings under Chapter 13 filings decreased (Figure 3).

• The steep decline in Chapter 13 filings in 2020 (Figure 2) corresponds to the decline in mortgage foreclosure filings. The foreclosure filing rate went from 0.36 percent in 2019 to 0.16 percent in 2020 as reported by the Consumer Financial Protection Bureau (CFPB).[4] Furthermore, eviction moratoriums slowed the rate of evictions.[5] Moreover, consumer debt levels also fell following the start of the pandemic.[6] With initiatives such as the CARES Act and other protection programs prohibiting evictions and foreclosures through July 31, 2021, foreclosure and eviction rates could return to pre-pandemic levels once protections were no longer a factor. Concurrent with the increase in consumer spending, there was an increase in disposable income. At this time, the direction or pace of these metrics is unclear.

• While the percentage change of both Chapter 7 and Chapter 13 filings declined across most federal court districts in the 12-month period ending Sept. 30, 2021, compared to 2019 (Map 1 and Map 2), districts in the South were disproportionately affected by the decline in Chapter 13 filings.[7] As shown in Map 3, the federal districts in which Chapter 13 nonbusiness bankruptcy filings constituted the highest percentage of total nonbusiness bankruptcy filings from 2006 to 2021 were concentrated in the South.[8] The Southern District of Georgia had the highest percentage of Chapter 13 filings as a percentage of total nonbusiness bankruptcy cases at 74 percent, followed by the Middle District of Alabama, in which Chapter 13 consumer filings accounted for 70 percent of total nonbusiness filings. The illustration in Map 4 further indicates that many of the districts with the highest count of Chapter 13 consumer bankruptcies were also located in the South.[9]

• Nonbusiness Chapter 7 and Chapter 13 filings per thousand population also varied by chapter.[10] Per thousand population Chapter 7 filings were highest in distinct areas in the West, Midwest, and Southeast regions of the United States. The highest filings per thousand population occurred in Nevada (2.2 filings) and the lowest in Alaska (0.4 filings) (Map 5). However, per thousand population Chapter 13 filings were more prevalent in the Southeast region of the United States. The largest share of per thousand population Chapter 13 filings occurred in Alabama (2.5 filings) and the smallest was in Alaska (0.1 filings) (Map 6). Although Chapter 7 and Chapter 13 filings per thousand population were both high for the Southeast region of the United States, this area was highest for Chapter 13 filings.

• Based on the most recent results of the American Community Survey (ACS-2019), the states with the highest rates of Chapter 7 bankruptcy filings per household were Nevada, Illinois, and Ohio (each at 0.006 filings) (Map 7). The highest rates of Chapter 13 filings were in Alabama (0.009 filings), Tennessee (0.007 filings), and Georgia (0.007 filings) (Map 8).

4 Source: Mortgage Bankers Association, National Delinquency Survey, Q3 2020.
5 For more information on housing insecurity and the COVID-19 pandemic, please visit consumerfinance.gov/data-research/research-reports/housing-insecurity-and-the-covid-19-pandemic.
6 For more information on debt service ratio trends, please visit fred.stlouisfed.org/series/TDSP (link is external).
7 For more information on consumer spending trends, please visit bea.gov/data/consumer-spending.
8 For more information on why debtors from the South choose Chapter 13 more often than those in other states, please see https://www.stlouisfed.org/open-vault/2019/june/wage-earners-bankruptcy-law-southern-roots (link is external).
9 Per capita count of Chapter 13 consumer bankruptcies were high in the Central District of California and Northern District of Illinois because of the large size of those courts.
10 Source: Annual Estimates of the Resident Population for the United States (NST-EST2020).

Member News & Announcements

Email Angelina Lim to be included in the next issue!
angelinal@jpfirm.com

Amy Denton Mayer was married to Stephan Mayer on April 23. In case you're wondering how it's pronounced…it is pronounced the same as the famous hot dog brand. Congrats Amy!

Judge Michael Hooi's investiture as a Hillsborough County Judge was held on October 12, 2022. Congratulations Judge Hooi!

Camryn Lackey joined Anthony & Partners. She was sworn in on September 21, 2022.

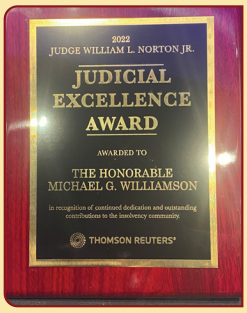
Share your accomplishments!

Email
Angelina Lim • angelinal@jpfirm.com

Michael Markham and Kathleen DiSanto became Subchapter V Trustees in April. Here's hoping we have many Subchapter V cases in our District to keep us all busy!

J.R. Boyd joined Erik Johanson PLLC. On October 3, 2022, J.R. had the honor of being sworn in as a member of the Florida Bar by Hon. Catherine P. McEwen, who helped inspire J.R.'s passion for bankruptcy and commercial law.

Judge Williamson was awarded the 2022 Judge William L. Norton, Jr. Judicial Excellence Award at the National Conference of Bankruptcy Judges



This award is given to a judge whose career embodies the namesake's continued dedication and and outstanding contribution to the insolvency community. Judges Delano and McEwen accepted the award on his behalf. Congrats to Judge Williamson! A well deserved award.

