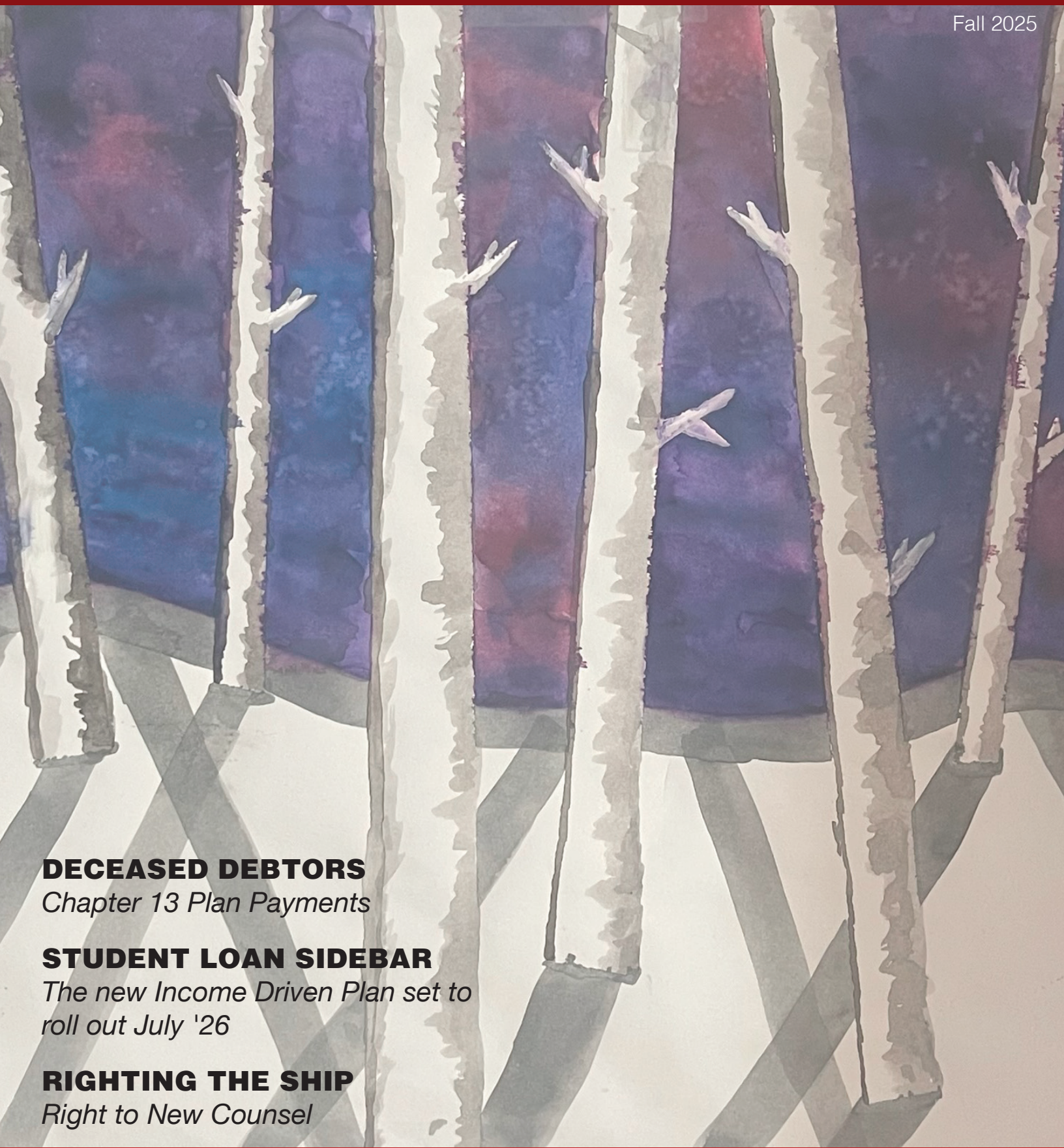
The Cramdown

Newsletter for the Tampa Bay Bankruptcy Bar Association

Fall 2025



DECEASED DEBTORS
Chapter 13 Plan Payments

STUDENT LOAN SIDEBAR
The new Income Driven Plan set to roll out July '26

RIGHTING THE SHIP
Right to New Counsel

Cover Art By Hunter Noel

President's Message

Ryan Reinert
Shutts & Bowen, LLP

As fall brings the slightly cooler weather we thoroughly enjoy in Tampa, we are reminded that change is all around us. The days grow shorter, the air is a bit crisper, and we naturally take stock of where we are in light of where are heading. Fall is a season of transition — a fitting moment to reflect on how our association continues to maintain traditions while evolving with the next generation of practitioners.

It is this fall that that we prepare to honor an icon of our practice, Judge Michael Williamson, with the celebration of his portrait unveiling. The example set by Judge Williamson reminds us of the pinnacle of our practice, as well as the deep roots and shared values that define our fine association. I expect all that read this message will share in the camaraderie at this special occasion. At the same time, we welcome a new era with the appointment of Judge Luis Rivera to the bench. I will be excited with the rest of the association to see how Judge Rivera brings his experience, insight, and perspective to the bench.

As this change surrounds us, our traditions will keep us connected. The TBBBA continues to flourish because of our shared commitment to professionalism, education, and fellowship. Our goal this year will be to continue to foster the relationships forged through the practice of law and our association, and I strongly encourage you to join us at the various happy hours, CLE lunches, consumer lunches and other upcoming events – including the holiday party. Fall moves quickly, especially here in Tampa.

In times of transition, we find strength in continuity. Building on the groundwork laid by our predecessors, we remain committed to stewarding the TBBBA forward with care, gratitude, and purpose.

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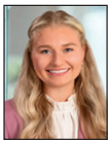

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In This Issue

Write For the Cramdown

Document Preparation, Filing, and Court Representation
(January 2026)

Article submissions due **December 15, 2025**

A significant part of a bankruptcy attorney's work involves meticulous preparation and filing of required documents, ensuring accuracy and compliance with court rules. What is the best advice you ever received regarding representing clients in court hearings, including the 341 meeting of creditors? What advice do you wish you had regarding how to handle any disputes or litigation that may arise during the process? What advice have you given young attorneys that enabled them to overcome these challenges.

