The Cramdown

Newsletter for the Tampa Bay Bankruptcy Association

Editor-in-Chief, Ryan Yant
Carlton Fields

Summer 2023

PRESIDENT'S MESSAGE

by Megan Murray
Underwood Murray PA

Just a few weeks ago on June 6, 2023, the TBBBA once again convened at Palma Ceia Golf and Country Club for the Annual Awards Dinner. It should come as no surprise that fond memories of Judge Williamson were abundant.

Outgoing President Barbara Hart moderated the evening just as she has run all of last year's events - with her characteristic wit, grace and humor. Judge Delano kicked off the night and led us through the wonderful memories served to us like layers of a trifle by Angelina Lim (Judge Williamson's first law clerk), Ed Comey (Judge Williamson's longest standing and last law clerk) and Linda Williamson (the love of his life). Judge Williamson's keen wit and deadpan humor were still present to captivate the largest crowd in three years (COVID, of course).

Keith Appleby and Lara Fernandez presented Jesus Lozano (2nd runner up), Kylie Riordan (1st runner up) and Taylor Petrie (award winner) with the Paskay Awards which are presented to students with "outstanding aptitude in areas of bankruptcy law." Michael Barnett and Kimberly Rodgers (Executive Director of the Community Law Program) presented Traci K. Stevenson with the Don Stichter Award, an award only given periodically for exceptional community service. Traci is well-suited for this prestigious award. These awards are not perfunctory, but go to the heart and soul of what this bar stands for: scholarship, skill and community service.

The passing of the gavel was a little like dark chocolate – bittersweet to lose our faithful chair (Noel Boeke) and a successful president (Barbara Hart), after years of dutiful service. With any luck, the new board will bring a dash of sweet new ideas while we all work hard to maintain a smooth consistency of the ingredients that make this Bar great.

We pulled out our spoons at the end of the night and enjoyed the bottom of the trifle together at Johnson Pope's after party (thank you Al, Mike, Angelina and Ed). It's been a good year…on to the next.

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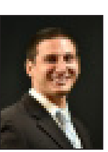

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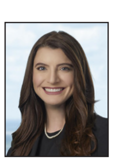

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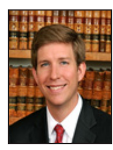

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A special

To Anglina Lim!

For your guidance with my first edition of the Cramdown.

-Ryan Yant

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Creditors Beware: Recent Developments Regarding the Automatic Stay and Discharge Injunctions

By Edward J. Peterson
Johnson, Pope, Bokor, Ruppel & Burns, LLP

The automatic stay and the discharge injunction are two of the most fundamental protections for a debtor. While the automatic stay provides the initial respite of peace that so many debtors crave and need, the discharge injunction provides the honest but unfortunate debtor the permanent peace that is the goal of every debtor—the ability to have a fresh start free from the shackles of old debts.

This article will explore the current state of the law and open issues regarding the automatic stay, discharge injunctions, and sanctions related to violations, including an examination of the Supreme Court's rulings in *Fulton v. City of Chicago* and *Taggart v. Lorenzen*.

The Automatic Stay and the Impact of *Fulton*

Introduction

The automatic stay benefits not only debtors but also creditors. In addition to providing the debtor a breathing spell, the automatic stay facilitates the orderly distribution of assets to creditors by avoiding the race to the courthouse. All of the nonexempt assets owned by a debtor at the snapshot point in time of the bankruptcy filing are property of the estate—and one of the goals of the automatic stay is to preserve the value of the estate for the benefit of all creditors.

Pertinent Statutory Provisions

Unlike most injunctions, the automatic stay does not require a court order to be enforceable. It arises by statute—specifically Section 362(a) of the Bankruptcy Code, which tells us what is stayed, as follows:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;
>
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

While each subsection under section 362(a) prohibits different kinds of acts, there are cases of clear overlap

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between the provisions. As such, a creditor action might violate multiple sections of the automatic stay.

Two other sections of the Bankruptcy Code are intertwined with the automatic stay—Section 541 (Property of the Estate) and Section 542 (Turnover). The filing of a bankruptcy case creates a bankruptcy estate consisting of "all legal and equitable interests of the debtor in property" and "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." 11 U.S.C. §§ 541(a)(1) & (6). As Congress has stated, "[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action, and all other forms of property currently specified ...." H.R. Rep. No. 595, 95th Cong., 1st Sess., 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 989, 95th Cong., 2nd Sess., 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868. As the Seventh Circuit has noted, "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [section] 541." *In re Carousel Int'l Corp.*, 89 F. 3d 359, 362 (7th Cir. 1996) (internal quotation and citation omitted).

Section 542(a) provides, in pertinent part, that anyone who has "possession, custody, or control" of bankruptcy estate property must deliver that property to the trustee and "account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). "By its express terms, section 542(a) is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover." 5 COLLIER ON BANKRUPTCY ¶ 542.02 (16th ed.); *see also Fitzgerald v. United States (In re Larimer)*, 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

A trustee must prove three elements to successfully argue a turnover obligation: (i) that the property in question belongs to the estate, (ii) that an entity had control or possession of the property during the pendency of the bankruptcy case, and (iii) that the property is not of inconsequential value or benefit to the estate. *Paloian v. Dordevic (In re Dordevic)*, Adv. No. 20ap00340, Case No. 20bk09807, 633 B.R. 553, 558–59 (Bankr. N.D. Ill. Sept. 22, 2021) (Cassling, J.) (citations omitted).

The Supreme Court's Ruling in Fulton

There are three words that are prevalent in Section 362(a) and that have been the source of judicial interpretation and analysis — "act", "control," and "enforce." Over the years there developed a split among the circuits over whether an entity that retains possession of the property of a bankruptcy estate violates Section 362(a)(3). Compare *In re Fulton*, 926 F. 3d 916, 924 (7th Cir. 2019), *In re Weber*, 719 F. 3d 72, 81 (2d Cir. 2013), *In re Del Mission Ltd.*, 98 F. 3d 1147, 1151–1152 (9th Cir. 1996), and *In re Knaus*, 889 F. 2d 773, 774–775 (8th Cir. 1989), with *In re Denby-Peterson*, 941 F. 3d 115, 132 (3d Cir. 2019), and *In re Cowen*, 849 F. 3d 943, 950 (10th Cir. 2017).

In 2021, the Supreme Court in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) endeavored to resolve this conflict. The background facts were as follows: The City of Chicago (the "City") impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Seventh Circuit affirmed all of the judgments in a consolidated opinion (*In re Fulton*, 926 F. 3d 916 (7th Cir. 2019)) and concluded that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had acted "to exercise control over" respondents' property in violation of § 362(a)(3). Id. at 924–925. The Supreme Court granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a bankruptcy estate violates § 362(a)(3).

