NACTT QUARTERLY
Official Publication Of The National Association of Chapter 13 Trustees
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October/November/December 2017

Historical Roots of Individual Chapter Choice: The Long Road to Chapter 13

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NACTT QUARTERLY
Official Publication Of The National Association of Chapter 13 Trustees

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All NACTT members should view the *Quarterly* in its ***new digital format***. You will be asked in the near future if you want to continue receiving a published printed copy or prefer to receive an electronic copy. **To view the Quarterly in the digital flip page format, log into the members only area on www.NACTT.com.**

NACTT Quarterly (ISSN 10458972) is published quarterly by the National Association of Chapter 13 Trustees, One Windsor Cove, Suite 305, Columbia, SC 29223. Subscription fee of $25.00 is by membership only and is included in the annual membership fee. Periodicals postage paid at Columbia, SC and additional mailing office. Material appearing herein, including editorial comment, represents the views of the respective authors and does not necessarily carry the endorsement of the National Association of Chapter 13 Trustees.

President's Message

Joyce Bradley Babin
NACTT President
Chapter 13 Trustee
Little Rock, AR

How Do You Measure the Success of a Chapter 13 Case?

A recent discussion topic circulating through the bankruptcy community is, "How do you measure the success of a Chapter 13 case?" A recent search on the "all-knowing" Google yielded articles with titles such as *Measuring Success in Chapter 13,*[1] *Why Do So Many Chapter 13 Cases Fail?,* [2] *When Bankruptcy Goes Bad: Why Chapter 13's Fail,*[3] *3 Real Reasons Chapter 13 Plans Fail*[4] and *Why do so many people fail to complete their Chapter 13 repayment plans?,*[5] to name a few. In August 2017, The *ABI Journal* published an article by Ed Flynn,[6] S*uccess Rates in Chapter 13*.[7] At the NACTT Annual Seminar, a plenary session was titled, "Plan Completions in Chapter 13 – A Debate on the Results," and featured Professor Katherine Porter, University of California, Irvine School of Law, discussing the results of her study recently reviewed in a Minnesota Law Review.[8]

The articles and presentations discuss ways that success in Chapter 13 cases can be measured. Should a comparison of cases filed to cases completed be used? Should other factors – objective and subjective -- be used? Professor Porter discusses in her article, *Cracking the Code*, which finds that one in three Chapter 13 cases result in a discharge. She asserts that local cultures may not explain success or lack of success and should not obfuscate the measureable influences on debtor success.[9] Other articles and studies suggest, consistent with Professor Porter, that completion of Chapter 13 cases is 33%. In his article, *Measuring Success in Chapter 13,* Judge Brian Lynch suggests that a better measure of success might be to compare cases that reach confirmation with cases that complete. Judge Lynch's investigation from his jurisdiction, Tacoma, Washington, found that out of cases confirmed in 2010, 70.4% of the cases had completed by the beginning of 2015.[10]

Mr. Flynn's article for the *ABI Journal* analyzed data for Chapter 13 cases closed between 2010 and 2016 obtained from the Administrative Office of the U.S. Courts' Interactive Data Base (IDB). He concluded that the following factors hamper Chapter 13 success: cases filed without attorneys, solo filings as opposed to joint case filings, cases where filing fees are not paid at the outset and cases with a history of prior filings. Mr. Flynn concluded, however, that predicting success in Chapter 13 case is less certain than predicting failure particularly because of the uncertainty of a plan that lasts from three to five years.[11]

The article by John Skiba, *When Bankruptcy Goes Bad: Why Chapter 13's Fail*, proposes that the reasons only 33% of cases complete are because of life, going it alone and bankruptcy trustees. Life happens to debtors and many changes occur three to five years, e.g., job loss, illnesses, marriage and divorce. He notes that less than one percent of cases filed *pro se* succeed. Mr. Skiba adds that the case trustee's approach can be essential to the success of the case.[12]

In *3 Real Reasons Chapter 13 Plans Fail*, Cathy Moran cites John Skiba's article and proposes that overly ambitious goals and inflexible calculations of required payments can prevent success. Debtors often try to retain a "doomed house" where payments were too large from the outset or the default insurmountable. The requirement that debtors contribute all available funds to a plan without a "savings vehicle" prevents debtors from achieving financial stability. Ms. Morgan writes that sometimes the reasons that a debtor may file a case, such as foreclosure or a lawsuit, may resolve without the necessity of a plan having to be completed which may lead to a successful result but not a success statistic and conversion to a Chapter 7 case from a Chapter 13 case may not necessarily be deemed a failure.[13]

Carron Armstrong's article, *Why Do So Many Chapter 13 Cases Fail?,* suggests the following factors impact success: emotions, fortitude and motivation; not enough resources at the start; disruption in the flow of income; filing without an attorney; and filing to just buy time. Emotional stress for a debtor contemplating bankruptcy hampers the debtor's ability to understand the bankruptcy process. Debtors may wait until they have exhausted all options. Any disruption in the flow of income, such as illness or job loss impacts success. Ms. Armstrong posits that sometimes debtors are just worn out and decide the process is not "worth it." She also emphasizes that some debtors "succeed" by buying time from filing even though their cases never become a completion statistic.[14]

The National Association of Chapter 13 Trustees has

initiated some surveys regarding success with preliminary information indicating that success among confirmed cases is much higher than 33% and averages around 60%. Success is definitely hampered for debtors who file without attorneys even though *pro se* cases are increasing in many areas of the country. The American Bankruptcy Institute's Commission on Consumer Bankruptcy is considering many factors relating to Chapter 13 cases and success. Regardless of the views, there is healthy discussion in the bankruptcy community about the factors that comprise success in Chapter 13 cases.

