Tampa Bay Bankruptcy Bar Association

The Cramdown

Newsletter for the Tampa Bay Bankruptcy Association

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PRESIDENT'S MESSAGE

by Nicole Noel Kass Shuler, P.A.

Dear Colleagues,

At the Annual Dinner, I mentioned some core values, specifically fairness, impartiality and excellence, upon which our Court is based. In the wake of Hurricanes Helene and Milton, I think of different core values – resilience and kindness. Our community has been struck with unimaginable hardship. Many of us have seen the devastation firsthand—homes, vehicles and personal property lost; offices impacted; children's schools damaged; and lives seriously disrupted. We have also seen tremendous kindness with friend, family, and community groups helping to clean out sand and rubble from homes and businesses in our area. As we continue to assess the extent of the destruction, we know that the path to recovery will be long and difficult. But relying on these values of resilience and kindness will help all of us in our Bankruptcy community and beyond navigate this difficult road.

While this is an unwanted road we traverse, it is in times like these that our strength as a legal community shines. The resilience and unity that we bring to our work every day are the same qualities that will help us recover and support those around us. We are more than just professionals—we are neighbors, colleagues, friends, and advocates for those who need it most.

I want to thank the members of our bar who have stepped forward in a spirit of professionalism and kindness to provide pro bono assistance to those affected by the storms. Many people in our community will need legal guidance on issues like insurance claims, housing disputes, and disaster relief. Your commitment to serving others during this time is a reminder of the important role we play, not just in the courtroom, but in the fabric of our community.

A few years ago, it would have been hard to imagine anything positive coming out of dealing with Covid. But recall that was when – in a testament to resiliency - our Court first pivoted to large-scale virtual hearings and the United States Trustee implemented electronic 341 meetings. That resiliency continues to serve us today in the aftermath of the storms so that we can continue to have hearings and 341 meetings nearly uninterrupted. While this pivot was solely in response to a crisis at hand, this has made many aspects of practice more efficient in the long run.

Resilience is not just about weathering the storm—it's about coming together to rebuild, restore, and grow stronger. And just as we learned lessons in adapting during the time of Covid, we will hopefully do the same in dealing with the storms in building back communities that are stronger than they were before.

Editor's Note – A special thank you to Beth Ann Scharrer for her special assistance, and demonstration of kindness, with this edition.

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Upcoming Dates (Dates, details, and registration at https://www.tbbba.com/calendar/#!calendar)

January 14, 2025
Consumer brown bag lunch webinar, presented by Judge Colton. Register at https://us06web.zoom.us/webinar/register/WN_IIwkfyUfSVC5FMbEnE9a-w

Upcoming Monthly CLE Luncheons
The TBBBA offers a variety of CLE programs, including monthly luncheons at the University Club of Tampa, 201 N. Franklin Street, #3800 in downtown Tampa. Open networking starts at 11:45 a.m. and the presentations themselves start at 12:00 noon and generally end around 1:15 p.m. Please save the date for the upcoming events and you can see the calendar and register for events at https://www.tbbba.com/calendar/#!calendar:

January 7, 2025 ..... (Note – 1st Tuesday) Sale Procedures, presented by Donald Kirk and Kenn Mann
February 11, 2025 .... State of the District 2025, presented by Chief Judge Caryl Delano
March 11, 2025 ..... Class Actions within Bankruptcies, presented by Lynn Sherman and Nicole Noel
April 8, 2025 ..... ESI Discovery Issues, presented by Michael Friedman
May 13, 2025..... Mediation Best Practices, presented by Roy Kobert

Long time friend and supporter of the TBBBA, Roy Kobert has launched Roy Kobert Mediation, offering expert bankruptcy and commercial dispute resolution with real-time scheduling. For more information, please visit RoyKobertMediation.com.

Charles (Chase) Preston has joined as an Associate Attorney with Anthony & Partners, where he represents various types of financial institutions and business entities. His practice area concentrates on bankruptcy, complex commercial litigation, and collection actions.

Chase was born and raised in Naples, Florida, and received his B.S. in Finance from Florida State University. Chase then received his J.D. from the Florida State University College of Law. During his time in law school, he was a member of the Florida State University Law Review, Moot Court Team, and Journal of Transnational Law & Policy.

Upon passing the Florida Bar in 2024, Chase began his career with Anthony & Partners, where he currently focuses on assisting clients navigate a wide range of business disputes.

Lynn Sherman (Trenam) has retired from the practice of law. Among her many accolades, Lynn was the 2022 recipient of the Douglas P. McClurg Professionalism Award, the highest honor awarded by the TBBBA.

Stichter Riedel Blain & Postler marks its 50th anniversary this year, coinciding with Harley Riedel's 50th anniversary in the practice of law. Over the years, eight SRBP attorneys have served as president of the TBBBA, including Don Stichter as the first president in 1988-89, and Harley Riedel in 1994-95.

Kathleen McLeroy, Carlton Fields, quoted in the New York Times on bankruptcy issues. Ms. McLeroy was quoted in a November 5, 2024 article, headlined "Guiliani Moved Possession from N.Y. Apartment as Creditors Closed In" about creditor collection efforts involving Rudy Guiliani.

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Purdue Pharma: Where Do We Go From Here?

By Mark Robens

In the landmark case *Harrington v. Purdue Pharma L.P.,*[1] the Supreme Court resolved a circuit split and held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[2]

Background

Purdue Pharma, the manufacturer of the highly-addictive opioid prescription pain reliever OxyContin, stood at the center of the opioid crisis—a storm that caused approximately 247,000 people in the U.S. their lives and "cost the country between $53 and $72 billion annually."[3] If Purdue Pharma was the center of the opioid storm, then the Sackler Family was the eye of the hurricane. Members of the Sackler Family owned and controlled Purdue Pharma, and they profited handsomely from Purdue Pharma's sales of OxyContin. The Sackler Family was once one "of the top twenty wealthiest families in America."[4] Under the direction of the Sackler Family, Purdue Pharma marketed OxyContin as a less addictive pain reliever, with a much broader range of medical applications than similar opioid prescriptions.[5] The Sackler Family members "were heavily involved" in marketing strategies by, for example, "push[ing] sales targets."[6]

After Purdue Pharma and OxyContin came under public scrutiny in 2007, the Sackler Family increased their distributions from 15% of Purdue Pharma's annual revenue to "as much as 70%" of its yearly revenue. "Between 2008 and 2016, the family's distributions totaled approximately $11 billion, draining Purdue's total assets by 75% and leaving it in 'a significantly weakened financial' state."7 Having been milked for all it was worth, Purdue Pharma ended up in bankruptcy.[8]

The Purdue Pharma chapter 11 plan proposed a broad third-party release and injunction in favor of the Sackler Family and entities under their control in exchange for returning, in payments over a decade, "$4.325 billion of the $11 billion they had withdrawn from the company in recent years."[9] The Sackler Family later increased the proposed settlement by another $1.175 billion to $1.675 billion. "And it proposed to end all these lawsuits without the consent of the opioid victims who brought them."[10]

After increasing the settlement to between $5.5 billion and $6 billion, "virtually all of the opioid victims and creditors in this case fervently support[ed] approval" of the plan, and "all 50 state Attorneys General have signed on to the plan—a rare consensus."[11] However, there remained a small number of objections from individual creditors in the U.S., Canadian creditors, and the U.S. Trustee.

Reasoning of the Court

In an example of textualism, the Court held that the bankruptcy code, and specifically Section 1123(b) governing plans, does not authorize a nonconsensual third-party release. "If authority for the Sackler discharge can be found anywhere, it must be found in paragraph (6)," which the Supreme Court described as a catch-all provision concerning *the debtor*.[13] "But the catchall cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants."[14] Finding that only a debtor who has "come forward with virtually all of its assets" can receive the benefit offered by the discharge, the majority concluded that "the Sacklers seek to pay less than the code ordinarily requires and receive more than it normally permits."[15]

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1 603 U.S. ---, 144 S. Ct. 2071 (2024) (decided June 27, 2024).
2 Id. at 2088.
3 Id. at 2078.
4 Id. at 2078.
5 Id.
6 Id.
7 Id. at 2078-2079 (quoting In re Purdue Pharma L.P., 69 F. 4th 45, 59 (2d Cir. 2023)).
8 Id. at 2078.
9 Id. at 2079.
10 Id.
11 Id. at 2088 (dissent).
12 Id. at 2081-2082.
13 Id. at 2082.
14 Id. at 2083 quoting Epic Systems Corp. v. Lewis, 584 U.S. 497, 513 (2018).
15 Id. at 2086.