Article submissions should be e-mailed to:
Kristina E. Feher
kfeher@feherlaw.com

Upcoming Dates

For more information, including dates, details, and registration, visit the TBBBA's website https://www.tbbba.com/calendar/#!calendar

Tuesday, December 9 • 11:45am
CLE Luncheon - University Club of Tampa

Thursday, December 11
Holiday Party - Spain Restaurant

Friday, January 9, 2026
Clay Shoot

CLE Luncheons 2026
Tuesday, January 13 • 11:45am - University Club of Tampa
Tuesday, March 10 2026 • 11:45am
Tuesday, April 14 2026 • 11:45am
Tuesday, May 5 2026 • 11:45am

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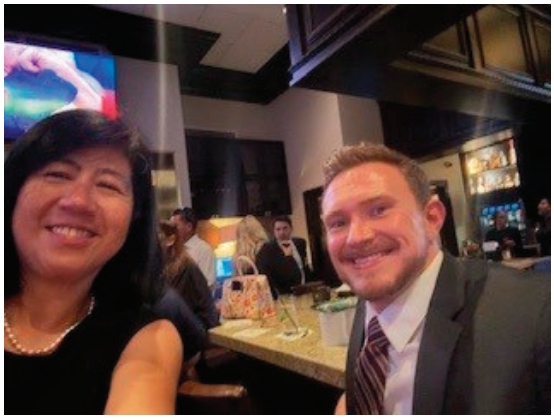
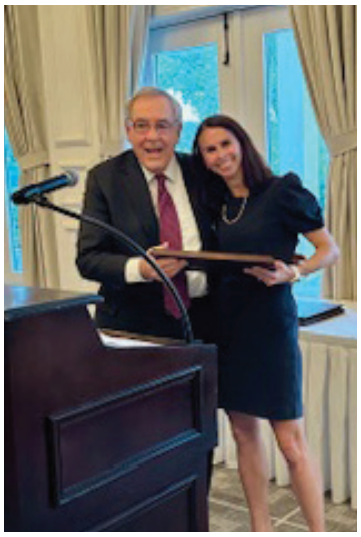
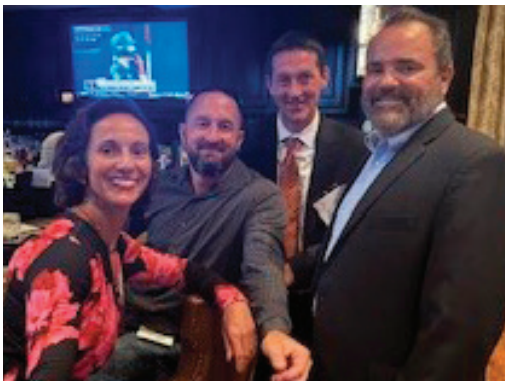
Annual Dinner

The TBBBA held its annual installation dinner on June 4, 2025 at the Palma Ceia Golf and County Club.





Annual Dinner, cont.



A Deceased Debtor's Survivor Can Make Chapter 13 Plan Payments from Her Income

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If a chapter 13 debtor dies before confirmation, it stands to reason that the case should be dismissed because the debtor can't file a plan, has no regular income and can't be examined by creditors.

That's right, isn't it?

Answer: No!

Employing a broader interpretation of Bankruptcy Rule 1016(b), Bankruptcy Judge Denise E. Barnett of Memphis, Tenn., confirmed the deceased's debtor's plan by allowing the debtor's daughter to use her income to fund the plan that paid a mortgage in full.

The Four Chapter 13s

The debtor suffered a stroke four years before her last chapter 13 filing and took up residence with her daughter. Over time, the debtor filed three chapter 13 petitions without a lawyer. Each time, the holder of the mortgage would offer to modify the mortgage, so the debtor would allow the case to be dismissed.

In the fourth and final chapter 13 petition, the debtor listed just over $2,000 in unsecured debts. The only other debt was the $39,000 mortgage. The debtor died before filing a chapter 13 plan, but the debtor's daughter filed a plan to which the chapter 13 trustee eventually did not object.

The daughter was to fund the plan with her income. Over the term of the plan, the plan would pay the matured mortgage in full at a higher interest rate. As Judge Barnett said in her August 22 opinion, the bank conceded that the fourth plan properly provided for the claim.

Nonetheless, the bank filed a motion to modify the stay and permit foreclosure, alongside an objection to confirmation.

The Lift-Stay Motion

The bank contended that the court should modify the stay under Section 362(d)(4) because the three dismissals indicated that the debtor was employing "a scheme to delay, hinder, or defraud creditors." Judge Barnett said that the bank "proffered no evidence to show [that the debtor] engaged in a scheme or had the intent to delay, hinder, or defraud the Bank."

Furthermore, the bank did not dispute the debtor's assertion that she allowed dismissal of the prior cases because the bank had offered to modify the mortgage each time. "Accordingly," Judge Barnett saw "no cause for in rem relief from the stay as to [the debtor's] House."

No Bad Faith Filing

The bank argued that the plan was filed in bad faith because the mortgage had matured.

Section 1322(c)(2) was the antidote. When the last payment on the mortgage for a principal residence is due before the final payment under the plan, the subsection provides that "the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title."

Even though the mortgage had matured before filing, Judge Barnett concluded that the plan was not filed in bad faith because "the debtor's plan still complies with the Code" by paying the claim in full.

Rule 1016(b)

The bank contended that the case could not continue because the deceased debtor had no regular income and

continued on p. 12

Pro Bono Corner

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Deceased Debtor's Survivor

continued from p. 9

could not file a plan on her own. If there was one, the answer could be found in Bankruptcy Rule 1016(b). On the death of a chapter 13 debtor, the rule provides:

the court may dismiss the case or may permit it to continue if further administration is possible and is in the parties' best interests. If the case continues, it must proceed and be concluded in the same manner as though the death or incompetency had not occurred.

Judge Barnett said there was no controlling Sixth Circuit precedent to declare how the rule should be applied in deciding when "further administration" is possible.

Some courts, Judge Barnett said, interpret the phrase narrowly by "only allowing further administration if 'incidental acts remain,'" like permitting a single payment from the decedent's estate to complete the plan. Those courts, she said, "use a narrow interpretation [to] reason that the main purpose of chapter 13 is to give the debtor a 'fresh start.'"

Allowing no one to substitute for a deceased debtor would "essentially [make] Rule 1016 unworkable," Judge Barnett said.