In making its decision, the Supreme Court started with the plain language of Section 362(a)(3)—and concluded that the language "suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." *Id*. at 590.

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The Supreme Court went on to instruct as follows:

> Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed ...; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International Dictionary, at 892. The suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

Id. In addition, the Supreme Court concluded that if mere retention of estate property violated Section 362(a)(3), then the turnover mandates of Section 542(a) would be rendered "superfluous." *Id*. at 591. Accordingly, the Supreme Court held that the retention of the vehicles was not a violation of Section 362(a)(3). *Id*. at 592.

Interestingly, the Court did note the somewhat limited nature of its opinion –noting that "[n]or do we settle the meaning of other subsections of § 362(a). We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code." *Id*. at 592. In footnote two, the Supreme Court notes as follows: "In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also violated §§ 362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F. 3d at 926, n. 1. Neither do we." *Id*. at footnote two.

In the aftermath of *Fulton*, the limited nature of the Supreme Court's ruling has been made clearer. For example, *In re Cordova*, 635 B.R. 321 (Bankr. N.D. Ill. 2021) involved a class action (filed prior to the *Fulton* ruling) against the City of Chicago for the same acts that were the subject of *Fulton*. However, in the aftermath of *Fulton*, the plaintiffs in *Cordova* amended their complaint to dismiss the (a)(3) count, leaving allegations that the acts also constituted violations of Sections 362(a)(4), (6), and (7), as well as Section 542(a) for turnover.

Relying on *Fulton*, the City filed a motion to dismiss, arguing that the provisions of 362(a)(4), (6), and (7) also require an affirmative act and that *Fulton* foreclosed the plaintiffs' claims because the retention of estate property is not an affirmative act. *Id*. at 329.

In making its decision, the *Cordova* court noted that in *Thompson v. GMAC, 566 F. 3d 699, 703 (7th Cir. 2009)*, the Seventh Circuit held that "the act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a) of the Bankruptcy Code."

Providing more context and background on the *Fulton* ruling, the *Cordova* court stated:

> While the clear language of *Thompson* might have led to an expedited judgment in favor of the Plaintiffs in this matter, the City was actively challenging the propriety of *Thompson* in other matters when this adversary proceeding was commenced. As a result, the court at the request of the parties stayed this proceeding pending an outcome of those challenges in the higher courts.
>
> In response to those challenges, in 2020, the Supreme Court narrowed that holding of *Thompson*. *Fulton*, 141 S. Ct. at 590 (2021) ("[T]he language of [section] 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision."). At the same time, the majority ruling recognized that exercise of control does not rule out omissions that might qualify as "acts" in certain contexts, "control" meaning "to have power over." *Id*. Still, the Supreme Court found that any ambiguity must be resolved in favor of the

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> City because a separate remedy against the City existed under section 542(a) of the Bankruptcy Code. *Id*.

Accordingly, the issue in *Cordova* was whether the same acts that were the subject of *Fulton* also constituted violations of Section 362(a)(4), (6), and (7). The *Cordova* court denied the City's motion to dismiss "for three essential reasons," stating as follows:

> (a) Fulton is limited by its own terms to section 362(a)(3) and thus retention of the vehicles may still be a stay violation; (b) The City may have committed other acts in violation of the automatic stay; and (c) The City's interpretation leaves debtors with virtually no immediate remedy and creditors with no remedy at all.

Id. at 341.

Having found that *Fulton* did not foreclose the claims, did the plaintiffs sufficiently allege facts to survive a motion to dismiss?

The *Cordova* court conducted an analysis of the plain language of sections 362(a)(4), (6) and (7). Section 362(a)(4) prohibits "any act to create, perfect, or enforce any lien against property of the estate." Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." Section 362(a)(7) stays "the setoff of any debt owing to the debtor that arose [prepetition]… against any claim against the debtor."

The *Cordova* court concluded that, with respect to (a)(4) and (6), the "other acts" that were alleged that could be violations of 362(a)(4) and (6) were that the City "demanded an upfront payment as a precondition for release of the vehicles and retained them to perfect its lien." *Id*. at 349.

However, with respect to the (a)(7) count, the court granted the motion to dismiss with leave to amend because "[t]he court finds no statutory or case law supporting the conclusion that mere possession of an estate property is a setoff. In fact, the case law that does exist is in the contrary." *Id*.

Finally, with respect to Section 542(a) count, the City argued that such a request for turnover required an adversary proceeding and that it has the right to adequate protection. The *Cordova* court summarily denied the motion to dismiss this count, noting "[t]hat compliance with section 542(a) is required even absent an order is tautological." Id. at 350. Moreover, the court found that the City's argument that it was entitled to adequate protection was premature because "the court has yet to determine the actual nature of the City's statutory interest." *Id*.

Garnishments Post *Fulton*

How have courts applied Fulton in other contexts such as garnishments and eviction actions?

Following *Fulton*, the Bankruptcy Appellate Panel for the Ninth Circuit addressed the issue of a creditor's obligation under section 362(a) with regard to pre-petition garnishments of a debtor's bank account. *Stuart v. City of Scottsdale (In re Stuart)*, 632 B.R. 531, 534 (B.A.P. 9th Cir. 2021). In that case, the City of Scottsdale garnished several of the debtor's bank accounts prior to his bankruptcy filing, and the debtor argued that the automatic stay mandated that the City lift the garnishments immediately. *Id*.

The *Stuart* court found that the City of Scottsdale did not violate section 362(a)(1), (2), (3), or (6) when it declined to move to quash the pre-petition garnishments since it had taken the proper steps to stay the non-bankruptcy case and stated on multiple occasions that it had no objection to the release of the frozen funds to the debtor. *Id*. Emphasizing that the City took no action post-petition to "obtain possession" of the funds, but simply did not "affirmatively release the frozen bank account funds," the Court found that the City was "merely preserv[ing] the status quo." *Stuart*, 632 B.R. at 542-43.

Subsequently, in *In re Educational Technical College, Inc.*, 643 B.R. 301 (Bankr. D. Puerto Rico 2022), the court did find a stay violation involving a garnishment because "the allegations of the amended complaint rise above the level set in *Stuart*. Whereas in *Stuart* the creditor moved quickly to stay the non-bankruptcy case and did not impede the release of the garnished funds back to the debtor, in this case Edutec is alleging that the defendants purposely misled the debtor for more than 60 days by

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representing that Atue was in possession of the garnished funds, including in settlement negotiations, when in fact it was not and had never been." *Id*. at 308.