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Resolving a circuit split, the Supreme Court reversed the Second Circuit's decision approving the bankruptcy plan and third-party release.

Adopting a practical approach, the dissent argues that the majority upended decades of bankruptcy jurisprudence in forbidding the use of non-consensual third party releases, which the dissent characterized as "essential" to enabling creditors and mass-tort victims to receive more than they might otherwise receive.[16] In the dissent's view, Section 1123(b)(6) allows the debtor to confirm a plan with "appropriate" plan provisions, including nonconsensual third-party releases, to maximize recovery by creditors.[17] Rejecting the majority's premise that Section 1123(b)(6) only applies to debtors in bankruptcy, the dissent points out that plans incorporating releases of "creditor's derivative claims, consensual releases, full-satisfaction releases, and exculpation clauses" in favor of third parties have been confirmed under Section 1123(b)(6).[18]

"The purpose of bankruptcy law is to address the collective-action problem" and "impos[es] a collective and compulsory proceeding" on creditors to "act as one."[19] The dissent argued that creditors benefit by permitting non-consensual third-party releases in bankruptcy by having one forum to address claims against the debtor and related third parties.[20] Where, as here, third party officers and directors have indemnity agreements with the debtor, lawsuits and collection actions against third parties are essentially claims against the debtor and potentially deplete estate assets for the benefit of a few.[21] Instead, allowing non-consensual third party releases in appropriate circumstances eliminates competition between creditors in the race to the courthouse, decreasing litigation costs, and coordinating recovery against third parties.

Where Do We Go From Here?

Equally important to resolution of the nonconsensual third-party release issue are the issues the Court left for another day. Notwithstanding the dissent's comments, the Supreme Court's majority decision expressly declined to address "what qualifies as a consensual release," or what happens when the plan "provides for the full satisfaction of claims against a third-party nondebtor." These issues are left for the lower courts to decide.

Opt-Out Plans Are Disfavored

What constitutes a consent for purposes of a third-party release in a plan is subject to some debate, but post-*Purdue Pharma*, the emerging majority view appears to reject opt-out provisions as a means of obtaining consent. An opt-out provision, like the one approved in *In re Stein Mart, Inc.*, requires the creditor to submit a form that affirmatively rejects third-party releases; otherwise, the creditor is deemed to have consented to the release.[24] Post-Purdue Pharma, the majority of courts hold that a debtor may not construe a creditor's silence or assume a creditor's consent to third-party releases from the creditor's failure to affirmatively opt-out. For example, applying New York state law, the bankruptcy court in *Tonawanda Coke Corp* held that a creditor must sign a release in order for the creditor to be bound by the release, and therefore a plan that included an opt-out provision was unconfirmable.[25] Closer to home, in the *Red Lobster* case, Judge Grace Robson recently rejected approval of a disclosure statement for a plan that included an opt-out third-party release, opining that there are many reasons why a creditor may fail to return an opt-out form, including "carelessness, inattentiveness, [and] mistake."[26]

In contrast, however, a minority of courts have held that opt-out third-party releases are sufficient to establish consent. The bankruptcy court in *In re Robertshaw US Holding Corp*, confirmed a plan that included third-party releases over the objection of the U.S. Trustee by concluding that opt-out provisions for non-debtor releases were consensual under well-settled precedent in that district.[27] Noting that consensual releases have

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16 Id. at 2089.
17 Id. at 2089-90.
18 Id. at 2110.
19 Id. at 2090 (emphasis in original).
20 Id. at 2093-2094.
21 Id. at 2090, 2100.
22 Id. at 2093-94.
23 Id. at 2087-88.
24 In re Stein Mart, Inc., 629 B.R. 516, 523-24 (Bankr. M.D. Fla. 2021) (Funk, J.).
25 In re Tonawanda Coke Corp, 662 B.R. 220, 223 (Bankr. W.D. N.Y. August 27, 2024) (denying without prejudice approval of disclosure statement);
26 Dietrich Knauth, Red Lobster Can't Use 'Opt-out' Liability Releases for Bankruptcy, Judge Rules (https://www.reuters.com/legal/litigation/red-lobster-cant-use-opt-out-liability-releases-bankruptcy-judge-rules-2024-07-26/ last accessed Oct. 25, 2024).
27 In re Robertshaw US Holding Corp., 662 B.R. 300, 322 (Bankr. S.D. Tex 2024).

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long been allowed in the Fifth Circuit through opt-out balloting and citing to *Cole v. Nabors Corporate Services, Inc. (In re CJ Holding Co.)*, 597 B.R. 597, 608-609 (S.D. Tex. 2019), the Robertshaw court opined that "[t]here is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan." [28]

Taking a middle position, the bankruptcy court in *In re Smallhold, Inc.* confirmed a plan incorporating third-party releases that bound creditors who voted in favor of the plan and did not opt out of the release, finding that such releases were consensual.[29] First, the court noted "that the sky is not falling" and that important plan finality in other areas was still achievable, like exculpation of estate fiduciaries and release of estate causes of action.[30] Importantly, the court held, affirmative consent to a third-party release is required, and therefore, creditors who are unimpaired by the plan or have failed to return a ballot cannot be deemed to have consented to the third-party releases.[31] "[F]ollowing a contract model, there [must be] evidence of an agreement to grant the release."[32] The *Smallhold* court, however, noted that the reasoning might be different if "the plan process builds in the protections of the class action mechanism under Rule 23(b)(3), where an 'opt-out' mechanism is deemed appropriate." [33]

A creditor who fails to assert their rights against a debtor in bankruptcy does so at their own risk, but creditors cannot be forced to release claims against non-debtors in a bankruptcy plan absent their consent. While a debtor may not coerce a creditor into a third-party release, nothing prohibits a debtor from obtaining a creditor's affirmative release of claims through an opt-in provision. Additionally, non-debtors and creditors are still free to negotiate and settle claims outside of bankruptcy.

What About Preliminary Injunctions?

Purdue Pharma does not directly address whether a bankruptcy court may grant preliminary injunctions and temporary restraining orders in favor of nondebtors. At least two courts have held *Purdue Pharma* does not preclude preliminary injunctions and temporary restraining orders that prohibit litigation against the debtor's principals or affiliates of the debtor.[34]

The court in *In re Coast to Coast Leasing, LLC* held that *Purdue Pharma* prohibits injunctions where the debtor seeks to "release and enjoin claims against a nondebtor."[35] Injunctions that only seek to prohibit litigation against the debtor's principals for a definitive period of time and do not seek to release claims against nondebtors are still allowed provided that the debtor's principals establish the traditional elements of an injunction.[36]

Similarly, in *Parlement Technologies*, the court held that *Purdue Pharma* is confined to the question presented, and that therefore, the court is bound to apply cases allowing preliminary injunctions "where the assertion of those claims would interfere with the debtor's reorganization efforts."[37] Recognizing that "interference" with the debtor's plan of reorganization "is no longer a lawful basis for *permanently* enjoining the assertion of such a claim, it remains a sufficient basis for the entry of a *preliminary* injunction."[38] Although the debtor in *Parlement Technologies* failed to meet its burden for the extraordinary relief of a preliminary injunction, the court noted that the "success on the merits" element can be satisfied where (i) the debtor's management needs relief from litigation to focus on the debtor's reorganization or (ii) where the court believes that the parties will ultimately be able to negotiate a consensual resolution of the claims against nondebtor parties.[39]

Another bankruptcy court, however, reached the opposite conclusion from *Coast to Coast Leasing and Parlment Technologies*. In *In re Diocese of Buffalo*, the bankruptcy court denied the debtor's request for a preliminary

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28Id. at 323.
29 In re Smallhold, Inc., Case No. 24-10267, 2024 WL 4296938 *8 (Bankr. D. Del. Sept. 25, 2024).
20 Id. at *3.
31 Id. at 8.
32 Id. at 13.
33 Id.
34 In re Coast to Coast Leasing, LLC, 661 B.R. 621, 623-624 (Bankr. N.D. Ill. 2024); In re Parlement Techs, Inc. (f/k/a Parler, LLC, f/k/a Parler, Inc.)., 661 B.R. 722, 724 (Bankr. D. Del. July 15, 2024);
35 Coast to Coast Leasing, LLC at 623-624 (emphasis in original).
36 Id. at 624-626.
37 Parlement Techs, Inc, 661 B.R. at 728.
38 Id.
39 Id. at 724.