Other courts interpret "further administration" broadly. Judge Barnett pointed to a district court in Pennsylvania that had "affirmed a bankruptcy court's decision to confirm the debtor's plan after the debtor's death and allowed a family member to pay the plan."

Like the Pennsylvania case, Judge Barnett said that the daughter was willing to make plan payments and finish the case. In response, the bank argued that Section 109(e) requires a debtor with regular income, and Section 1321 only permits a debtor to file a plan. In response, Judge Barnett said, "courts have held that subsection 109(e) defines who may initiate a bankruptcy case and does not affect 'post-petition events.'"

Likewise, Judge Barnett went on to say that "requiring the debtor to always have regular income would make Rule 1016(b) unworkable."

Regarding Section 1321's provision that the "debtor shall file a plan," Judge Barnett said, "it would appear [the daughter] should not be able to file a plan in her mother's case." However, she said that "the purpose of section 1321 is to ensure the plan is voluntary, which it is."

"Because [the daughter] will voluntarily fund the plan on her mother's behalf," Judge Barnett held that "section 1321 is not violated" and that "further case administration is possible."

Judge Barnett denied the objection to confirmation and the motion to modify the stay. She confirmed the plan, finding that further administration was in the best interests of the bank, which would be paid in full, and in the best interests of other creditors, because it was "unclear how much the general unsecured creditors could recover outside of bankruptcy."

Clerk's Luncheon

The TBBBA continued its tradition of hosting the Clerk of Court, Jose A. Rodriguez, his staff, the Tampa judges and court staff at the Clerk's luncheon

1st CLE

The TBBBA hosted its first Continuing Legal Education Program of the bar year. The presentation, titled How to Get the Most from Your Subchapter V Trustee, hosted three of the Middle District's premier subchapter v trustees Amy Mayer, Kathleen DiSanto, and Rudi Mueller.

The Honorable
Catherine Peek McEwen

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By Christie Arkovich
info@christiearkovich.com

The new Income Driven Plan ("IDR") set to roll out on July 1, 2026 is called the Repayment Assistance Plan ("RAP") for federal student loans.

The administration's goal is to eliminate the choices and complexity of the present federal student loan repayment system. The old IBR, new IBR, ICR, PAYE and SAVE plans are all being terminated. Those legacy plans will exist for three more years until July 1, 2028, after which time those borrowers enrolled in non-RAP IDRs can remain in those plans. It appears that forgiveness will only occur for those enrolled in IBR or RAP. For instance, someone could remain in PAYE or ICR, but would need to switch to IBR or RAP for forgiveness.

What is RAP? RAP is an income driven plan going into effect next summer based upon a borrower's adjusted gross income ("AGI"). It will offer a tiered payment plan:
Up to $10k = $10
$10,000.01 - $20k = 1% of AGI
Up to $30k – 2% of AGI
Up to $40k – 3% of AGI
Up to $50k – 4% of AGI
Up to $60k – 5% of AGI
Up to $70k = 6% of AGI
Up to $80k = 7% of AGI
Up to $90k = 8% of AGI
Up to $100k = 9% of AGI
Over $100k + = 10% of AGI

Borrowers can subtract $50 per month, per dependent child claimed on their tax return. A spouse and other people do not count, nor do children living outside the household. Accordingly, family size is much more restrictive than under existing plans.

Estimated monthly payment snapshots show that RAP will be higher than SAVE but could be less than IBR:

Yearly income	SAVE	RAP
25k	0	$42
40k	$40	$133
60k	$207	$300
$90k	$457	$675
$200k	$1373	$1667

Presently, the various IDR plans have a cost- of-living adjustment keyed to the poverty level. RAP does not. Neither RAP nor the existing IDRs allow for high mortgage payments, or high medical or child costs – something only a bankruptcy plan payment can take into account when determining disposable income.

AGI	IBR Single	IBR Married	RAP
$ 25,000	$ 39	$ -	$ 42
$ 50,000	$ 352	$ 255	$ 167
$ 75,000	$ 664	$ 568	$ 438
$ 100,000	$ 977	$ 880	$ 750

AGI	IBR single w/ 1child	RAP single w/ 1child
$ 25,000	$ -	$ 10
$ 50,000	$ 255	$ 117
$ 75,000	$ 568	$ 378
$ 100,000	$ 880	$ 700

AGI	IBR married w/1child	RAP married w/1child
$ 25,000	$ -	$ 10
$ 50,000	$ 159	$ 117
$ 75,000	$ 443	$ 378
$ 100,000	$ 651	$ 700

Forgiveness under RAP moves up to 30 years versus the 25 years presently available under IBR. The 20-year term of PAYE or SAVE forgiveness has already been eliminated. Consistent with SAVE, RAP will allow for waiver of unpaid interest.

Basically, RAP offers simplicity at the cost of flexibility. There will be a minimum payment of $10 so borrowers will maintain contact with their loan servicer, a sliding scale based upon income, waiver of accruing interest which created huge balances, and complete forgiveness in three decades.

For new loans after July 1, 2026, RAP will be the sole IDR option available to borrowers.

continued on p. 19

Student Loan Sidebar
continued from p. 18

While RAP has been signed into law, there still remains the rule making process for working out the finer details.

What's going on now?
There are still borrowers on a SAVE forbearance, mostly those who:
1) Are planning to pay off their loans;
2) Are not in a position to pay right now because addressing other payments or between jobs etc. or
3) Waiting for a PSLF buyback response.
Everyone else should have already switched plans or be in the process of moving to an IDR that fits their circumstance.

PSLF Buybacks: We are starting to see some movement on the Public Service Loan Forgiveness ("PSLF") buyback processing for those who applied in late 2024. The counts are often wrong however and an administrative complaint can be filed here: https://studentaid.gov/feedback-center/.

IDR Recount: If you have questions about how many months you have in IDR credit from past federal student loan payments or forbearances/deferments, you can use this back door even though the count has been removed from the federal dashboard under StudentAid.gov:
Step 1) Log in to studentaid.gov
Step 2) Open another browser tab and go to https://studentaid.gov/app/api/nslds/payment-counter/summary

Forgiveness Emails: Early October has many borrowers receiving forgiveness emails for those whose backdoor trackers show 300+ qualifying payments, and enrollment in IBR. This suggests that the Department of Education ("ED") ran an internal audit and submitted the most straightforward cases first. We anticipate more rounds of forgiveness emails in the future. Getting to 300

continued on p. 20

Student Loan Sidebar

continued from p. 19

payments and enrollment in IBR is key.