Eviction Actions Post *Fulton*

In *In re O'Connor*, 641 B.R. 875 (Bankr. M.D. Tenn. 2022), an eviction of the debtor from his house was scheduled three days after he filed for bankruptcy. The eviction occurred after the bankruptcy was filed. The debtor then filed a lawsuit against the creditor's lawyer, alleging a willful violation of sections 362(a)(2) and (3). *Id*. at 882. The crux of the lawsuit was the attorney should be held accountable for his client's violation of the stay because he instructed the county clerk to proceed with the eviction. The court did not find any admissible evidence to support such an allegation. Therefore, the issue was whether the lawyer had an affirmative duty to stop the eviction. The lawyer relied on *Fulton* for the proposition that section 362(a) "prohibits acts and does not create affirmative duties to act, and thus with no action on his part, he cannot be liable." *Id*. at 883. The *O'Connor* court disagreed, instructing as follows:

> Mr. Russell's reliance on *Fulton* is misguided since a post-petition eviction and dispossession of a debtor does not maintain the status quo in the same way as retaining possession of a vehicle repossessed prepetition. The debtor in *Fulton* did not have possession of the subject vehicle on the date the petition was filed. Failure to take the affirmative action of turning over a vehicle and thereby maintaining the status quo is quite different from failing to stop an eviction and thereby changing the status quo. A post-petition eviction changes the status quo that existed on the date of the bankruptcy, so *Fulton* cannot provide much guidance about what is required when a failure to stop an eviction will dramatically change the status quo.

Id. at 884.

The court nevertheless refused under the circumstances to hold the creditor's lawyer liable because:

> The facts of this case are considerably different from others in which courts found a creditor's attorney had an affirmative duty to act such that a failure to act was considered a violation of the automatic stay. Contrary to most attorney affirmative duty cases, Mr. Russell was not responsible for setting the collection ball rolling by, in this case, obtaining the order of possession in the detainer proceeding or scheduling the eviction. Indeed, when Mr. Russell undertook representation after the bankruptcy was filed, it was on behalf of Property Fund 629, LLC, not the entity that had initiated the eviction process in state court.

Id. at 885.

Accordingly, after *Fulton*, with respect to garnishments, the creditor does not have a duty to affirmatively release the garnishment but cannot oppose the release after the debtor filed bankruptcy. With respect to an eviction action, there is an affirmative duty to stop the eviction process once a bankruptcy has been filed.

What we do know is that the Supreme Court in *Fulton* made a very narrow pronouncement that is only limited to Section 362(a)(3). It did make clear that the same acts that it found did not violate section 362(a)(3) could be a violation of other sections.

Discharge Injunctions and the Impact of *Taggart*

Section 524(a)(2) of the Bankruptcy Code provides that

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Creditors Beware

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a discharge of debt in a bankruptcy case "operates as an injunction against the commencement or continuation of ... an act ... to collect ... any such [discharged] debt." 11 U.S.C. § 524(a)(2). This injunction is enforced through section 105, whereby the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 "grants statutory contempt powers in the bankruptcy context." *In re Hardy*, 97 F.3d 1384, 1389–90 (11th Cir. 1996) ("Therefore, § 105(a) grants courts independent statutory powers to award monetary and other forms of relief for [violations] to the extent such awards are 'necessary [or] appropriate' to carry out the provisions of the Bankruptcy Code.") (internal quotation marks and citations omitted).

The Supreme Court in *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019) considered "the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection." *Id*. at 1799. The debtor was part owner of a company with two other owners who, along with the company, sued the debtor for breach of the company's operating agreement. Prior to trial, the debtor filed a chapter 7 bankruptcy and received a discharge. Subsequently, the trial court entered judgment against the debtor, and the company plaintiff filed a petition for attorneys' fees incurred after the debtor filed his bankruptcy petition. *Id*. at 1800.

At the state court level, parties agreed that under the Ninth Circuit's decision in *In re Ybarra*, 424 F. 3d 1018 (9th Cir. 2005), a discharge order would normally cover and thereby discharge postpetition attorneys' fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "returned to the fray" after filing for bankruptcy. *Id*. The company argued that the debtor had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held the debtor liable for roughly $45,000 of Sherwood's postpetition attorneys' fees.

The debtor returned to the bankruptcy court and filed a motion to hold the company plaintiff in civil contempt for a willful violation of the discharge order as a result of its attempt to collect the attorney fees. The bankruptcy court initially denied the motion because it concluded that the debtor had "returned to the fray."

On appeal, the district court disagreed with the bankruptcy court and held that the debtor had not returned to the fray and therefore the company had violated the discharge order by trying to collect the attorneys' fees. The district court remanded the case to the bankruptcy court.

Subsequently, on remand, the bankruptcy court held the company in civil contempt. In doing so, it applied a standard that it likened to "strict liability." *Id*. The bankruptcy court held that "sanctions were appropriate because Sherwood (the company) had been aware of the discharge order and intended the actions which violated it." *Id*.

On further appeal, the Bankruptcy Appellate Panel vacated the sanctions, based on the application of a more subjective standard that considers whether the creditor has a "good faith belief" that the discharge order does not apply to the conduct in question. Under this standard, if there is such a good faith belief, there will be no sanctions even if the belief is unreasonable. Finding that the company had such a good faith belief, the BAP held that civil contempt sanctions were improper. *Id*. at 1801.

The Supreme Court granted certiorari and disagreed with both the bankruptcy court and the BAP, instructing that the standard for holding a creditor in civil contempt for violating a discharge order is an objective one under which sanctions are appropriate "when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." *Id*. at 1801.

In reaching this conclusion, the Supreme Court noted that Sections 524(a)(2) and 105(a) "bring with them the 'old soil' that has long governed how courts enforce injunctions." *Id*. at 1801. That "old soil" consists of two significant ingredients: first, "the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction;" and second, the past instructions from the Supreme Court that "civil contempt 'should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." *Id*. (quoting *California Artificial Stone Paving*

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Co. v. Molitor, 113 U.S. 609, 618 (1885)). As a further part of this second ingredient, the Supreme Court noted that "[w]e have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable." (citing to *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id*. at 191, 69 S.Ct. 497.).

The debtor in *Taggart* argued for a standard like the one applied by the bankruptcy court which would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the action that violated the order. The Supreme Court's concern with such a strict liability standard is that it could actually lead to more litigation which would be anathema to the purpose of a discharge, as risk averse creditors would begin to seek advance determinations about the scope of the discharge. *Id*. at 1803. As further support for his argument, the debtor noted that lower courts often use a standard akin to strict liability for automatic stay violations. *Id*. at 1804. In response, the Supreme Court explained this by highlighting the differences between the purpose of the automatic stay and the purpose of the discharge injunction, as follows: "[a] stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection." *Id*. at 1804.