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injunction that was premised on "development of a plan that might include a global settlement of abuse claims against the Diocese . . . [which included] a nonconsensual channeling order" because the use of a channeling order is no longer valid under *Purdue Pharma*.[40]

The take-away is that pre-confirmation preliminary injunctions premised on extending the automatic stay in favor of the debtor's management so as to reorganize the debtor's business appear to be permitted under *Purdue Pharma*, unless they are a bridge to a plan built on a nonconsensual third-party release.

Conclusion

Where do we go from here? Non-consensual third-party releases are no longer permitted in chapter 11 plans under Section 1123(a)(6). Since *Purdue Pharma* is limited to non-consensual third-party releases that do not fully satisfy claims, however, other types of relief and injunctions, such as preliminary injunctions, are still available in chapter 11 plans. Post-*Purdue Pharma*, expect the issue of creditor's consent to third-party releases to be hotly debated in plan confirmations. Plans that permit opt-in releases are likely confirmable, while plans requiring creditors to opt-out are likely not confirmable in most jurisdictions. Finally, it remains to be seen whether other provisions of the Bankruptcy Code and rules of procedure may support third-party releases, including Section 105 and Bankruptcy Rule 9019.

40 In re Diocese of Buffalo, N.Y., --- B.R.---, Case No. 20-ap-01016, 2024 WL 4488459 *3 (Bankr. W.D.N.Y. Sept. 30, 2024).

Examining the Absolute-Priority Rule in Individual Chapter 11 Cases

By Dana L. Robbins, *Burr & Forman, LLP*
& Edward Comey, *U.S. Bankruptcy Court (M.D. Fla.)*

This article was first published in the ABI Journal.

Since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), a split of authority has developed over whether § 1115 eliminates the absolute-priority rule in individual chapter 11 cases. However, another split of authority over the scope of the absolute-priority rule in individual chapter 11 cases dates back more than 30 years: Does an individual debtor violate the absolute-priority rule by retaining exempt property?

In *In re Joseffy*, Hon. Peter D. Russin of the U.S. Bankruptcy Court for the Southern District of Florida recently confronted both splits of authority and held that "the absolute-priority rule is alive and well in individual chapter 11 cases and that individual debtors may retain their exempt property without violating it."[1] This article examines the contours of the absolute-priority rule and its application in individual chapter 11 cases and the not-so-absolute nature of the rule in 21st century jurisprudence.

History of the Absolute-Priority Rule

The absolute-priority rule was originally a judicially created rule. Arising from a series of early 20th century railroad cases, including *Northern Pacific Railway Co. v. Boyd*,[2] the absolute-priority rule "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan."[3] The U.S. Supreme Court created the absolute-priority rule to prevent senior creditors and equityholders from imposing unfair terms on unsecured creditors.[4]

In 1939, in *Case v. Los Angeles Lumber Products Co.*,[5] the Court explained that the "rule of full or absolute priority" had been "properly applied" throughout the history of equity reorganizations in "passing on objections made by various classes of creditors that junior interests were improperly permitted to participate in a plan."[6] However, when Congress amended the Bankruptcy Act 13 years later, it did away with the judicially created absolute-priority rule.[7]

Congress codified the absolute-priority rule when it passed the Bankruptcy Act of 1978. New § 1129 (b) (2) (B) (ii) of the Bankruptcy Code provided that a plan could be confirmed without an impaired class's consent if "the plan [did] not discriminate unfairly, and [was] *fair and equitable*, with respect to each class of claims or interests that [were] impaired under, and [had] not accepted, the plan."[8]

As such, a plan was "fair and equitable" with respect to a class of unsecured creditors if the unsecured creditor class is paid in full, or any junior claim or an equity interest-holder does not receive or retain any property under the plan on account of such junior claim or interest.[9] "As codified," then, the absolute-priority rule made it clear that "every unsecured creditor must be paid in full before the debtor can retain 'any property' under a plan."[10]

Split No. 1: Post-BAPCPA, Does the Absolute-Priority Rule Apply in Individual Chapter 11 Cases?

In connection with BAPCPA, Congress made two changes to the Bankruptcy Code implicating the absolute-priority rule. First, Congress added § 1115, which expands the definition of "property of the estate" in individual chapter 11 cases. Section 1115 provides that in individual chapter 11 cases, property of the estate includes, "*in addition to the property specified in section 541*," "all property of the kind specified in section 541 that the debtor acquires after the commencement of the case" and "earnings from services performed by the debtor after the commencement of the case."[11]

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1 In re Joseffy, 654 B.R. 747, 748 (Bankr. S.D. Fla. 2023).
2 N. Pac. R. Co. v. Boyd, 228 U.S. 482, 508 (1913).
3 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988) (quoting Ahlers v. Norwest Bank Worthington (In re Ahlers), 794 F.2d 388, 401 (8th Cir. 1986)).
4 Zachary v. Cal. Bank & Trust, 811 F.3d 1191, 1194 (9th Cir. 2016) (citing In re Friedman, 466 B.R. 471, 478 (B.A.P. 9th Cir. 2012)).
5 Case v. Los Angeles Lumber Prod. Co., 308 U.S. 106, 116-18 (1939).
6 Id. at 118.
7 Joseffy, 654 B.R. at 750 (citing In re Maharaj, 681 F.3d 558, 560-61 (4th Cir. 2012)).
8 11 U.S.C. § 1129 (b) (1) (1978) (emphasis added).
9 11 U.S.C. § 1129 (b) (2) (B).
10 Ice House Am. LLC v. Cardin, 751 F.3d 734, 737 (6th Cir. 2014) (citing 11 U.S.C. § 1129 (b) (2) (B) (ii) (1994)).

Absolute-Priority Rule

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Second, Congress amended the definition of "fair and equitable" in § 1129 (b) (2) (B) (ii). Post-BAPCPA, a plan is "fair and equitable" with respect to an unsecured class as long as "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, *the debtor may retain property included in the estate under section 1115*."[12]

Since BAPCPA, courts have disagreed over the effect of those two amendments. In particular, courts are split over what Congress meant when it amended § 1129 (b) (2) (B) (ii) to permit individual chapter 11 debtors to "retain property *included in the estate under section 1115*."[13] The two conflicting views have been characterized as the "broad view" and the "narrow view."

Cases adopting the "broad view" have held that Congress effectively abrogated the absolute-priority rule in individual chapter 11 cases when it permitted individual chapter 11 debtors to "retain property included in the estate under section 1115."[14] Those courts read § 1115's inclusion of certain post-petition property in an individual chapter 11 debtor's estate *in addition to the property specified in § 541* to mean that Congress intended for § 1115 to subsume § 541. Put another way, "property included in the estate under section 1115" includes all § 541 property *plus* the post-petition property enumerated in § 1115.[15] "Under that 'broad view,' then, an individual chapter 11 debtor can retain — without paying unsecured creditors in full — *all* property of the estate, whether it is acquired pre-petition or post-petition."[16]

In contrast, "the narrow view holds that § 1115 merely adds to — but does not replace — § 541's definition of estate property for individual debtors."[17] Courts adopting the "narrow view" read § 1115 to "include" in the estate

11 11 U.S.C. § 1115 (a) (1)-(2) (2005) (emphasis added).
12 11 U.S.C. § 1129 (b) (2) (B) (ii) (2005) (emphasis added).
13 In re Joseffy, 654 B.R. 747, 752 (emphasis added; collecting cases).
14 Id. at 753.
15 Id.
16 Id.

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"only that property which was not already included by § 541," such as "post-petition property and earnings."[18] All courts of appeals that have considered the issue — the Fourth, Fifth, Sixth, Ninth and Tenth Circuits — have adopted the "narrow view."[19]

Split No. 2: Does an Individual Debtor Who Does Not Pay Unsecured Creditors Violate the Rule by Retaining Exempt Property?

Assuming that the absolute-priority rule still applies in individual chapter 11 cases, a less-well-known split has lingered for decades: Does an individual chapter 11 debtor who does not pay unsecured creditors in full violate the absolute-priority rule by retaining exempt property? While the split over whether Congress effectively repealed the absolute-priority rule in individual chapter 11 cases focuses on § 1129 (b)'s reference to a debtor's right to "retain property included in the estate under section 1115," the split over a debtor's right to retain exempt property focuses on language preceding that phrase: A plan is "fair and equitable" with respect to a class of unsecured creditors if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain *under the plan on account of such junior claim or interest any property.*"[20] Courts disagree over whether the prohibition against a debtor retaining "any property" bars a debtor from retaining exempt property.