Parent Plus Loans: if you have Parent Plus loans, you still have a path for forgiveness but you need to consolidate to a Direct Loan and enroll in Income Contingent Repayment before July 1, 2026 to remain eligible. You can keep these Parent Plus loans separate from other Direct Loans for the lowest payment options.

Social Security Offset: In a policy reversal, seniors will not face offset of Social Security after all. People 60+ hold an estimated $125 billion in student loan debt according to the National Consumer Law Center, which is roughly six times higher than 20 years ago.

Defaults Increasing: More borrowers are entering default because they are choosing to either wait out ED and the uncertainty of SAVE, are tired of dealing with their servicers and the constant changes, or they simply do not have the ability to make IDR payments. Default on federal student loans is never a good idea as the penalties can be quite severe including garnishment, credit impairment, tax refund seizures and debt collection.

Consolidation and Rehabilitation to Cure a Default: While the Fresh Start Initiative has expired, borrowers can still cure a loan default by a consolidation or rehabilitation. There are significant differences between the two options. Borrowers should beware of consolidation without understanding exactly what will happen and why.

Consolidation is a new loan versus a rehab of an existing loan.
Consolidation is basically a new loan where prior IDR credit is invalidated. For instance, if someone has several years of IDR forgiveness credit under their belt, they may not want to lose that. A rehab of existing loans would be better than a consolidation if someone wants to continue building off that IDR credit to eventual forgiveness.

Repayment options may change.
If someone consolidates their loans after July 1, 2026, the IDR repayment options dwindle to only RAP. Consolidation now will convert all FFEL loans to Direct loans which is necessary for PSLF. One consolidation is necessary for a Parent Plus Direct loan to be eligible for IBR after an initial enrollment in ICR (before July 1, 2026).

A rehab is usually better for credit.
A rehabilitation will remove all the late pays, while a consolidation will not.

Consolidation is faster at two -three months. A consolidation is faster than a nine-month rehabilitation.

Finally, you cannot cure a loan default by consolidation if you already have a Direct Consolidation loan.

Bankruptcy Attestation for Undue Hardship is Working.
We received a signed stipulation today for a borrower making $4k a month who received a 95% reduction on $380k+ of federal student loan debt. Now her payments are approximately $100 a month with a much more manageable loan balance of $15,600. *Blarcom v. U.S. Dep't of Education* **Case No. 3:23-ap-58-BAJ**

Eventually, the federal student loan system should be easier to navigate. Right now, there is significant conflicting information online and decisions should only be made after a careful analysis of the borrowers' loan type and circumstances.

The information provided in this Sidebar does not, and is not intended to, constitute legal advice. For a 1-on-1 strategy session with Arkovich Law, please email info@christiearkovich.com or call (813) 258-2808.

Editors:
Bradley M. Saxton and Lauren M. Reynolds, *Winderweedle, Haines, Ward & Woodman, P.A.*
Kathleen L. DiSanto, *Bush Ross, P.A.*

Eleventh Circuit Cases

Smart Baking Co., LLC v. Powers Indus., LLC (In re Smart Baking Company, LLC)
2025 WL 1157151 (11th Cir. Apr. 21, 2025).

Smart Baking Company, LLC filed for Chapter 11 bankruptcy, during which the bankruptcy court granted Powers Industrial two administrative claims—one for unpaid rent and another for building-repair costs. Smart Baking initially appealed the repair cost claim before a specific amount was determined, leading to dismissal for lack of finality. After the claim was set at $724,922.00, Smart Baking appealed again but submitted its initial brief 11 days past the deadline. Additionally, the brief was nearly identical to a previously filed one, lacked a corporate disclosure statement, and failed to designate lead counsel as required by local rules. The Eleventh Circuit concluded that the district court acted within its discretion in dismissing the appeal. The combination of the late filing, failure to adhere to procedural rules, and lack of a request for an extension demonstrated "negligence, and even indifference" on Smart Baking's part. The court emphasized that dismissal under Rule 8018(a)(4) is appropriate when such conduct is evident, distinguishing this case from others where appellants showed diligence or sought extensions.

Benshot, LLC v. 2 Monkey Trading, LLC (In re Two Monkey Trading, LLC)
142 F.4th 1323 (11th Cir. July 9, 2025).

In pre-bankruptcy litigation pending in the Eastern District of Wisconsin, BenShot, LLC prevailed against 2 Monkey Trading, LLC and Lucky Shot USA, LLC on all claims, including claims for violations under the Lanham Act and Wisconsin common law, and were awarded punitive damages by the jury. The jury verdict form inquired as to whether the debtors acted "maliciously toward" Benshot or "in an intentional disregard of" BenShot's rights, and the jury answered affirmatively. The debtors sought relief under Subchapter V of Chapter 11 and to confirm a plan non-consensually under section 1191(b). Benshot filed a complaint objecting to the dischargeability of its debt, alleging that the debt was a non-dischargeable debt under section 523(a)(6) for a willful and malicious injury. The bankruptcy court, adopting the ruling of several bankruptcy courts around the country, granted the debtors' motion to dismiss the creditor's complaint objecting to the dischargeability of debt under section 523(a). The creditor timely appealed the order dismissing the adversary proceeding. Aligning with Fourth and Fifth Circuits, the Eleventh Circuit held that corporate debtors in Subchapter V proceedings who seek to confirm non-consensual plans under section 1191(b) cannot discharge debts listed under section 523(a) based on the plain and unambiguous language of section 1192. The Eleventh Circuit acknowledged the complexity of the interplay between the applicable provisions of the Bankruptcy Code and the split among bankruptcy courts across the nation, but focused on the plain text of section 1192, including its reference to a "kind of debt" rather than a "kind of debtor."

Bankruptcy Court Cases

In re Bay Club of Naples, LLC
2025 WL 1139323 (Bankr. M.D. Fla. Apr. 17, 2025) (Delano, C.J.).