The Supreme Court vacated the judgment of the BAP and remanded with instructions to apply an objective standard to discharge violations.

Shortly after the *Taggart* ruling, the Eleventh Circuit considered the standard for discharge violations in I*n re Roth*, 935 F. 3d 1270 (11th Cir. 2019). The debtor sought sanctions against Nationstar because Nationstar continued to send monthly mortgage statements to the debtor after her discharge was entered. In her chapter 13 bankruptcy case, the debtor had indicated on her schedules

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Creditors Beware

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that she would surrender the underlying property. *Id*. at 1273. About four months after the discharge, Nationstar started sending Roth monthly statements related to her mortgage. The statements included a disclaimer that they were not debt collection, but also included an amount due and payment instructions. The debtor's lawyer sent a cease and desist letter, but Nationstar kept sending the statements. The debtor then filed a motion for sanctions in the bankruptcy court, alleging that the statements were improper debt collections in violation of Section 524 as well as the Fair Debt Collection Practices Act ("FDCPA"). The parties resolved the first sanctions motion. *Id*.

After the resolution of the first sanctions motion, communications from Nationstar continued in the form of an "Informational Statement," which included the amount due, payment instructions, due date, and a lengthy disclaimer that the communication "is sent for informational purposes only and is not intended as an attempt to collect, assess, or recover a discharged debt from you…." *Id*.

Consequently, the debtor filed a second lawsuit in federal district court against Nationstar alleging that the informational statement was an improper debt collection under the FDCPA. The parties settled the FDCPA lawsuit. The debtor had also filed a motion in the bankruptcy court for sanctions on the same day alleging that the informational statement was an attempt to collect a discharged debt in violation of the discharge order. The bankruptcy court denied the motion for sanctions, finding that the informational statement was not a debt collection attempt and therefore was not in violation of the discharge order. *Id*.at 1274.

On appeal, the district court affirmed and rejected the debtor's argument that the court should apply the FDCPA's "least sophisticated consumer" standard to a request for sanctions for a violation of a discharge order. *Id*.

On further appeal, the Eleventh Circuit crystallized the issue as follows:

> Accordingly, we first determine whether a communication is a prohibited debt collection under section 524 by looking to "whether the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt." In re McLean, 794 F.3d 1313, 1322 (11th Cir. 2015). If so, we then evaluate whether that violation of the discharge injunction is sanctionable under section 105, by determining if "there is no fair ground of doubt as to whether the order barred the creditor's conduct." Taggart, 139 S. Ct. at 1799.

Id at 1276.

With respect to the first issue of whether the informational statement was a prohibited debt collection, the Eleventh Circuit concluded that the debtor did not meet her burden of showing that the communication from Nationstar was unlawful because the objective effect was not to pressure her to repay a discharged debt. Indeed, as the Eleventh Circuit noted, the disclaimer was printed on the first page of the statement and included language that it was "informational," and "not intended as an attempt to collect, assess, or recover a discharged debt…." Further, the payment coupon was marked in large lettering as "voluntary." The Eleventh Circuit noted that Section 524(f) allows a debtor to voluntarily repay a debt. In the instant case, Nationstar had not completed a foreclosure of the property and therefore the debtor still had the option of paying the debt and retaining the property. *Id*. at 1276.

The debtor argued that the court should use a different standard for determining whether there was a discharge violation—the "least sophisticated consumer" standard from the FDCPA. The Eleventh Circuit declined this invitation, instructing as follows:

> This Court has never incorporated the "least sophisticated consumer" test into our § 524 analysis. And for good reason—what counts as "debt collection" under one statutory scheme is not necessarily "debt collection" under the other. *See Midland Funding, LLC v. Johnson*, ––– U.S. ––––, 137 S. Ct. 1407, 1414, 197 L.Ed.2d 790 (2017) ("The [FDCPA] and the [Bankruptcy] Code have different purposes and structural features. The Act seeks to help consumers .... The Bankruptcy Code, by way of contrast, creates and maintains what we have called the delicate

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> balance of a debtor's protections and obligations.") (citation and internal quotations marks omitted). And the Supreme Court reiterated that "civil contempt is a severe remedy," so it follows that the burden to show contempt should be a high one. *Taggart*, 139 S. Ct. at 1802 (citation and internal quotation marks omitted). There is nothing in either statute that suggests we should evaluate potential § 524 violations using the FDCPA standard, and we find no other reason to do so.

Id. at 1277-78.

Finally, the Eleventh Circuit denied the motion for sanctions because it had found there was no violation. However, the Eleventh Circuit did note that even if it had found a violation it would not have awarded sanctions under the objective standard set by the Supreme Court in *Taggart*. According to the Eleventh Circuit:

> The *Taggart* standard is a rigorous one: in order to find that sanctions are appropriate here, we would have to hold that "there is no objectively reasonable basis for concluding that [Nationstar's] conduct might be lawful." Id. With more than a "fair ground of doubt," *Taggart*, 139 S.Ct. at 1799, as to whether the discharge order barred Nationstar's conduct, sanctions would be inappropriate.

As we have determined that Nationstar's Informational Statement did not violate § 524, the "no fair ground of doubt" standard for § 105 is necessarily not satisfied. Accordingly, the bankruptcy court's denial of Roth's motion for sanctions was not an abuse of discretion.

Id.at 1278.

Accordingly, the Eleventh Circuit now uses an objective standard for both whether the conduct was a violation of the discharge order and whether it should be sanctionable.

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UPCIC Crash

By Richard M. Harrylal, Esq.
Cole, Scott & Kissane

I. Introduction to UPC and Insurance Generally

At the corner of Eighth Street South and Third Avenue South in downtown St. Petersburg, among the large commercial buildings and seemingly innumerous apartment complexes, there is a somewhat small, squat brick building. This is the headquarters of United Property and Casualty Insurance Company (UPC), the homeowner's insurance policy issuer arm of United Property Holdings Corp, and, until recently, one of the largest providers of homeowner's insurance in Florida.[1] In August 2022, UPC had roughly 180,000 active policies in Florida. As of February 27, 2023, UPC is insolvent. Through a bizarre, yet not altogether unique sequence of events, the insurance giant has entered receivership and is in the process of running-off its remaining assets and providing avenues for its policyholders to find new coverage.[2]

The majority of homeowner's have homeowner's insurance, it being a requirement in most mortgages, however, the majority of homeowner's have never made a claim under their insurance policy. (For clarity's sake, a brief overview of the mechanics of the often tenuous world of homeowners insurance is warranted.) A policy of homeowner's insurance provides an assurance that in the event of a *covered loss*, the damage to the subject property will be paid for by the Insured's chosen insurance company. The process of opening coverage on a claim is generally two-fold. The first is the assessment which involves the insurance company inspecting the property with a field adjuster who photographs the damages and prepares an estimate for repairs. The second is the review of the claim by a desk adjuster, who will make a determination on whether the claim is covered based on the Policy's language, the field adjuster's photographs and estimate, and any information provided by the Insured or their representative. An issue of tremendous dispute and litigation under the umbrella of coverage is whether the damage claimed under the Policy preexisted the claimed date of loss, an affirmative defense to a claim. Broadly speaking, the more severe the weather event that gives rise to the claim, the more difficult is it to separate damages that existed before the weather event from those that occurred during the weather event.