For example, in *In re Gosman*, the court reasoned that "[h] ad Congress intended to exclude exempt property from the effect of the 'absolute-priority rule,' then the term 'property' would not have been used under Section 1129 (b) (2) (B) (ii)."[21] Instead, "Congress would have used 'nonexempt property' or 'property of the estate.'"[22] Likewise, in *In re Fross*, the Bankruptcy Appellate Panel

17 In re Stephens, 704 F.3d 1279, 1285 (10th Cir. 2013) (citing In re Draiman, 450 B.R. 777, 821 (Bankr. N.D. Ill. 2011)).
18 Id.
19 Joseffy, 654 B.R. at 754.
20 11 U.S.C. § 1129 (b) (2) (B) (ii) (emphasis added).
21 In re Gosman, 282 B.R. 45, 49 (Bankr. S.D. Fla. 2002).
22 Id.

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for the Tenth Circuit "read the fact that § 1129 (b) (2) (B) (ii) does not expressly exclude exempt property to mean that the broad reference to 'any property' includes both exempt and nonexempt property."[23]

Courts holding otherwise focus on the caveat that the holder of a junior claim or interest cannot retain "any property" "*under the plan on account of such junior claim or interest*." For example, the Ninth Circuit Court of Appeals in *In re Juarez* explained that § 1129 (b) (2) (B) (ii) has not been "implicated when a debtor retains exempt property" because "a debtor does not 'receive or retain' exempt property 'under the plan *on account* of [a] junior claim or interest.'"[24] Reasoning that a debtor "obtains exempt property from the bankruptcy estate by virtue of the right to exempt certain property under § 522, not 'under the plan on account of [a] junior claim or interest,'" the Ninth Circuit held that the absolute-priority rule does not prohibit a debtor from retaining exempt property.[25]

In re Joseffy

In *In re Joseffy*, the debtor owned certain real property, a truck and two watches.[26] The debtor claimed that the real property and the truck were exempt.[27] The debtor proposed a chapter 11 plan that paid a 3.99 percent dividend to unsecured creditors, who rejected the plan. The debtor thus attempted to cram down the plan under § 1129 (b) over the dissenting unsecured class and the U.S. Trustee objected that the plan was not "fair and equitable" because it violated the absolute-priority rule.[28]

The bankruptcy court began by considering whether Congress abrogated the absolute-priority rule in individual chapter 11 cases. Although all the circuit courts of appeals that had considered the issue had adopted the "narrow view," the Eleventh Circuit never addressed the issue.[29] Not bound by Eleventh Circuit precedent, the bankruptcy court joined the circuit courts of appeals and adopted the "narrow view."

In doing so, the court began with the text of §§ 1115 and 1129 and concluded that the language of those sections was plain and unambiguous: Section 1129 permits an individual chapter 11 debtor to retain property "included" in the estate under § 1115.[30] The court noted that the term "included" was a transitive verb meaning to "take in or compromise as a part of a whole or group."[31] Applying the dictionary definition, the court concluded that the property § 1115 "takes in [to]" the estate is certain post-petition property. Section 1115 does not include § 541 property, the court reasoned, because it is already in the estate.[32] Thus, the court concluded that a debtor could not retain pre-petition property under § 1129 (b) (2) (B) (ii), and therefore, the absolute-priority rule had not been abrogated.[33]

The bankruptcy court also concluded that the outcome would be the same even if §§ 1115 and 1129 were ambiguous. As such, "[f] or most of the past 100 years, the absolute-priority rule has been 'central to the bankruptcy bargain.'"[34] Given this, if Congress had intended to abrogate the absolute-priority rule, the court concluded that it would have mentioned its intention in the legislative history. In fact, when Congress repealed the judicially created absolute-priority rule in 1952, it did exactly that,[35] yet BAPCPA's legislative history is silent about any repeal of the absolute-priority rule. That "silence would be an 'odd occurrence for such a significant change.'"[36]

The bankruptcy court noted that the Supreme Court has reaffirmed that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[37] Moreover, the bankruptcy court noted that had Congress intended

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23 In re Fross, 233 B.R. 176 (B.A.P. 10th Cir. 1999).
24 Todeschi v. Juarez (In re Juarez), 836 F. App'x 557, 561 (9th Cir. 2020) (quoting 11 U.S.C. § 1129 (b) (2) (B) (ii); emphasis added)).
25 Id.
26 Joseffy, 654 B.R. at 748-49.
27 Id. at 749.
28 Id.
29 Id. at 754.
30 Id. at 754-55.
31 Id. at 755 (citing "Include," Merriam-Webster Online Dictionary, available at merriam-webster.com/dictionary/include; last visited Jan. 2, 2024).
32 Id.
33 Id.
34 Id. at 756.
35 Id.
36 Id. (quoting In re Maharaj, 681 F.3d 558, 572).
37 Id. (quoting Hamilton v. Lanning, 560 U.S. 505, 517 (2010)).

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to abrogate the absolute-priority rule, it could have done so in a more straightforward way "by adding the words 'except with respect to individuals' at the beginning of § 1129 (b) (2) (B) (ii)."[38]

After deducing that the absolute-priority rule applied in individual chapter 11 cases, the bankruptcy court concluded that debtors would not violate it by retaining exempt property: The court's chief complaint with cases holding that a debtor could not retain exempt property was that "[i] n focusing on the words [that] Congress did not include in § 1129 (b) (i.e., 'nonexempt property' or 'property of the estate')," those courts "ignore [d] the words [that] Congress did include."[39] As such, "Congress did not simply say that unless unsecured creditors are paid in full, the debtor cannot 'receive or retain any property.'"[40] Rather, the *Joseffy* court noted, Congress said that debtors could not retain "any property" "*under the plan on account of such junior claim or interest.*"[41]

According to the bankruptcy court, debtors do not retain exempt property *under the plan*, nor do they retain it *on account of their claim or interest.* Thus, debtors retain exempt property under § 522, and the court concluded that the plain language of § 1129 (b) (2) (B) (ii) permits a debtor to retain exempt property, which made sense in the court's view:

> The idea behind property being exempt and passing through bankruptcy unmolested is to allow debtors to retain property that state or federal law deems essential for daily living, such as a primary residence, tools of a trade, retirement savings, or a car. That property is no less essential in an individual chapter 11 than it is in an individual chapter 7.[42]

38 Id. at 757.
39 Id. at 759.
40 Id. (emphasis added).
41 Id. (quoting 11 U.S.C. § 1129 (b) (2) (B) (ii); emphasis added)).
42 Id. at 760.

Conclusion

For more than two decades, there has been some doubt about an individual chapter 11 debtor's ability to retain both exempt and nonexempt property without paying unsecured creditors in full. Relying on the plain language of §§ 1115 and 1129, the Joseffy court concluded that the absolute-priority rule is alive and well, and that an individual chapter 11 debtor "may only retain three categories of property under § 1129 (b) if unsecured creditors are not paid in full: (1) exempt property; (2) property of a kind specified in § 541 that [has been] acquired post-petition; and (3) earnings from post-petition services."

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By Christie Arkovich
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Many borrowers are waiting until the presidential election or the SAVE litigation is resolved to decide what to do about their student loans. Unfortunately, student loan forgiveness has turned into a political battlefield. All Income Driven Plans have ceased processing and the entire online system is frozen due to SAVE injunctions imposed by the 8th and 10th Circuits. Four hundred pages of regulations expected to into effect on July 1, 2024 have been enjoined nationally.

The Department of Education ("ED") is not processing Public Service Loan Forgiveness ("PSLF") or any IDRs. ED requested clarification of the SAVE injunction and the 8th Circuit declined. The first major hearing on the SAVE lawsuits will occur on October 25, 2024 and a ruling is expected in November. However, it will likely be Summer before we know whether SAVE will continue to exist. If SAVE does not survive perhaps we will go back to Repaye with some modifications.

Starting October 1, borrowers can expect to be considered delinquent if they do not make payments or take advantage of any forbearance or deferment opportunities.

In the meantime, what we will call Plan C for student loan forgiveness never really got off the ground as it was challenged immediately. Plan C was intended to grant forgiveness of high interest balances, automatically cancel debt for those eligible for forgiveness plans but unenrolled, cancel debt for repayment over 20 years, cancel debt for enrollment in low financial value programs, and cancel debt for borrowers experiencing hardship.

Admittedly, repayment of student loans is quite a mess right now and many borrowers do not know what to do or what to expect.

However, waiting and doing nothing can create more harm than good as is often true in the legal field.

Some very good programs will sunset shortly or will have expired as of this publication:

9/30/24 On Ramp Expires – collection efforts will restart including wage garnishment, Social Security offsets and negative credit reporting.