The two affiliated debtors are real estate developers in Naples, Florida. To facilitate the construction of luxury condominium projects, Debtors' chapter 11 plan, the confirmation order, and related transaction documents provided for the holder of the mortgage on the projects to be "subordinate in right, title, and enforcement" to exit financing and construction financing, and that the senior lender (who provided the exit and construction

continued on p. 23

financing) would be paid in full before any payments were made on the subordinated mortgage. Post-confirmation, the subordinated mortgage holder filed a foreclosure action. The debtors, joined by the senior lender, moved to compel the subordinated mortgage holder to comply with the confirmation order. The bankruptcy court held that it had both "arising in" and "related to" jurisdiction over the parties' dispute. And after a trial, the court held that the plain, unambiguous language of the confirmation order barred the foreclosure action.

In re Commercial Express, Inc.
670 B.R. 573 (Bankr. M.D. Fla. 2025) (Geyer, J.).

Relying on section 105(a) of the Bankruptcy Code and the Eleventh Circuit's decision in Matter of Munford, Inc., the bankruptcy court approved a chapter 7 trustee's sale of an insurance policy and related settlement agreement, which required the entry of third-party bar orders, over the objection of the United States Trustee. The United States Trustee argued that the bar orders were precluded by Purdue and that Munford was abrogated by Purdue. In overruling the objection of the United States Trustee, the bankruptcy court found that Purdue does not apply to section 363 sales and does not foreclose the entry of a bar order if necessary to monetize an asset of the estate through a sale free and clear of liens, claims, and encumbrances as requested by the chapter 7 trustee.

In re Combs
2025 WL 1114055 (Bankr. M.D. Fla. Apr. 14, 2025) (Geyer, J.).

The bankruptcy court granted judgment creditor's motion to compel chapter 7 debtor's non-filing spouse, who was allegedly a permanent resident of Sweden and the sole owner of the debtor's employer, to appear for a Rule 2004 examination concerning the debtor's financial affairs. On rehearing, the bankruptcy court found that the subpoena was validly served and that the pending proceeding rule did not preclude the wife's examination. Her residence abroad did not negate the service, and her health issues were not sufficient to merit relief. Furthermore, the examination was permissible under Rule 2004, as no adversary proceeding was active at the time the examination was sought.

In re Hudson
2025 WL 1734005 (Bankr. M.D. Fla. June 12, 2025) (Robson, J.).

Prior to the petition date, the debtors obtained a commercial loan with a lender, that was approved by the United States Small Business Administration and secured in part by a mortgage on the debtors' homestead property. The lender filed a proof of claim, asserting a secured claim in the amount of $300,000.00 and an unsecured claim in the amount of $768,845.09. The bankruptcy court disapproved a reaffirmation agreement with the lender for the entire balance due, finding that the debtors did not rebut the presumption of undue hardship, as their monthly income after expenses did not allow for payment of the reaffirmed debt, and that the reaffirmation agreement was not in the best interest of the debtors.

In re Khorran
2025 WL 1144885 (Bankr. M.D. Fla. Apr. 15, 2025) (Colton, J.).

Pro Health, Inc. filed a motion for summary judgment, seeking to have its state court judgment against the debtor declared non-dischargeable under sections 523(a)(2)(A) and 523(a)(6) of the Bankruptcy Code. The judgment stemmed from a state court action in which the debtor was found to have fraudulently induced Pro Health to enter into a lease agreement and subsequently engaged in deliberate acts to render the leased premises uninhabitable. The state court determined that that the debtor acted with conscious and willful intent to harm Pro Health, resulting in damages that were deemed non-dischargeable. The bankruptcy court granted Pro Health's motion for summary judgment in part, holding that the judgment and the associated attorney's fees and costs were non-dischargeable due to fraud and willful and malicious injury based on collateral estoppel principles.

continued on p. 24

In re Mize
2025 WL 1167801 (Bankr. M.D. Fla. Apr. 21, 2025) (Colton, J.).

The debtor, a realtor for Coldwell Banker, and his wife filed for chapter 7 bankruptcy. Mr. Mize claimed two real estate commissions expected post-petition for pre-petition sales as exempt earnings on Schedule C of his bankruptcy schedules, citing Florida Statute § 222.11(2)(b). This statute protects the "disposable earnings of a head of a family" from garnishment. The trustee objected, arguing the commissions did not constitute earnings under the statute. Mr. Mize worked under an Independent Contractor Agreement with Coldwell Banker, where his compensation was determined by commission, and he did not have ownership in the company. The bankruptcy court granted the debtors' motion for summary judgment and denied the trustee's motion for summary judgment, finding that the real estate commissions claimed by Mr. Mize as exempt earnings under section 222.11(2)(a), Florida Statutes, qualified as "earnings." Since Mize was the head of a family and did not agree to garnishment in writing, his commissions were deemed exempt and protected from garnishment.

In re MTL Partners, LLC
2025 WL 1905637 (Bankr. M.D. Fla. June 2, 2025) (Robson, J.).

Chapter 11 debtor contended that the United States Small Business Administration did not have a perfected security interest in cash generated from the sale of inventory held in the debtors' bank account in the absence of a deposit control agreement. The SBA was properly perfected as to the debtor's inventory and office furnishings and equipment. In concluding that the SBA's claim was secured by the identifiable proceeds of the sale of the inventory, even though the parties did not execute a deposit control agreement, the bankruptcy court relied on sections 679.3121(a) and 679.3151, Florida Statutes, which provide that a deposit control agreement is not necessary where a secured creditor has a properly perfected lien on collateral and the cash proceeds from the sale of the collateral are identifiable.

In re Ortiz
2025 WL 1139169 (Bankr. M.D. Fla. Apr. 17, 2025) (Delano, C.J.).

Reaffirmation agreement can be enforceable when it was "made" prior to entry of discharge, even if it was signed and filed after entry of the discharge.

Can A Debtor-In-Possession Consensually Confer Derivative Standing Onto Another Party?

By Daniel Etlinger, *Underwood Murray, P.A.*
With Contributions By
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A debtor-in-possession ("DIP") owes a fiduciary duty to the estate, which includes the investigation and, if warranted, prosecution of claims. When a DIP is derelict in bringing those claims, other interested parties may assert derivative standing to bring those same claims. However, what if, for economic or other practical reasons, the DIP simply desires to confer standing? This article will first walk through the typical framework for assessing derivative standing before evaluating three potential conferral scenarios – a single creditor, a creditor committee, and a Subchapter V trustee ("SVT").