The most significant weather event that Florida faces, with the longest season and the highest cost in damages, is a hurricane.[3] I was with the National Guard in the Panhandle a week after Hurricane Michael made landfall and on Fort Meyers Beach a few days after Hurricane Ian hit. From seeing the damage firsthand and later handling claims from Hurricane Ian as an attorney, it is nigh impossible to differentiate preexisting damage to the majority of the affected properties. Because of this, the hurricane deductible contained in a homeowner's insurance policy is significantly higher than the "all other perils" deductible, usually ranging from two to five percent of the total amount of coverage. Insurance companies are well aware of the influx of claims and lawsuits that follow a hurricane and do what they can to cushion the blow. Florida has many densely populated areas, particularly on the coast line, and an abundance of homes that need insurance. This, juxtaposed with frequent severe storm events, results in the need for homeowners' insurance companies to thread the needle between providing a competitive price for insurance and protecting the viability of the company against the inevitable payout after a hurricane.

One of the ways to limit an insurer's risk and to increase its underwriting capability is to spread that risk among other companies, a process known as reinsurance and frequently referred to as "insurance for insurance companies."[4] Here, a reinsurer will usually cover a percentage of the original insurer's overall losses for a specified event for a period of time in exchange for a percentage of the original insurer's policy premiums.[5]

The federal government also provides a method to protect homeowners from the potentially negative results of the actions of their insurance company. Fannie Mae

continued on p. 19

1 William Rabb, Another Big Insurer Stops Writing Homeowners Policies in Florida, Ins. Journal, Feb. 8. 2022, https://www.insurancejournal.com/news/southeast/2022/02/08/653123.htm.
2 State of Florida, ex rel., the Dept. of Financial Services of the State of Florida vs. United Property and Casualty Insurance Company, No. 2023-CA-000320, Consent Order (Fla. 2d Cir. Ct. Feb. 27, 2023).
3 Ron Brackett and Jan Childs, Hurricane Ian in Florida: Millions in the Dark, Homes Ripped Apart, The Weather Channel, Oct. 5, 2022, https://weather.com/storms/hurricane/news/2022-09-28-hurricane-ian-live-updates-wednesday-florida-key-west-storm-surge.
4 Reinsurance (Jun. 1 2023), https://content.naic.org/cipr-topics/reinsurance.
5 Caroline Banton, Reinsurance Definition, Types, and How it Works, Investopedia, May 1, 2023, https://www.investopedia.com/terms/r/reinsurance.asp.

UPCIC Crash
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and Freddie Mac will only purchase a mortgage if the insurance company that issued the policy is top rated by specified rating agencies. The two main rating agencies Fannie Mae and Freddie Mac will accept are Kroll Bond Rating Agency (KBRA) and Demotech, Inc.[6] Of note, a reinsurance agreement must contain a "'cut through' endorsement that provides for the reinsurer to become immediately liable for 100% of any loss payable by the primary insurer in the event the primary insurer becomes insolvent."[7]

II. A Brief Timeline of UPC's Path to Insolvency

- January 1, 2022: Following six consecutive years of losses, UPC makes the decision to cease issuing policies in Florida.[8]

- June 2022: Wright National Flood Insurance takes over UPC's flood insurance accounts.[9]

- July 2022: UPC announces it is searching for options to raise capital, including "subsidiary divestiture… [or] sale of equity."[10] Additionally, Demotech, Inc., lowered UPC's financial rating in response to UPC choosing to stop issuing policies.[11] Far from being the only insurance company in this predicament, the Florida Office of Insurance Regulation (FLOIR) proffered a deal, known as the Temporary Market Stabilization Arrangement (TMSA), in which Citizens Property and Casualty Insurance Company, the state-backed homeowner's insurance provider, would provide 100% coverage for UPC's policies in the event that UPC became insolvent, allowing Freddie Mac and Fanny Mae to continue purchasing the underlying mortgages and homeowners to keep UPC as their current insurer.[12] Consistent with this downward trend, UPC reported a $33 million loss for the first quarter of 2022.[13]

- August 2022: Demotech, Inc. removes UPC's rating altogether.[14] UPC officially announced it is in run-off and will not be renewing existing policies starting January 1, 2023. In response, KBRA downgrades UPC's rating from A- to BBB-.[15] These actions made UPC the first carrier eligible for the TMSA program.[16]

- October 2022: KBRA downgrades UPC's rating from BBB- to BB-. UPC reports an estimated loss from Hurricane Ian of $36.4 million.[17]

- November 2022: UPC announces a net loss of $173 million for the third quarter of 2022, the market responded and UPC's share price closed at $0.32 the week of November 14.[18]

- December 2022: Fannie Mae and Freddie Mac accept the deal proposed by FLOIR, allowing Citizens to provide 100% coverage for claims made by homeowners under the Temporary Market Stabilization Arrangement. [19]

- January 2023: UPC implements its decision to halt the renewals of existing policies.