9/30/24 Fresh Start ends – this program enables someone to easily cure a federal student loan default and obtain IDR credit for the Covid period since March 2020.

At the beginning of the year, the U.S. Government and Accountability Office reported that 29% of federal student loan borrowers were one or more days late on their payments. With high inflation over this Spring and Summer, and borrowers stalling on student loan payments hoping for forgiveness, that number is likely unchanged despite the forgiveness that has occurred to date.

Starting October 1, borrowers can expect to be considered delinquent if they do not make payments or take advantage of any forbearance or deferment opportunities. This will result in being reported to the credit bureaus after 90 days of non-payment and being placed in default after 270 days of non-payment. One little known consequence of default is that 25% is added to the loan balance.

The IDR recount is expected to conclude in late September – early October for those with government held FFEL Loans or more likely Direct Loans. This will give borrowers IDR credit for extended forbearances and most deferments plus periods of repayment pre-consolidation that was seemingly lost forever. Borrowers who have multiple consolidations will likely see a delay due to the complexity of the accounts.

Borrowers are Receiving Payment Notices Now for Payments due in October or November!

Most borrowers have started to receive payment notices, often in amounts far more than the income driven plans they have become used to.

What to do with payment notices:

It is important to recertify your income on time. Even though the servicers are not processing Income Driven Plans, if you do not certify income on time, you will fall out of your IDR and a much higher 10 year standard payment will be due. If you fail to make that payment, the missed payments will start to report on your credit after Oct. 1 when On Ramp expires. Collection efforts will also restart in October.

We hope that ED will extend the recertification dates yet again to avoid the headache of submitting income information that will just sit there unprocessed. But if not, we suggest calling your servicer and informing them that you have completed your recertification paperwork on time as requested, and that you would like to be placed on a processing forbearance to avoid being put on a standard repayment plan.

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Student Loan Sidebar

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Forbearances While Waiting for SAVE Litigation. Forbearances while SAVE is being litigated will not receive any IDR or PSLF credit. Interest will not accrue but this will likely only apply to those previously enrolled in SAVE before July 1, 2024 when the injunctions took effect.

Consolidations are Being Processed on a Limited Basis. While the online system is frozen, it is still possible to consolidate loans via Aidvantage when done via a paper application. None of the other servicers are presently processing consolidations. Now that the deadline of June 30, 2024 has passed for those consolidating for the benefits of the IDR recount, there is less need to consolidate. But consolidation of FFEL Loans to Direct Loans is still necessary for those with Parent Plus loans who are seeking an income driven plan, or for those who are not otherwise eligible for PSLF, Paye or SAVE.

Parent Plus Borrowers: There is a pending bill called The Parent Plus Parity Act. If this bill becomes law it will:

- Make Parent PLUS borrowers eligible for all income-driven repayment plans—including SAVE
- Allow loan forgiveness if the child becomes eligible for Total and Permanent Disability discharge
- Make Parent PLUS borrowers eligible for PSLF if their child enrolls in qualifying public service jobs
- Create a new hardship category for loan discharge based on income, age and other factors.

This is not a bi-partisan bill and may not be signed into law. Due to this uncertainty, if you have Parent Plus loans, it is much safer to explore the double consolidation route which is good until July 2025 to get these loans into SAVE or other IDR.

Discharging Student Loans via Bankruptcy or the Total and Permanent Disability Program is working well. Discharge by bankruptcy attestation is reportedly taking a year to finalize, while a TPD discharge is fairly quick in 1-3 months.

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

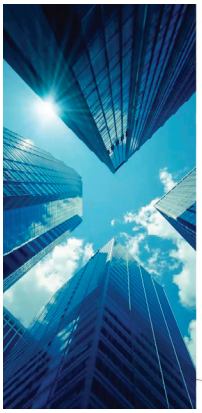
On September 3, 2024, the TBBBA's CLE programing year started with a Consumer Brown Bag Lunch featuring "Pro Bono – Easy as 1, 2,3", presented by Attorney Katelyn M. Vinson, Attorney Kelley M. Petry, Attorney Kristina E. Feher, Attorney William Kopp, and Attorney & Chapter 7 Trustee Traci Stevenson. The panelists discussed how pro bono opportunities and frequent issues that come up when assisting pro bono clients.

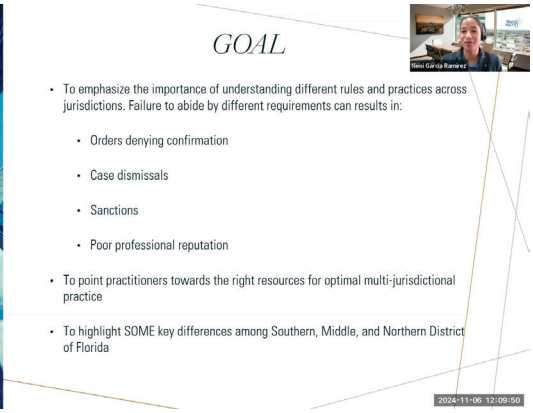
On September 24, 2024, Judge McEwen held her quarterly mentoring program for lawyers new to the bankruptcy practice, titled Subchapter V: Let Us Introduce (or Reintroduce) the Most Popular 11 on the Planet (at Least In FLMB). Featuring Guy Van Baalen, Assistant U.S. Trustee, Tampa Division, the presentation provided an overview of Subchapter V of Chapter 11, selected issues in eligibility requirements, a discussion of case administration for Sub V cases, selected plan confirmation issues, and remedies for debtor misconduct, default, or failure to progress the case.

On October 1, 2024, the Consumer Brown Bag Lunch featured UCC Liens in Consumer Bankruptcy presented by Wayne Spivak and Patrick Hruby. Wayne and Patrick discussed, from the lender and debtor perspective, perfection, priority, avoidance, redemption, and other issues in connection with liens subject to the Uniform Commercial Code on consumer bankruptcy debtor's property. The panelists discussed how to address liens for consumer debt or on consumer properties, such as UCC fixture filings for windows, solar panels, pools, and water softeners, and gave practical insights on options for challenging, stripping off, or redeeming those liens.

The October 23, 2024 membership luncheon CLE, rescheduled from October 8, 2024 due to Hurricane Milton, was presented by Andrea Bone, Christopher Emden, and Michael Dal Lago, and moderated by Amy Mayer, titled Federal Loan Program Defaults, Remedies, and Bankruptcies: How to Effectively Navigate Federal Loan Program Defaults. The panel addressed common federal loan programs—such as PPP, EIDL, SBA 7(a) and 504, USDA and Mainstreet. The panel discussed the typical collateral packages, whether guarantees are required, permitted use of funds, what constitutes a default and the implications of a default in the event of a bankruptcy filing, and what are the available collection remedies. It was great to be back in the big room at the University Club.

On November 6, 2024, the Consumer Brown Bag Lunch Webinar entitled Navigating Nuances: A Bankruptcy Attorney's Guide to Multi-Jurisdiction Practice was presented by Seth Greenhill, Esq., Neisi Garcia Ramirez, Esq., Sharon Sperling, Esq., and Christina Fiallo, Esq., bankruptcy practitioners throughout the state and country. The panelists discussed local practice and procedures and highlighted some of the key differences among the Southern, Middle, and Northern District of Florida, pointing practitioners to helpful resources to navigate the nuances between practices in different districts.





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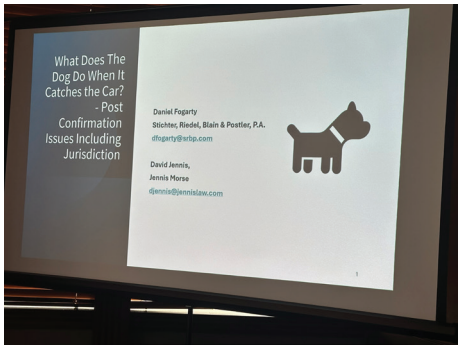
At the November 12, 2024 membership luncheon CLE, Daniel Fogarty and David Jennis presented What Does The Dog Do When It Catches The Car? – Post Confirmation Issues Including Jurisdiction. In both the discussion and the materials, the program covered issues that arise following confirmation of a plan in bankruptcy cases. Specifically, the presenters discussed retention of jurisdiction for post-confirmation claims or causes of action and related procedures, including caselaw and suggestions for preserving or challenging jurisdiction. The program also included discussions on plan modifications, default and enforcement remedies, discharge, and administrative closures following confirmation in connection with subchapter v plans – both consensual and non-consensual. The panelists also provided an overview of some additional post confirmation issues across chapters.