The Typical Derivative Standing Assessment

At the heart of the tension concerning derivative standing is a party substituting its own judgment for that of an estate fiduciary on the one hand against the practical reality, and in some cases, the only way to advance prosecution of meaningful claims on the other hand.

Standing is defined as a "party's right to make a legal claim or seek judicial enforcement of a duty or right based on the party's having a sufficient interest in a justiciable controversy."[1] "The concept of derivative standing arose when, despite a lack of express statutory authorization, courts of equity allowed shareholders to pursue valuable actions when the nominal plaintiff (the corporation) unreasonably refused to do so."[2] Essentially, derivative standing allows another party to step into the same shoes and pursue the claim.

Courts typically cite two Code provisions in support of the proposition that they can authorize derivative standing. The first is Section 1109(b) which states that a "party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue under this chapter."[3] The second is Section 503(b)(3)(B), which allows an administrative expense by a "creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor."[4], [5]

Most courts have adopted a four-part test to confer derivative standing: "[1 the derivative party] made demand on the debtor to bring a claim; [2] the demand was unjustifiably refused; [3] the claim is colorable; and [4 the derivative party] seeks court permission to bring the claim."[6] Some courts have established a fifth element that the derivative standing "would further the bankruptcy objective of marshaling estate assets, provided any recovery is for the benefit of the estate."[7]

However, can this four- or five-part test be supplanted by the DIP agreeing to derivative standing?

Can the Dip Confer Standing to a Single Creditor

Those advocating for the position that the DIP can confer standing to a single creditor will find support for this position.[8] A common rationale is the DIP having a conflict of interest, such as investigating its own affiliates, parents, subsidiaries or other insiders. One court framed the issue as follows in reaching the conclusion there could be derivative standing:

> we conclude that the express statutory language does not prohibit creditor standing, and that such standing furthers Congress's purpose in balancing the interests between the debtor and its creditors in a Chapter 11 reorganization . . . [W]e are faced with a situation where we must determine whether

continued on p. 26

1 *Standing*, Black's Law Dictionary (12th ed. 2024).
2 *Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. v. Chinery*, 330 F. 3d 548, 568 (3d Cir. 2003)
3 11 U.S.C. § 1109(b).
4 *Id.* at § 503(b)(3)(B).
5 *See also Id.* at §§ 105(a) and 1107.
6 *E.g. In re Roman Cath. Church of Archdiocese of Santa Fe*, 621 B.R. 502, 508-09 (Bankr. D.N.M. 2020).
7 *In re Palm Ave. Partners, LLC,* 611 B.R. 457, 471 (Bankr. M.D. Fla. 2019), *affirmed in part, vacated in part, remanded in part by Cramer v. Palm Ave. Partners, LLC*, 2025 WL 1222269 (M.D. Fla. 2025).
8 *See e.g. In re Laramie Assocs. Ltd.*, 1996 WL 549984, at *2-3 (Bankr. E.D. Pa. 1996) ("[T]he Plan allowed [creditor] to prosecute an action against the Debtor's insiders and affiliates for its own primary benefit rather than the sole benefit of unsecured creditors…."); *First Ala. Bank v. Shelby Motel Group, Inc. (In re Shelby Motel Group, Inc.)*, 123 B.R. 98, 103-04 (N.D. Ala. 1990) ("The [DIP] has proven that it will never bring adversary proceedings against its own family members and their existing or non-existent business enterprises. Who could be better to prosecute such claims on behalf of the debtor under § 1109 than a badly harmed creditor?).

Debtor In Possession

continued from p. 25

> Congress intended to confer exclusive authority on the trustee or debtor-in-possession to bring avoidance actions in a Chapter 11 case if the debtor abuses its discretion in not bringing such an avoidance action. A [DIP] often acts under the influence of conflicts of interest and may be tempted to use its discretion under Sections 547 and 548 as a sword to favor certain creditors over others, rather than as a tool to further its reorganization for the benefit of all creditors as Congress intended. Given this reality, we do not believe Congress intended to exclude creditors from seeking to avoid preferential or fraudulent transfers where the [DIP] abuses its discretion.[9]

However, case law curtails the powers as an exception, not the norm, due to the practical constraints of conferring derivative standing to a single creditor.[10] For instance, creditors themselves can have a conflict of interest to the estate and thus the parties must determine how appropriate guardrails will be implemented. The scope – including what specific claims are going to be derivatively prosecuted – can be abstruse. Those opposing standing will often cite to investigations that the claims are just not colorable (e.g. subject to an early motion to dismiss). The fifth element, articulated by Judge Williamson *supra*, can be particularly messy. For example, are all the attorneys' fees and costs of the prosecuting creditor now considered an allowed priority claim (perhaps even superpriority as to the litigation proceeds)? Further, how is any recovery divvied up -- first applied to that prosecuting creditor's claim, then to the estate, vice versa, or pursuant to some other waterfall?

continued on p. 27

9 *Canadian Pacific Forest Products Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1440-41 (6th Cir. 1995) (internal citations omitted), *disagreed with by Surf N Sun Apts., Inc. v. Dempsey*, 253 B.R. 490, FN 3 (M.D. Fla. 1999).

10 *In re Racing Services, Inc.*, 540 F.3d 892, 899-900 (8th Cir. 2008) ("If creditors could obtain derivative standing too readily, they could usurp the entire role that the trustee or [DIP] plays as the representative of the estate. And so, to prevent derivative adversary proceedings from becoming the norm in bankruptcy, we agree with our sister circuits that the critical inquiry is whether the trustee (or [DIP]) abused its discretion by unjustifiably refusing to pursue the creditor's proposed claims.") (emphasis in original).

continued from p. 26

Can The Dip Confer Standing to a Creditors' Committee

A committee appointed under Section 1102 has certain enumerated powers under Section 1103.[11] These powers include the investigation of "acts, conduct, assets, liabilities, and financial condition of the debtor…" as well as to generally "perform such other services as are in the interest of those represented."[12]

Similar to a single-creditor analysis, various cases support the proposition that the DIP can confer standing to a committee.[13] Providing for derivative standing to the committee is often seen as a better alternative to appointing an additional chapter 11 trustee or examiner, each with additional administrative burdens, or converting the case altogether.[14] The analysis over standing to one particular creditor is improved in that a committee is a statutory creature, with duties and powers articulated in the Code. However, many of the same practical considerations carry over, such as clearly defining the scope, having a colorable claim, and establishing the waterfall from the outset.