- February 2023: On February 6, UPC was deemed insolvent and Florida's Circuit Court for the Second Circuit, after review of a petition filed by the State of Florida's Dept. of Financial Services, entered an Order placing UPC in a receivership on February 27, 2023.[20]

continued on p. 21

6 B7-3-07, General Property Insurance Requirements for all Property Types (Dec. 14, 2022), https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B7-Insurance/Chapter-B7-3-Property-and-Flood-Insurance/1032998301/B7-3-01-Property-Insurance-Requirements-for-Insurers-12-04-2018.htm.
7 Id.
8 Matt Sheehan, United (UPC) suspends new homeowners' business in Florida, Reinsurance News, Feb. 11, 2022, https://www.reinsurancene.ws/united-upc-suspends-new-homeowners-business-in-florida/.
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11 Id.
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13 United Property & Casualty Says It Is Exploring Potential Sale or Merger, Ins. Journal, July 14, 2022, https://www.insurancejournal.com/news/southeast/2022/07/14/675839.htm.
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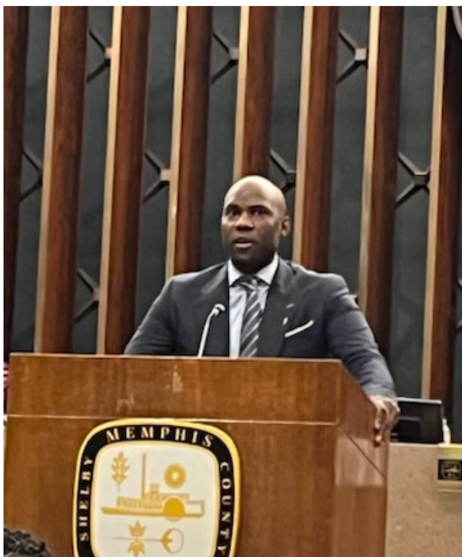

THE INVESTITURE OF

THE HONORABLE
DENISE ELIZABETH BARNETT

AS JUDGE OF THE

UNITED STATES BANKRUPTCY COURT

FOR THE

WESTERN DISTRICT OF TENNESSEE

MEMPHIS, TENNESSEE
JULY 14, 2023

Opening of Court	Lisa Haney, Clerk of Court U.S. Bankruptcy Court WDTN
Star Spangled Banner	Teiona Echols – Memphis Jazz Workshop
Invocation	Honorable Jimmy L. Croom U.S. Bankruptcy Court WDTN
Welcome and Recognition of Special Guests	Honorable Sheryl H. Lipman Chief Judge, U.S. District Court, WDTN
Remarks	M. Everett George, Esq.
	Honorable Caryl E. Delano Chief Judge, U.S. Bankruptcy Court, MDFL
	Nicole Peair, Esq.
	Daryl Smith, Bankruptcy Section of the Memphis Bar Association
Remarks & Administration Of the Oath	Honorable Bernice B. Donald Sixth Circuit Court of Appeals (2011-2023)
	Taylor C. George holding the Bible
Robing	Family Members – Taylor C. George, Yvonne McLean, and Wilfred G. Palms
Welcome to the Bench	Honorable Jennie D. Latta Chief Judge, U.S. Bankruptcy Court, WDTN
Response	Honorable Denise E. Barnett U.S. Bankruptcy Court, WDTN
Lift Every Voice and Sing	Teiona Echols – Memphis Jazz Workshop
Benediction	Maurice Chester Grant, II, Esq.
Closing of Court	Lisa Haney, Clerk of Court

Reception Immediately Following Ceremony
Hall of Mayors
Music provided by the Memphis Jazz Workshop

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UPCIC Crash

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III. The Future of Insurance in Florida

The February 27, 2023 Order grants receivership of UPC to the Florida Department of Financial Services for the primary purpose of liquidation, and it appears that UPC's is destined to follow the fate of many other insurers before it. This leads to question what Florida's insurance field will look like in the future.

In the short term, the future remains bleak. As of March 29, 2023, UPC has cancelled all its policies.[21] Slide Insurance picked up roughly 72,000 of those policies, but they are not liable for any claims made prior to the transfer.[22] The result is that the Florida Insurance Guaranty Association (FIGA) will now have to handle almost 21,000 outstanding UPC claims.[23] FIGA is a state-backed system that pays covered losses that remain after insurers become insolvent.[24] FIGA generates funding from three sources: "liquidated assets of the insolvent insurer; the second is from investment income, and the third is from assessments levied on insurers based on the dollar value of the policies they've underwritten."[25] In response to UPC's insolvency, FIGA has authorized a 1% emergency assessment on its members.[26] As many Florida insurers area already struggling to remain afloat, this will likely result in short- term increases in premiums for newly issued policies and policies up for renewal from the assessment dates of October 1, 2023 through September 30, 2024.

The future may, however, hold a silver lining. In a long-awaited move, Florida's legislature signed Senate Bill 2-A in December 2022.[27] A significant insurance reform, this legislation is designed to streamline insurance suits, reduce the number of first-party insurance suits, and level the playing field between the carriers and the Insureds. The bill accomplishes this by prohibiting the assignment of benefits to a contractor or Public Adjuster, eliminating one-way attorney's fees (Insureds must now pay their own attorney's fees in a manner similar to a tort suit), and shortens the deadline the Insureds have to report a claim.

While Senate Bill 2-A allows insurers some hopeful optimism, there are some areas that remain unclear. One of the more hotly contested issues is whether the bill applies retroactively to one-way attorney's fees. It is clear from the bill's language that all policies and renewals issued after December 16, 2022 fall under the new bill. However, whether the removal of one-way attorney's fees applies to *suits* filed after December 16 is still up for debate.[28] Likely, this issue will eventually be ruled on by Florida Supreme Court as cases are appealed in each circuit.

All in all, with the application of Senate Bill 2-A and congruent removal of multiple incentives leading attorneys to file suit on insurance claims, the insurance landscape in Florida may well be upward bound. It is the hope of many that by lowering the risks associated with doing business in Florida, more insurers will move into the state, creating more competition and in turn lowering rates. All we need to do is resolve a few thousand old cases and we're in good shape.

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26 2023 FIGA Assessment Update (Apr. 12, 2023) https://figafacts.com/2023/04/12/2023-figa-assessment-update/.
27 Robert Barton and Allan Rotlewicz, Florida's Property Insurance Reform: The Impact on Carriers and Insureds in the State of Florida, JD Supra, https://www.jdsupra.com/legalnews/florida-s-property-insurance-reform-the-1269772/.
28 Id.

Special Thanks! to our **Pro Bono Volunteers**

We'd like to give a shout out to the following participants who provided pro bono services to people in need

On May 11, 2023, at the Thirteenth Judicial Circuit 's16th Annual Pro Bono Service Awards, the Circuit presented its "Special Recognition Award" to the Middle District of Florida Bankruptcy Pro Se Virtual Clinic**.** Thanks to all those volunteers who donate their valuable time to the virtual clinic and to the in-person clinic!