Eleventh Circuit Lowers Bar for Debtor Eligibility in Chapter 15 Cases

By Luis Ernesto Orengo, Jr.
Carlton Fields PA

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The Eleventh Circuit Court of Appeals recently affirmed a decision on appeal from the United States District Court for the Middle District of Florida (which also affirmed the bankruptcy court's decision), with notable implications for Chapter 15 cases.1 The central question at issue was whether 11 U.S.C. § 109(a), which governs who may be a debtor under title 11, applies to cases brought under Chapter 15 of the Bankruptcy Code. Despite the Bankruptcy Code's plain text stating that section 109(a) (as well as all of Chapter 1) applies to Chapter 15 cases, the Eleventh Circuit found itself bound by precedent in In re Goerg, 844 F. 2d 1561 (11th Cir. 1985), wherein the Eleventh Circuit held that the Bankruptcy Code's debtor eligibility language does not apply to cases ancillary to a foreign proceeding. Thus, the Eleventh Circuit held that the debtor eligibility requirements in section 109(a) do not apply to Chapter 15 cases and affirmed the lower courts' decisions.

Chapter 15 Generally

Chapter 15 of the Bankruptcy Code is designed to help the U.S. recognize foreign insolvency proceedings and increase international cooperation among insolvency courts to effectively address cross-border insolvency issues. Chapter 15 was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") in 2005 and repealed its predecessor, section 304 of the Bankruptcy Code. Chapter 15 codifies the Model Law on Cross-Border Insolvency in substantially the same way it was written by the United Nations Commission on International Trade Law. It provides for recognition of a foreign insolvency proceeding before a U.S. bankruptcy court can provide automatic, provisional, or permissive relief.

Factual Background

In 2015, the appellant, Talal Qais Abdulmunem Al Zawawi and his wife, Leila Hammoud, moved to the United Kingdom with their children. In 2017, Hammoud petitioned for dissolution of marriage. In March 2019, Hammoud obtained a divorce decree and a judgment in her favor for £24,075,000 from a U.K. court. In April 2019, the U.K. court issued a worldwide freezing order against Al Zawawi, enjoining him from disposing any of his assets until the judgment was paid in full. Roughly one year later, Hammoud petitioned the U.K. court to place Al Zawawi in involuntary bankruptcy, alleging that he had failed to make payments on the March 2019 judgment. On June 29, 2020, Al Zawawi was adjudged bankrupt, and the court appointed Colin Diss, Hannah Davie, and Michael Leeds as joint trustees (the "Foreign Representatives").

On March 24, 2021, the Foreign Representatives filed a Chapter 15 Petition for Recognition of a Foreign Proceeding in the U.S. Bankruptcy Court for the Middle District of Florida, which, if granted, would subject Al Zawawi's U.S. assets to the automatic stay and open the door to discovery and other relief relating to those assets. The Foreign Representatives argued that the requirements of section 1517 were met and therefore an order granting recognition was warranted. Al Zawawi did not dispute whether the petition satisfied section 1517. He argued, however, that the case should be dismissed on the basis that he was not eligible to be a debtor under section 109(a) because he did not reside or have a domicile, place of business, or any property in the U.S.

The bankruptcy court granted recognition, determining that section 109(a) does not apply to Chapter 15 cases and that, even if section 109(a) did apply, Al Zawawi had property interests in the U.S. Al Zawawi appealed the bankruptcy court's decision, and the district court affirmed without addressing the alternative finding that Al Zawawi nonetheless had property in the U.S. Al Zawawi again appealed, this time to the Eleventh Circuit Court of Appeals.

Eleventh Circuit's In re Goerg Decision Binds It to Interpretation Differing from Plain Text

The Eleventh Circuit first addresses the central issue by confronting the plain text of section 103(a), which states that "this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15." 2 "This chapter," as used in section 103(a), refers to Chapter 1 of the Bankruptcy Code, which includes section 109(a) and the eligibility requirements listed therein. However, unlike other circuits that have held the above plain language settles this issue, the Eleventh Circuit is bound by prior precedent wherein it held otherwise: In re Goerg.

In In re Goerg, the Eleventh Circuit dealt with the question

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of whether a hypothetical debtor in a case brought under Chapter 15's predecessor—section 304, titled "Cases ancillary to foreign proceedings"—must fall within Chapter 1's definition of a "debtor." The court ultimately said no. In coming to that decision, the Eleventh Circuit had to wrestle with the Bankruptcy Code's anomalous definitions of "debtor" and "foreign proceeding," wherein a debtor was defined as a person with a bankruptcy case under title 11, and a foreign proceeding was defined as a proceeding concerning such a debtor but need not even be a bankruptcy proceeding. To resolve the anomaly, the Goerg court adopted the view the term "debtor," as used in the section 304 context, incorporates the definition of "debtor" used by the foreign proceeding forum. Using this view, the bankruptcy court could entertain the section 304 petition so long as the debtor qualified for relief under applicable foreign law and the foreign proceeding was for the purpose of liquidating an estate; adjusting debts by composition, extension, or discharge; or effecting a reorganization—the definition of "foreign proceeding" under the Bankruptcy Code. In choosing this option, the court relied on section 304's purpose to prevent piecemeal litigation as to a debtor's assets in the U.S. and to generally help further the efficiency of foreign insolvency proceedings involving worldwide assets. In light of that understanding, the Eleventh Circuit in Goerg held that the debtor in an ancillary assistance case under section 304 need only be subject to a foreign proceeding (as defined in the Bankruptcy Code) and that debtor eligibility under the Bankruptcy Code was not a prerequisite to section 304 ancillary assistance.

Ultimately, since the Bankruptcy Code's current definitions of "debtor" and "foreign proceeding" still present a similar anomaly for Chapter 15 as they did for section 304, Goerg counseled the Al Zawawi court to consider the purpose of Chapter 15 (as it did with section 304) in holding that debtor eligibility under Chapter 1 is not a prerequisite for the recognition of a foreign proceeding under Chapter 15. While there are differences between the former section 304 and its successor Chapter 15 (e.g., section 304 did not entitle debtors to the automatic stay), the purposes of section 304 and Chapter 15 are the same. Both aim to provide effective mechanisms for dealing with cases of cross-border insolvency. Based on that purpose, the Eleventh Circuit in Goerg determined that a debtor in a case ancillary to a foreign proceeding need only be properly subject, under applicable foreign law, to a "foreign proceeding" as defined by the Bankruptcy Code. In In re Al Zawawi, the Eleventh Circuit followed that logic and held that based on the current definition of "foreign proceeding" in section 101(23), debtor eligibility under section 109(a) is not required to grant recognition of a foreign proceeding under Chapter 15. Al Zawawi was properly subject to a "foreign proceeding," and the requirements for recognition under section 1517 were met; thus, the bankruptcy court's order granting recognition was affirmed.

Takeaway

The Eleventh Circuit's decision in In re Al Zawawi opens the door for bankruptcy courts in Alabama, Florida, and Georgia to recognize foreign proceedings so long as the debtor is properly subject to a foreign proceeding, which may lead to an influx of similar cases. The decision 3 may also set the stage for the Supreme Court to weigh in, given the circuit split with the Second Circuit and the juxtaposition of the court's reasoning with the plain text of the Bankruptcy Code.

Thoughts on the Oral History of Judge Proctor's Legacy

By Caroline Levine
2L student, University of Florida Levin College of Law

Judge Proctor Introduction

The following article was adapted from a speech originally given by Caroline Levine, a 2L student at the University of Florida Levin College of Law, at the Jacksonville Bankruptcy Bar Association's 30th Annual Seminar on August 16, 2024. Most of the information within this speech was collected from the Honorable George L. Proctor's oral history video.

In case you do not know who the Honorable George L. Proctor is, he was the first U.S. Bankruptcy Judge in the Jacksonville Division of the Middle District of Florida. During his 32 years on the bench, Judge Proctor presided over many high-profile cases, including The Charter Company bankruptcy and the P-I-E International bankruptcy. Today, Judge Proctor's legacy continues through his loving family and the memories of the countless attorneys who practiced before him.

When originally reviewing the Middle District of Florida's oral history archives, I felt an immediate connection with the Honorable George Louis Proctor. I found that his life had a shocking number of similarities with my grandfather's life, and this sparked an additional layer of interest. Both were Jewish and lived in the state of Florida beginning in the first half of the twentieth century, and they each had parents who emigrated from similar regions in Eastern Europe. Both also described major historical events like the Great Depression in almost identical manners. And they also both fought in the Pacific theatre during World War II. For all these reasons, I almost saw my grandfather in Judge Proctor.

But enough about my grandfather—now for the story of Judge Proctor's life.