Can the Dip Confer Standing to a Subchapter V Trustee

Like a creditor's committee, an SVT's powers are specifically enumerated in the Code. The SVTs primary purposes are to facilitate confirmation of a plan, and then to monitor for substantial consummation of the same.[15] Upon a showing of cause, those powers can be expanded, notably to investigate and report on the finances and operations of a debtor.[16]

At least one court has found that a DIP cannot consensually confer standing onto the SVT. In *In re Ghatanfard*, the United States District Court for the Southern District of New York examined if these provisions could authorize the debtor to voluntarily confer standing upon an SVT to "take over the entire litigation and causes of action."[17] That court began by noting that at the bankruptcy level, both the objecting creditor and SVT himself found no authority for expanding the powers to pursue avoidance actions against third parties.[18] Indeed, the bankruptcy court held that "to employ [the SVT] to pursue matters not authorized by statute, over the objection of a creditor, would inject uncertainty and risk complications later on."[19]

The District Court agreed that the SVT's powers could not be expanded to prosecute fraudulent conveyance claims on behalf of the estate, finding it lacked the statutory authority to do so.[20]

Conclusion

A DIP may potentially acquiesce to the derivative standing of a single creditor or an entire creditor committee to prosecute claims. Such a conferral is not without its practical considerations that should be afforded due consideration from the outset of the relationship. One alternative to derivative standing altogether would be to simply assign or sell the claim. This may alleviate many of the above concerns, potentially provide for the income into the estate much sooner than the lawsuit, and provide a cleaner record for the action.

11 11 U.S.C. §§ 1102 and 1103.
12 *Id*. at §§ 1103(c)(2) and (5).
13 *In re AppliedTheory Corp.*, 345 B.R. 56, 58 (S.D. N.Y. 2006) ("The right to bring suit may be exercised in a limited set of situations, including when the trustee or '[DIP] unreasonably fails to bring suit' and 'where the trustee or [DIP] consents'."), *citing In re Commodore Intern. Ltd.*, 262 F.3d 96, 100 (2d Cir. 2001) ("We adopt an approach similar to that followed by the court in *In re Spaulding Composites [Co.*, 207 B.R. 899, 904 (9th Cir. BAP 1997)]: A creditors' committee may acquire standing to pursue the debtor's claim if (1) the committee has the consent of the [DIP] or trustee, and (2) the court finds that suit by the committee is (a) in the best interest of the bankruptcy estate, and (b) is 'necessary and beneficial' to the fair and efficient resolution of the bankruptcy proceeding.").
14 *In re Roman Cath. Church*, 621 B.R. at 507.
15 11 U.S.C. §§ 1183(a) and (b).
16 *Id*. at § 1183(b)(2).
17 666 B.R. 14, 20 (S.D. N.Y. 2024).
18 *Id*.
19 *Id*. at 26.
20 *Id*. at 26-27; see also *In re Turkey Leg Hut & Co. LLC*, 659 B.R. 539, 542-44 (Bankr. S.D. Tex. 2024 ("None of the subchapter v trustee's general duties authorize the Subchapter V Trustee to pursue claims belonging to the estate, [or] on behalf of the estate.").

Righting the Ship: Post-petition Retainers, Subchapter V, and the Right to New Counsel

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In small Subchapter V cases where time and cash are tight, the ability to retain competent substitute counsel can mean the difference between reorganization and collapse. But to pay a post-petition retainer to substitute counsel, a debtor must obtain prior court approval under 11 U.S.C. § 363(b), right? After all, numerous courts have explained that section 363(b) provides the mechanism for the use of property of the estate outside of the ordinary course of business upon "notice and a hearing."[1] Judge Radel's decision in *In Re Kearney* departs from the conventional premise, holding that post-petition retainers are governed by and permitted under 11 U.S.C. § 328(a), which does not require notice or a hearing.[2] In doing so, the ruling not only strengthens debtors' access to the bankruptcy system but also provides important incentives for attorneys to take on representation in complex, ongoing cases.

Reconsidering Retainer Approval: Section 363(b) vs. Section 328(a)

In *Kearney*, the Debtor—an optometry practice in upstate New York—filed for Subchapter V bankruptcy relief in December 2024.[3] The Debtor's initial counsel had brought the case to the brink of dismissal.[4] In March 2025, the Debtor engaged Andrew S. Rivera of Bond, Schoeneck & King, PLLC ("Bond") to replace its prior bankruptcy counsel and paid an $18,000 post-petition retainer.[5] Bond timely filed a substitution of counsel and applied for retention nunc pro tunc to March 15.[6] The United States Trustee ("UST") objected, arguing that the post-petition retainer was an unauthorized transfer of estate funds that violated section 363(b), and that the circumstances of the case did not justify a post-petition retainer under the Knudsen framework.[7]

As an initial matter, Judge Radel agreed with the UST's contention that the Debtor's payment of the $18,000 retainer constituted a transfer of estate property outside of the ordinary scope of business. The court, however, rejected the view that any post-petition transfer automatically requires preapproval under section 363(b).[8] Instead, the court relied on section 328(a), which allows debtors to employ professionals "on any reasonable terms and conditions of employment, including on a retainer."[9] The court found no requirement in the Bankruptcy Code—or in prevailing case law—that post-petition retainers must be separately approved by way of a section 363 motion.[10]

continued on p. 30

1 11 U.S.C. § 363(b).
2 In re: John R. Kearney M.D. Eye Physician and Surgeon P.C., 2025 WL 1949468 (Bankr. N.D.N.Y. July 15, 2025).
3 Id. at *1.
4 Id. at *1, *4.
5 In re Kearney, 2025 WL 1949468, at *1.
6 Id.
7 Id. at *1-2.
8 Id. at *2.
9 Id.; see 11 U.S.C. § 328(a).
10 In re Kearney, 2025 WL 1949468, at *2.
11 In re Knudsen Corp., 84 B.R. 668, 672 (B.A.P. 9th Cir. 1988) (listing factors relevant to approval of a post-petition retainer, including size of the case, potential hardship from delayed payment, counsel's ability to respond to fee assessment, and whether the retainer procedure is subject to notice and a hearing).
12 In re Kearney, 2025 WL 1949468, at *2-4.
13 Id. at *3.