THIRTEENTH JUDICIAL CIRCUIT
VERITAS ET JUSTITIA
STATE OF FLORIDA

16th Annual

Pro Bono Service Awards

May 11, 2023

As members of the legal profession and as members of a learned profession, we owe a higher duty than the average citizen, and one of these is the assurance that legal services and justice are available to all." - Wm. Reece Smith, Jr. (1925-2013)

Order of Ceremony

Welcome
Judge Barbara Twine Thomas, Chair of Pro Bono Committee

Introduction of Judges and Honored Guests
Chief Judge Ronald Ficarrotta

Recognition of Event Sponsors
Tori Simmons/Antina Mobley, Awards Ceremony Committee Chairs

Florida Supreme Court Letters and Pro Bono Lapel Pins
Jena Hudson, Pro Bono Committee Administrator

Recognition of Hillsborough County Attorneys Providing Pro Bono Service in 2022 & Recognition of 5K Pro Bono River Run Pro Bono Producers
Judge Darren Farfante, Vice Chair of Pro Bono Committee

Presentation of Award for Outstanding Pro Bono Service by a Paralegal
HANNAH SCHWARTZ
Judge Wesley Tibbals

Presentation of Award for Outstanding Pro Bono Service by an Organization
THE GEORGE EDGECOMB BAR ASSOCIATION
Judge Barbara Twine Thomas

Presentation of Special Recognition
THE MIDDLE DISTRICT OF FLORIDA BANKRUPTCY PRO SE ASSISTANCE CLINIC
Bankruptcy Judge Catherine McEwen

Presentation of Award for Outstanding Pro Bono Service by a Young Lawyer
NICOLE DUGA WALSH
Scott McLaren

Presentation of Award for Outstanding Pro Bono Service by a Lawyer
L. CARINA CUTTER
Judge Wendy DePaul

Presentation of the Hillsborough County Bar Association's Jimmy Kynes Pro Bono Service Award
MARK WOLFSON
Dick Woltmann

Closing Remarks – ***Judge Barbara Twine Thomas***

... of 2022, Ms. Cutter was in the Forms Clinic assisting the most vulnerable members of our community. Despite not practicing in family law, Ms. Cutter studied family law so she could represent pro bono clients in family law cases. She has also taken cases where clients speak only Spanish when no Spanish-speaking attorney volunteered, even though she was not fluent. Instead of allowing this to serve as a barrier, Ms. Cutter applied herself to become proficient in Spanish.

NICOLE DUGA WALSH (Young Lawyer): In 2021, Nicole Walsh volunteered to take on pro bono representation of a prisoner in a Section 1983 case in the United States District Court for the Middle District of Florida. Ms. Walsh's client had been denied necessary medical care while in custody as a pre-trial detainee. Despite repeated requests for medical treatment for a hernia, the client was provided only minimal medication to treat his pain. Ms. Walsh handled all discovery and was first chair in the jury trial in which the client was awarded both compensatory and punitive damages. After trial, Ms. Walsh successfully defended two post-trial motions and also represented the client in defending an appeal to the Eleventh Circuit Court of Appeals. As a result of Ms. Walsh's efforts, the Eleventh Circuit affirmed the judgment in favor of her client. In total, Ms. Walsh spent over 450 hours on the case.

THE MIDDLE DISTRICT OF FLORIDA BANKRUPTCY PRO SE ASSISTANCE CLINIC (Special Recognition): For the year ending December 31, 2022, the United States Bankruptcy Court for the Middle District of Florida was ranked fifth in the nation (out of 90 judicial districts) for pro se bankruptcy filings per authorized judgeship. In mid-2022, at the direction of Chief Judge Caryl E. Delano, Bankruptcy Judge Jacob A. Brown chaired a committee of bankruptcy judges and practitioners whose goal was to develop a mechanism for attorneys to provide pro bono services to pro se individuals. The committee tackled the task of creating a virtual clinic with an online platform to allow pro se parties to schedule a 30 minute zoom consultation with an attorney. The committee recruited volunteer attorneys to staff the clinic, identified and obtained grants to fund the clinic, and developed a short form notice that the court can mail to each pro se debtor advising them about the clinic. As a result of the committee's efforts, the Middle District of Florida Bankruptcy Pro Se Assistance Clinic, Inc. was formed and opened its virtual doors on September 1, 2022. In its first six months of operation, with the support of more than 200 attorneys, the virtual clinic has served more than 180 clients.

THE GEORGE EDGECOMB BAR ASSOCIATION (GEBA) (Organization): Founded in 1982 in memory of the late Honorable George E. Edgecomb, GEBA is dedicated to the promotion and recognition of African Americans within the legal profession and the judiciary, as well as empowering the African American community with legal knowledge. In 2022, GEBA focused these efforts on two programs: 1) GEBA's Legal Education Series ("GLE's") - one-hour webinar sessions on special areas of law in order to provide legal education to the community; and 2) GEBA's Learn Your Legal Rights Community Workshop - this yearly event is held in an area of Tampa that provides the greatest access to the African American community. The workshop consists of one-on-one free consultations, panel discussions held by judges, and classroom style sessions on legal topics.

By Christie Arkovich
info@christiearkovich.com

Now that President Biden's 10k-20k student loan forgiveness plan has been rejected by the U.S. Supreme Court, borrowers are getting ready to resume payments in October. The Court gave a clear signal that it will not approve universal debt relief in its June 30, 2023 decisions in *Department of Education, et al. v. Brown*, 22-535 and *Biden, et al. v. Nebraska*, 22-506.

In *Brown*, a unanimous Court found that the two nonqualifying students lacked standing to bring suit. Students argued that the Department should not use the HEROES Act and instead should rely on the Higher Education Act for debt forgiveness.

The *Nebraska* case was filed by six GOP-led states. The Court found that the HEROES Act allows the Secretary to waive or modify existing requirements, but cannot rewrite the statute to create a new program cancelling debt.

The Higher Education Act of 1965 authorizes the Secretary to "compromise, waive, or release any right, title, claim, lien, or demand." 20 U.S.C. 1082(a)(6). It is anticipated that the Biden administration will put forth an alternative plan under the Higher Education Act that will likely impact the presidential election in 2024. Ultimately, this pathway is presumed to meet the same fate before the U.S. Supreme Court.

New Programs in Bankruptcy are Expected to Provide Individualized Rather than Universal Relief

So, what is a borrower/debtor to do now? There remains $1.77 trillion in education debt in the United States.

Fortunately, as the payment pause expires early this Fall, with both payments expected to resume in October 2023 and interest accruing on September 1, 2023, there are many improvements and new pathways to provide forgiveness or discharge.

New SAVE IDR plan: The new Saving on a Valuable Education ("SAVE") IDR (income-driven repayment) plan is being promoted by the Department as both a new and improved income-driven plan as all borrowers in REPAYE (Revised Pay As You Earn) will be shifted into SAVE. The key elements of SAVE are:

- Reduction to 5% of discretionary income payment for undergrad loans (from 10% under the current REPAYE);
- An increase in the poverty level deduction for expenses from 150% under the current REPAYE to 225% under SAVE;
- Exclusion of a spouse's income if separately filed tax returns (not a feature of REPAYE)
- Additional interest subsidy
- Forgiveness of loan balances after 10 years of payment for those with original balances of $12,000 or less.