Judge Proctor was born on George Washington's birthday—hence the name George—on February 22, 1926, in Jacksonville. His father, Jack Proctor—whose surname was originally Yutkovitch—emigrated from Poland at ten years old with his younger brother through Ellis Island before settling in New Haven, Connecticut. Judge Proctor's mother's name was Celia, and she was originally from Baltimore, but she had family in St. Augustine who owned a ready-to-wear dress shop. Something fascinating about Celia Proctor's life was that she lost and regained her American citizenship.

At the time in the United States, when a woman married a man, she gained his citizenship. Because Jack Proctor was a Polish national and had not yet naturalized, Celia Proctor temporarily lost her American citizenship by marrying Jack. Later, Jack Proctor naturalized—effectively reinstating Celia Proctor's citizenship—and they both moved to Jacksonville, where they settled in the Jewish part of downtown. Judge Proctor was born during this period of their lives, and he fondly remembers living downtown, as well as later living in the Springfield and Riverside neighborhoods in Jacksonville.

Judge Proctor had five brothers—all who were very successful and well-educated. His oldest brother, Sam, became a prominent history professor at UF. Meyer worked in journalism writing programs for newspapers. David was an engineer in the space program. Sol was a prominent attorney in Jacksonville. And Irving started a home construction business. Judge Proctor was a proud family man, and he married his wife, Gloria, on November 12, 1950. The two of them went on to have two daughters, Donna and Cindy, and one son, Keith—all of whom were similarly successful. Judge Proctor also had five grandchildren whom he was very close to.

As a teenager, Judge Proctor graduated from Robert E. Lee High School and immediately enlisted in the Marine Corps to fight during World War II. He remembered hearing about the bombing of Pearl Harbor—and one thing that struck me was that no one knew where Pearl Harbor was! While every newspaper and radio broadcast kept repeating "Pearl Harbor," none happened to mention where in the United States this was! Personally, I can't imagine the feeling of hearing such monumental history happening and not quite knowing where the event actually occurred. But nonetheless, Judge Proctor intently listened to the radio about Pearl Harbor, and he even recalls listening with his 10th grade class. Interestingly, they all firmly believed the war would end within a couple weeks, and thus lamented being too young to fight. However, Judge Proctor and his peers would later get this opportunity.

During the war, Judge Proctor served in the First Marine Division from 1943 to 1946 in the Pacific. On two

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occasions he landed: once in the Palau Islands and once in Okinawa. When the war ended, Judge Proctor returned home and decided to enroll at the University of Florida—something he had thought long and hard about while overseas. At the time, there was a program for veterans to get a law degree and two years of undergraduate education in five years. Judge Proctor did it in three. After graduating in 1949—and without needing to take the Florida Bar Exam because UF students at the time were not obligated to take the exam to begin practicing law—Judge Proctor returned to Jacksonville and hung out a shingle.

In his practice, Judge Proctor typed his own documents for a long time. One memory he always recalled was how he would notate the typist's initials at the end of documents. Usually, whoever had typed the document would place their initials at the bottom of each document. When notating his initials, Judge Proctor would not write "GP," but instead wrote "MS"—standing for "myself."

Over time, Judge Proctor worked with many different attorneys in Jacksonville before he was appointed by the Florida Governor to be a Deputy Commissioner of the Florida Industrial Commission—now called a Judge of Industrial Claims. In this position, he handled a lot of worker's compensation cases.

Notably, I have not yet mentioned the word "bankruptcy." This is because when Judge Proctor became the first bankruptcy judge in Jacksonville, he had no prior bankruptcy experience. However, when a vacancy opened in the 1970s, Judge Proctor decided to apply. He would later say that he learned bankruptcy on the job by thoroughly reading cases in the evenings and by learning from more experienced attorneys around him. These efforts paid off, and Judge Proctor became an expert in bankruptcy.

As many in the Middle District of Florida already know, there was no Orlando Division for a long time. In an effort to assist the greater Orlando area, Judge Proctor routinely went to Orlando in order to hear cases there. Eventually, he was instrumental in forming the Orlando Division of the Middle District of Florida, when he helped bring Judge Lionel Silverman to Orlando. Tragically, Judge Silverman passed away suddenly and Judge Proctor again shouldered some of the Orlando caseload.

Throughout his career, Judge Proctor presided over some of the largest cases in Jacksonville history. Two of these cases include The Charter Company bankruptcy in the 1980s, which at the time of the bankruptcy, was ranked 61st on the Fortune 500 and had revenue of $5.6 billion the year prior in 1983—which is equivalent to approximately $17.6 billion today. Another case is the trucking firm P-I-E International. This case involved the notorious white-collar criminal Lenny Pelullo, who acquired the Jacksonville-based company immediately prior to its bankruptcy.

A couple final thoughts that Judge Proctor shared before concluding his oral history relate to how the practice of law changed throughout his career.

Immediately, one huge way was technology—even when it comes down to correcting typos. Typos used to be so hard to erase that anyone typing up a document—when Judge Proctor was not doing the typing himself, of course!—would bring the typo to Judge Proctor and they would see if they could salvage the document. In the era of instant edits, it is incredibly hard to imagine the ramifications one mistyped word could have!

Another big change involved respect shown to the Court. Judge Proctor recalled that towards the beginning of his judicial career, not all attorneys wore suits and not all judges wore robes. Judge Proctor believed that formality and respect were integral to the courtroom, and thus he always emphasized formal attire.

Finally, the last major change to the practice of law was tolerance. Judge Proctor recalled some antisemitism—mainly in being barred from entering some country clubs—but he primarily recalled the disparate treatment that Black attorneys and witnesses received when compared to White attorneys and witnesses. For example, White attorneys could not shake hands with Black attorneys, and, by law, Black attorneys could not be addressed as "Mr." or "Ms." Instead, they had to be addressed as "Attorney so-and-so" or "Lawyer so-and-so." Black witnesses could not be called by their last names or with any titles. Instead, attorneys had to address them by their first name only. Fortunately, these practices are not acceptable anymore, but I found it humbling to hear about the enforcement of these practices within Jacksonville not that long ago.

Overall, Judge Proctor had a long and illustrious life and career, surrounded by a large, loving family. He was a hard worker—holding hearings on Saturday and Sunday mornings or at 7 a.m. And he was also an avid Gators football fan—even scheduling some of those hearings around UF and other college football games.

On November 18, 2007, Judge Proctor passed away at the age of 81, leaving a wonderful legacy behind.

OHI Asset (VA) Martinsville SNF, LLC, et al. v. Wagner (In re Wagner), 115 F.4th 1296 (11th Cir. September 11, 2024). On appeal from a district court decision vacating and remanding a decision by Judge Grossman in a false oath objection to discharge case involving ownership of a show horse, the Eleventh Circuit reversed the district court, holding that a district court reviewing a bankruptcy court judgment must defer to the bankruptcy court's credibility determinations.

GFRS Equipment Leasing Fund II, LLC v. Zebrowski (In re Zebrowski), 663 B.R. 776 (Bankr. M.D. Fla. October 15, 2024) (McEwen, J.). "When an individual debtor is an officer or in control of a corporation and actively participates in wrongful conduct of the corporation, the individual debtor becomes personally liable for a willful and malicious injury caused by the corporation." Where individual debtor ignored efforts of creditor to obtain discovery in aid of execution, and failed to turnover equipment after execution of writ by sheriff, conduct eventually become enough to constitute willful and malicious conduct.

In re Feltmann, 663 B.R. 119 (Bankr. M.D. Fla. September 27, 2024) (Geyer, J.). Debtor moved to reopen chapter 13 case for determination that nondischargeable tax and related interest claims had been satisfied, and for sanctions for collection actions by taxing authorities. Because the post-petition interest accruing on the nondischargeable claims were not discharged and not paid, taxing authorities did not violate the discharge injunction by seeking to collect accrued postpetition interest on nondischargeable priority tax claim. And, taxing authorities had no affirmative obligation to object to treatment of claim under the plan or to notify the debtor of the post-petition interest accrual or rate.

In re 2408 W. Kennedy LLC, 663 B.R. 562 (Bankr. M.D. Fla. July 31, 2024) (Delano, C.J.). *Rooker-Feldman* doctrine, res judicata, and collateral estoppel all applied to Debtor's claims asserting quiet title action and seeking declaration that prepetition foreclosure judgment did not terminate its leasehold interest, and thus defendant foreclosing mortgage holder was entitled to summary judgment. State court orders finding that leasehold interest was terminated by foreclosure judgment and sale determined claims, and thus were distinguishable from cases were subsequent courts could determine "effect" of judgment.