Next, the court addressed the UST's argument that, under the *Knudsen* factors,[11] the Debtor's limited size and the lack of complex legal or factual issues weighed against approval of the post-petition retainer.[12] While the court acknowledged Knudsen's factors, it found them overly restrictive.[13] In particular, the court cited *Jefferson Business Center* to emphasize that "[m]any courts have added their own factors to meet the needs of their cases." [14] Instead of relying on the *Knudsen* factors, Judge Radel joined a growing number of courts urging flexible, case-by-case inquiries guided by the "reasonableness of the retention terms" standard in section 328.[15]

The UST also cited *Soul Wellness* in support of its position that a retainer was unwarranted given the size of the case and the lack of complexity. There, the court denied approval of a Subchapter V post-petition retainer, noting that counsel had already received a pre-petition retainer and could seek further compensation through interim fee applications if that retainer were exhausted.[16] Judge Radel, however, distinguished *Kearney* on both factual and procedural grounds, pointing to Bond's midstream entry.[17] Unlike *Soul Wellness*, where counsel was engaged pre-petition and continued uninterrupted throughout the proceeding, Bond had assumed the case after filing, when dismissal was imminent, and without a pre-petition retainer.[18]

In determining the reasonableness of the post-petition retainer, the court emphasized that counsel had not drawn on the retainer, which remained in escrow subject to a formal fee application and judicial review.[19] These procedural safeguards, paired with Bond's well-established reputation and the Debtor's apparent need for competent substitute counsel, tipped the scales.[20] In addition, Judge Radel evaluated the extent and nature of the work Bond had already performed: it filed monthly operating reports, moved to preserve the Debtor's cash management system, filed a Subchapter V plan, and positioned the estate to leverage an $89,000 Employee Retention Tax Credit.[21] As the Court succinctly put it: "Bond righted the ship."[22]

A Valuable Tool for Subchapter V Practitioners: Seeking to Replace Counsel Post-Petition

Judge Radel's decision carves out a procedural route for debtors to retain substitute counsel after filing for bankruptcy, while also incentivizing attorneys to take on complex, midstream cases they might otherwise hesitate to accept.[23] Replacing counsel midstream can present significant challenges. When initial counsel withdraws, debtors must act quickly to retain substitute counsel that can absorb the case's procedural posture, salvage ongoing plan negotiations, and meet approaching deadlines—often when the debtor is already operating under strain. At the same time, experienced bankruptcy attorneys are understandably reluctant to take on a case midstream—particularly where deadlines are pending; prior counsel's filings are incomplete or defective, and key disclosures (e.g.

continued on p. 31

14 In re Kearney, 2025 WL 1949468, at *3; see In re Jefferson Bus. Ctr. Assocs., 135 B.R. 676, 680 (Bankr. D. Colo. 1992) (finding that post-petition retainers should not be limited to large firms or complex cases, as smaller firms face the same practical difficulties when they are unable to receive a retainer); see e.g., In Re Truong, 259 B.R. 264, 267 (Bankr. D.N.J. 2001) ("[T]he test is too restrictive for the broad range of retention terms permitted by Code § 328."); In re Mariner Post-Acute Network, Inc., 257 B.R. 723, 731 (Bankr. D. Del. 2000) ("We also find that there may be other important factors which we have not specifically enumerated here."); In re Golden Fleece Beverages, Inc., 2021 WL 6015422, at *6 (Bankr. N.D. Ill. Nov. 24, 2021) ("The Knudsen factors may be more or less important, and there may be other relevant factors, depending on the circumstances of the case.").
15 See id.
16 In re Soul Wellness LLC, 669 B.R. 848, 856-57 (Bankr. S.D. Fla. 2025) (Isacoff, B.J) ("[T]he Court finds that there is nothing about the size and circumstances of this case that warrants a post-petition retainer.")
17 In re Kearney, 2025 WL 1949468, at *3-4.
18 Id. at *4.
19 In re Kearney, 2025 WL 1949468, at *4.
20 Id.
21 Id.
22 Id.
23 See id. ("Absent the ability to obtain post-petition retainers from clients, attorneys may be unwilling (or less willing) to take over a case midstream.") (internal citations omitted).
24 See e.g. In re Chapel Apartments, 64 B.R. 569, 572 (Bankr. N.D. Tex. 1986) ("[I]t is neither surprising nor unreasonable that … retainers would be required before counsel would undertake the arduous task of guiding a debtor through a complicated reorganization plan laden with risk.")

SOFA) are either missing or inconsistent with the debtor's financial records.[24]

These challenges are particularly acute in Subchapter V cases where its efficiencies are intentionally front-loaded and give debtors little room to correct course.[25] The Bankruptcy Code reflects that accelerated timeline: the court must hold a status conference within 60 days (11 U.S.C. § 1188) and the debtor must file a plan within 90 days (11 U.S.C. § 1189). Fiduciary obligations also remain active regardless of whether counsel represents the debtor.[26] As Bankruptcy Judge Catherine P. McEwen aptly stated, "[a] subchapter V bankruptcy is designed to go fast and contain costs… [it] should be as pre-packaged as possible." [27]

In that context, midstream replacement of counsel becomes particularly precarious—and the early retention of competent counsel becomes essential.[28] By permitting post-petition retainers for substitute counsel under appropriate circumstances—and without requiring notice and a hearing—Judge Radel's ruling expands the practical ability of debtors to retain counsel midstream while ensuring attorneys receive fair compensation for legal services rendered. In the future, this decision may serve as persuasive authority for our talented Florida Bankruptcy Bar seeking to secure post-petition retainers in similarly situated cases.

25 William L. Norton III and James B. Bailey, Individual Chapter 11 Cases Under New Subchapter V, Bus. L. Today (Sept. 2020), https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-september/individual-chapter-11-cases-under-new-subchapter/.
26 See 11 U.S.C. §§ 1184, 1107(a) (imposing on the debtor all duties of a trustee under Chapter 11, including fiduciary obligations to the estate).
27 Hon. Catherine P. McEwen, Don't Put the Brakes on a Subchapter V, The Cramdown, Summer 2021, at 23 (Tampa Bay Bankr. Bar Ass'n).
28 See id.

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