Not all of SAVE will go into effect when the payment pause ends this fall. But most, including the interest subsidies, the ability to file a separate tax return, and the 225% of poverty guidelines will go into effect July 30, 2023. Anyone with undergrad loans will see a marked reduction in the payment when the 5% begins (July 2024). Anyone who previously filed a joint tax return may wish to reconsider that filing status in early 2024 to analyze whether filing separate will decrease student loan payments over and above any tax ramifications.

Soft Start to Payments: Due to an On Ramp process, there will be no adverse credit reporting or referral to collection agencies for one year – although interest will accrue during the year.

Auto Enrollment: Those on REPAYE before or during the COVID forbearance, will be automatically enrolled in SAVE.

Avoidance of Future Default: A default in federal student loan payments damages a borrower's credit. It also allows for a 25% penalty to apply, and authorizes severe collection activities including 15% wage garnishment, 15% social security offset, and seizure of tax refunds. To help avoid unintentional defaults, the Department will auto enroll any borrower in SAVE after 75 days delinquency if the borrower has previously linked his or her studentaid.gov account with the IRS. This step is normally done during the IDR process.

IDR Waiver Begins. Beginning August 13, 2023, the Department will begin to forgive loan balances under the IDR Waiver rules. Notifications went out to 804,000 borrowers that they will have $39 billion in federal student loans automatically discharged in the coming weeks. Anyone who still has the older Family Federal Education Loans under FFELP should consider consolidation to the Direct Loan program to get in line for this one-time fix:

- to allow prior forbearances exceeding 12 consecutive months or 36 months cumulative to

continued on p. 25

Student Loan Sidebar

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qualify under IDR;
- Back door fix to PSLF (can change loan type to Direct to qualify for PSLF)
- All loans will be re-dated to the earliest repayment date (very beneficial for those with bifurcated education)
- All payments count toward PSLF to determine 120 payments;
- Consolidation does not restart the IDR count as it normally would.
- Many deferments count toward IDR.
- After application of the above one- time fix, loans that have been in repayment for 20 years (undergraduate) or 25 years (graduate) will be automatically forgiven.

PSLF Expansion to Contract Workers: Public Service Loan Forgiveness has been expanded to include individuals who work in public service as a contract employee for a qualifying employer in a position or providing a service which cannot be funded or provided by a direct employee under state law.

TPD Discharge Relaxed Rules:
- Automatic now for those who are approved for SSD or VA disability;
- Three-year post-discharge income monitoring no longer required;
- Certification not just limited to MD or DO – expanded July 1, 2023 to include nurse practitioners, physicians assistants (PAs) and psychologists.

Parent Plus Loans: While Parent Plus borrowers do not qualify directly for SAVE, there is a path for a borrower to double consolidate their Parent Plus loans to qualify. A normal consolidation will allow a Parent Plus borrower to qualify for Income-Contingent Repayment(ICR), but at a much higher rate than would be permitted under SAVE. Section 685.209(c)(5)(iii) was implemented by the Department to provide that a Direct Consolidation loan made on or after July 1, 2025, which repaid a Parent Plus loan or repaid a consolidation loan that at any point paid off a Parent Plus loan, is not eligible for any IDR plan except ICR. So that's the deadline – there are two years left to double consolidate Parent Plus loans to qualify for anything other than ICR. However, a borrower will likely be much better off to do the double consolidation as soon as possible this fall so that the loans are all re-dated to the earliest loan repayment date, and to prevent any prior payments from being waived under IDR under the normal consolidation rules which will restarted on January 1, 2024.

New Programs in Bankruptcy are Expected to Provide Individualized Rather than Universal Relief:

DOJ Attestation Adversary Process underway: the DOJ intends for the new DOJ Guidance Process established in November 2022 for any pending or future case to be user-friendly and avoid time consuming and expensive litigation. The three-prong Brunner test still applies. Attestation focuses on a debtor's present, future, and past circumstances. Certain rebuttable presumptions that the inability to repay will persist if:
- The debtor is 65 or older;
- The debtor has a disability or injury impacting income potential;
- The debtor has been unemployed for at least 5 of the last 10 years;
- The debtor failed to obtain the degree for which the loan was procured;
- The debtor's loan has been in repayment status for 10 years.

The presumptions are not the only basis for satisfying an undue hardship. The undue hardship discharge program is only available for Direct Federal Loans. It is suggested that debtors seek relief through available programs and consolidate to Direct loans before filing bankruptcy.

New BK IDR plan: Section 685.209(k)(4)(iv)(K) was revised to provide that the Department will award credit toward IDR forgiveness for months where the Secretary determines that the borrower made payments under an approved bankruptcy plan. While the regs have not yet come out, this change is expected to be significant. While a process exists to allow for IDR treatment for payments made on Federal Student Loans during bankruptcy, the process is convoluted and often not understood by many including debtors, debtors' attorneys, and loan servicers. Also, this may be an avenue for relief for those with Parent Plus or Grad loans who may be facing unaffordable payments under the IDR programs.

The information in this Sidebar does not, and is not intended to, constitute legal advice. For a consultation, email info@christiearkovich.com or call 813.258.2808.

Clerk's Appreciation Luncheon

May 17, 2023

TBBBA Annual Dinner

June 6, 2023

TBBBA Annual Dinner, cont.

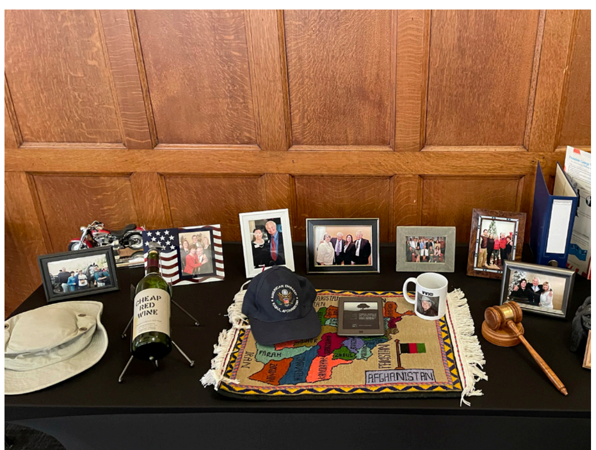
June 6, 2023

Paskay Award Winner

Taylor Petrie

MGW Retrospective

May 25, 2023



Save the Date

CLE luncheon
September 5 · 12pm

CLE Luncheon
October 10 · 12pm

View From the Bench Reception
November 1 · 5pm

View From the Bench
November 2

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