In re Burdock & Assocs., Inc., 662 B.R. 16 (Bankr. M.D. Fla. June 17, 2024) (Vaughan, J.). Creditors asserting claim in contractual dispute objected to eligibility of debtor under Subchapter V. The Court determined that, because the creditors claim included damages for lost profits and other damages not subject to simple calculation by reference to the agreement, the claim was unliquidated, and therefore did not count for purposes of eligibility and the debt limit.

In re Tampa Hyde Park Cafe Properties, LLC, 660 B.R. 322 (Bankr. M.D. Fla. June 5, 2024) (Delano, C.J.). The IRS filed a claim in a chapter 7 case for unpaid taxes owed by the debtor's alleged alter ego. The court concluded that the Internal Revenue Code allowed the IRS to pursue recovery against an alter ego of the taxpayer, and did not limit the liability to an *in rem* remedy for property of the taxpayer held by another. The court also held that an earlier release of the alleged alter ego given by the chapter 7 trustee in a settlement did not release the IRS's alter ego claims, because the IRS's claims were personal to the IRS, and not a general claim common to all creditors that was property of the bankruptcy estate.

View From the Bench

The **2024 Judge Michael G. Williamson View From the Bench** featured new locations-the reception at Le Meridien, and the program at Armature Works. As has come to be expected, but is always immensely appreciated, the moderation, Paul Singerman of Berger Singerman, facilitated the discussion well, and the stars of the bankruptcy firmament, the judges of the Middle District and the chief judges of the Northern and Southern Districts, shined brightly.

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Pro Bono Corner

Thank You Volunteers

(especially those over the summer)!

May
Michael Barnett
Samantha Dammer
Daniel Fogarty (x4)
Laura Gallo
Katelyn Vinson
Peter Zooberg

June
Laura Gallo
Megan Klotz
Katelyn Vinson
Peter Zooberg

July
Peter Zooberg
Katelyn Vinson
Scott Stichter
Michael Barnett
Daniel Etlinger

September
Daniel Fogarty
Peter Zooberg
Megan Klotz
Katelyn Vinson
Laura Gallo

October
Peter Zooberg
Megan Klotz
Katelyn Vinson
Mark Robens
Nicole Carnero
Kelley Petry

Middle District Virtual Pro Se Clinic

The TBBBA's Pro Se Assistance Clinic is always in need of volunteers. We can't do it without you. The Clinic relies on volunteers to staff the hours every Wednesday between 2:00 pm and 4:00 pm.

The TBBBA offers an in-person Pro Se Assistance clinic in the 9th Floor Resource Room every Wednesday from 2:00 pm to 4:00 pm. Timeslots are available in one-hour increments, one at 2:00 p.m. and one at 3:00 p.m.

Available slots are posted and available here. Just click on the button to sign up. Please send any questions to Kristina Feher at KFeher@FeherLaw.com. Thank you!

CARE Corner

Credit Abuse Resistance Education (CARE) provides opportunities for volunteers to address middle school, high school and college age kids about the best practices and pitfalls regarding their credit in an attempt to start them off on the right path. It was created in 2002 by John C. Ninfo, II, retired bankruptcy judge, and now boasts approximately 55 nationwide chapters including 5 in Florida. The Tampa chapter in particular was launched in 2007 by Rodney May, retired bankruptcy judge, who has passed the torch to Judges Catherine Peek McEwen and Michael Hooi. If you have a connection with a school or youth organization who could benefit from a presentation (free and approximately 1 hour long), or, you would like to volunteer as a presenter please contact our Tampa Bay Bankruptcy Bar Association's Matthew Hale. You can also visit the chapter's website here.

Legal Assistance Program

The Middle District Virtual Pro Se Clinic also needs volunteers. Volunteers can set the dates and times they are available for a 30 minute consultation with a pro se client. We have both debtors and creditors seeking assistance. Please sign up to help at bankruptcyproseclinic.com. Thank you.

The Middle District Bankruptcy Court has created a Legal Assistance Program for low income debtors and is requesting that members of the bankruptcy bar volunteer to be assigned cases under the program. The goal is for a sufficient number of attorneys to volunteer so that each attorney is assigned to a case every 3 or 4 years.

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Legal Assistance Program

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The scope of representation is limited only to the following cases:

- Adversary proceedings relating to the debtor's entitlement to a discharge and/or the non-dischargeabilty of a debt.
- Contested matters concerning the debtor's claim to a homestead exemption and subsections 522(o)-(q) of the Bankruptcy Code.
- Representation of spouses and former spouses of debtors in connection with the dischargeability of obligations under marital settlement agreements or judgments for the dissolution of marriage.

In 2022, during the four months of the virtual clinic's operation (September to December), Middle District attorneys conducted 87 "no charge" consultations. In 2023, our attorneys conducted 492 consultations. And through October 2024, attorneys conducted 571 consultations.

Thanks to all the attorneys who have donated their time to consult with pro se parties However, we were reminded that what's really important, especially as bankruptcy filings continue to increase, is for attorneys to follow up and provide consultations through the virtual clinic, rather than only signing up. If you have questions on how to get more involved, please go to www.bankruptcyproseclinic.com or contact the clinic's Website Administrator, John Schumpert, at johnschumpert@gmail.com.

Please consider participating in this worthwhile program.

Thank you to the following volunteers for holding virtual appointments:

Pro Bono Appts Scheduled	**Pro Bono Appts Held**
Specific Dates Available	
Alec Solomita	Alec Solomita
Bill McDaniel	Bill McDaniel
Jennifer Duffy	Jennifer Duffy
R.J.Cole, III	-
Thomas Adam	-
Recurring Availability	
Allan Wulbern	Allan Wulbern
Edward Jackson	-
Jonathan Sykes	Jonathan Sykes
Kathleen DiSanto	Kathleen DiSanto
Luis Rivera	Luis Rivera
Michael Barnett	Michael Barnett
Mike Dal Lago	Mike Dal Lago
Nina LaFleur	Nina LaFleur
Robert Branson	Robert Branson

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

Request to Attorneys to Volunteer for the Court's Legal Assistance Program

The Court has established a legal assistance program to enable low-income debtors (and in some instances their spouses and former spouses) to receive free legal services in the following types of cases:

- Adversary proceedings relating to the debtor's entitlement to a discharge and/or the non-dischargeabilty of a debt.
- Contested matters concerning the debtor's claim to a homestead exemption and subsections 522(o)-(q) of the Bankruptcy Code.
- Representation of spouses and former spouses of debtors in connection with the dischargeability of obligations under marital settlement agreements or judgments for the dissolution of marriage.

The Court requests that members of the bar volunteer for assignment under this program. The Court's goal is for a sufficient number of attorneys to volunteer so that each attorney is assigned to a case every three or four years.

The following procedures apply:

1. Applicants for legal assistance submit an application, including financial information, on a form available on the Court's website and at the Clerk's Office.

2. The application, and the applicant's bankruptcy schedules and statement of financial affairs, will be reviewed by the judge assigned to the adversary proceeding or contested matter.

3. Generally, the Court will grant an application if: (a) the applicant's current income does not exceed 200% of the current year's U.S. Department of Health and Human Services Poverty Guidelines for the applicant's family size, and (b) the applicant does not have sufficient assets to pay for the needed representation.

4. If the application is granted, the Court will enter an order appointing an attorney from the list of attorneys who have volunteered to provide representation in this program. Assignments will be made based upon Division in which the case is pending and the location of the attorney. If requested, the Court will provide the assigned attorney with pertinent papers and pleadings and the debtor's bankruptcy petition, schedules, statement of financial affairs.

5. If an attorney case wishes to decline the appointment to a case, the attorney, within seven days from the date of the appointment, may file and serve on the proposed client a motion for relief from the appointment order. If a motion is granted, the Court will enter another order of appointment.

6. Separate lists of volunteer attorneys will be maintained for each Division of the Middle District. A volunteer attorney seeking to discontinue participation in the program should send a letter to the Clerk of Court.

The Court urges you to volunteer for this important program. To volunteer, please complete the form below and return it to the Court. Thank you for your help.

Caryl E. Delano
Chief United States Bankruptcy Judge

Revised 10/1/2019

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

I wish to volunteer for the Court's Legal Assistance Program.

Name: _____
[Please print or type]

Address: _____

_____

Telephone: _____
[Please include area code]

Division(s) in which I am willing to accept assignments (check all that apply): __FM, __JAX, __ORL, __TPA.

Please return this form by email to: flmb_probono@flmb.uscourts.gov