Hurricane Ian Update

The Fort Myers Courthouse lost water and power when Hurricane Ian swept through SW Florida on September 28. It re-opened on Monday, October 17. Many of the District Court's employees were without electricity or water, and those employees who have water are or were under a "boil water" advisory. This is a very difficult time for most residents in Southwest Florida.

Our thoughts are with our brethren south and east of us who suffered from Hurricane Ian.

The Florida Bar President, Gary Lesser, and Josh T. Chilson, the Florida Bar Communications Committee Chair, issued a letter on October 6, 2022, regarding the hurricane Ian. For your information, an excerpt from the letter outlining how attorneys can help is reprinted below:

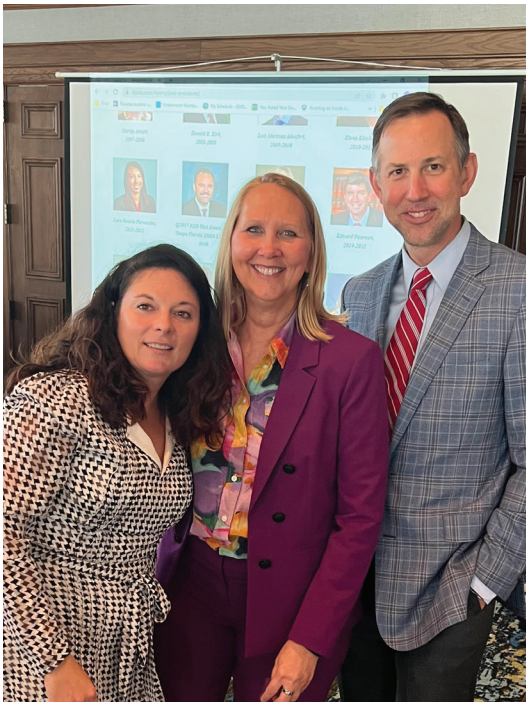
HOW LAWYERS CAN HELP

To quickly connect Florida Bar members offering office space and legal support services for attorneys and law firms impacted by Hurricane Ian, we have added a Hurricane Ian section of The Florida Bar News' Classified Ads for temporary office space or other resources. If you would like assist, email the offered resources and your contact information to Editor Mark Killian of the Florida Bar.

The Florida Bar Young Lawyers Division has activated the YLD/FEMA Disaster Hotline. Volunteers return calls placed to the YLD's 1-800 hotline or at FEMA center. Florida Bar members interested in volunteering can enroll online now. Counties covered under the disaster declaration include Charlotte, Collier, DeSoto, Flagler, Hardee, Hillsborough, Lee, Manatee, Orange, Osceola, Pinellas, Polk, Putnam, Sarasota, Seminole, St. Johns, and Volusia. The Seminole Tribe of Florida has been included in the federal disaster declaration.

The Florida Free Legal Answers 100% online pro bono project has added a Hurricane Ian category. Florida Bar members can volunteer now to provide online pro bono assistance through Florida Free Legal Answers.

Past Presidents' Reception
July 28, 2022



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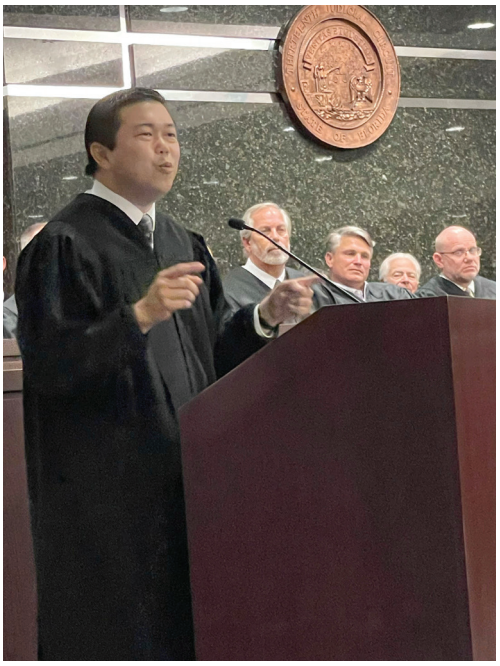
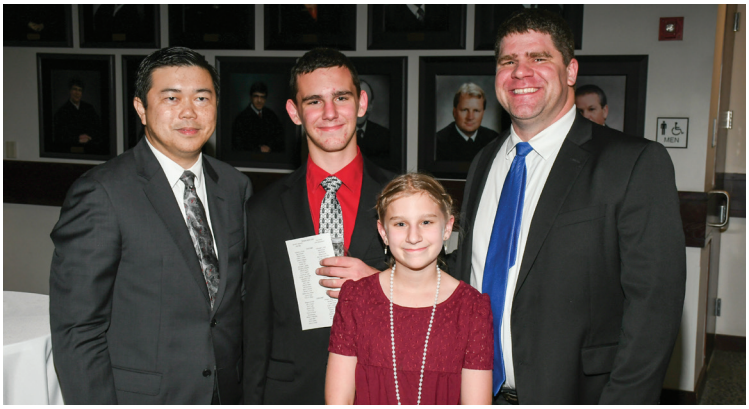
Judge Michael Hooi's Investiture
October 12, 2022





Judge Michael Hooi's Investiture
October 12, 2022