As a Chapter 13 Trustee, I have a number of thoughts based on personal experience and my reactions to factors suggested by others. Trustees do not screen prospective debtors. We meet debtors as they are. The debtors often have tried to handle their financial affairs on their own or through other negotiations before they meet an attorney to file. Debtors' incomes often are tenuous. Nevertheless, the debtors want to try one last time to formulate a plan to pay their creditors. Some debtors propose more viable (think feasible) plans than other debtors and have more reliable incomes to fund plans. These debtors have a better chance to attain confirmation, make regular payments and ultimately achieve the long-awaited discharge. Along the way, life does happen and some debtors, with and without confirmed plans, do not make it through the process. Trustees assist along the way to identify debtors who can be successful as well as those that cannot.

Debtors do not spend time thinking when they file that their cases are going to be one of the 33%, the 60% or some other percentage that studies find comprise "success." Debtors know the path is difficult, but most have a desire to succeed. For debtors, success is measured on a more personal, and less statistical, level. Success may be the breathing spell that the automatic stay brings after loss of income from a lengthy hospital stay. Success may be the ability to negotiate a loan modification on a mortgage default for a debtor to restart payments with income from a new job. Success may be a mother paying off a used car needed to transport her to her job and her three children to school. And yes, success may be the feeling of gratification for completing a plan after five years. Success truly comes in all shapes and sizes to debtors.

As a trustee, I, and my office, are grateful to be a part of the success process. I look forward to exploring more opportunities for successful Chapter 13 cases in my jurisdiction and as part of the NACTT. The NACTT's recent annual seminar in Seattle was a wonderful opportunity to consider success and other important consumer bankruptcy issues. Much appreciation goes to David Peake for a successful seminar, as well as The NACTT Academy and the NACTT executive director and staff. The seminar also would not have been possible without the support and participation of judges, trustees, debtors' attorneys, creditors' attorneys, other bankruptcy representatives and staffs of trustees. The NACTT committees are already looking toward next year's seminar in Miami. Before that time, there is much work to be done.

Be involved. Be part of the dialogue. Success is what we make it. ◉

Footnotes

1 Brian D. Lynch, *Measuring Success in Chapter 13*, www.considerchapter13.com (June 5, 2016) (**http://considerchapter13.org/2016/06/05/measuring-success-in-chapter-13/**).

2 Carron Armstrong, *Why Do So Many Chapter 13 Cases Fail?*, **www.thebalance.com** (February 28, 2017) (**https://www.thebalance.com/why-do-so-many-chapter-13-cases-fail-316195**).

3 John Skiba, *When Bankruptcy Goes Bad: Why Chapter 13's Fail*, **www.skibalaw.com** (Aug. 3, 2012) (**http://skibalaw.com/when-bankruptcy-goes-bad-why-chapter-13s-fail/**).

4 Cathy Moran, *3 Real Reasons Chapter 13 Plans Fail*, **www.thebankruptcysoapbox** (2017) (h**ttp://www.bankruptcysoapbox.com/why-chapter-plans-fail-alternate-argument/**).

5 Kyle A. Frost, *Why do so many people fail to complete their Chapter 13 repayment plans?* **www.charlottebankruptcylawyer-blog.com** (May 19, 2016) (**https://www.charlottebankruptcylawyer-blog.com/2016/05/19/many-people-fail-complete-chapter-13-repayment-plans/**).

6 Ed Flynn is an ABI Consultant formerly employed by the Executive Office of the United States Trustees and the Administrative Offices of the Courts.

7 Ed Flynn, *Success Rates in Chapter 13, Bankruptcy by the Numbers,* ABI Journal, August 2017, at 38.

8 Sara S. Greene, Parina Patel and Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 Minn. L. Rev. 1031 (2016-17). The article discusses a study that emanated from Professor Porter's initial investigations with the 2007 Consumer Bankruptcy Project.

9 Greene, Patel and Porter, 101 Minn. L. Rev. at 1097. *See also* 101 Minn. Law Rev. at 1097, note 205.

10 Lynch, *supra.*

11 Flynn, *supra at* 57.

12 Skiba, *supra.*

13 Moran, *supra.*

14 Armstrong, *supra.*

Computer Incident Response

Thomas P. O'Hern
STACS Program Manager
for Jacob & Sundstrom

The 2017 Summer Edition of the NACTT Quarterly article on Incident Response and Data Breach Notification introduced an incident response process and the initial activities in the response phase that initiates a notification workflow for managing data breach incidents.

This article revisits the Incident Response process concentrating on the key aspects and issues with incident analysis, recovery and prevention.

Response Phase

To summarize, the Response Phase starts with the detection of unusual activity identified and reported by a person. Detection is a "Human in the loop" problem because a person is always required to see and respond to the alert, email or activity indicating a potential incident. These indicators are triaged to determine if an actual incident occurred that requires further analysis, response, documentation or reporting to the UST by the Standing Trustee.

Analysis Phase

The analysis phase seeks to preserve and collect data for evidence, analysis and recovery.

It is important to document incident details and response activities throughout the entire process. These details are used to develop intermediate response and recovery plans of action as well as longer-term recommendations for improvement and prevention.

The key factors to determine in the analysis phase are:

- Degree of access obtained to each specific system.
- If, when, where, and how critical data was accessed
- Short and long-term impact on business operations
- Contributing factors and root cause of the incident

Quick identification of the root cause and contributing factors are crucial to expedite effective analysis and response activities. With accurate initial details analysis is more a confirmation process then a lengthy investigation process.

However, it is common for staff involved in an incident to be reluctant to share full and accurate details out of embarrassment or fear of consequences. We have found discussing with staff, the eventuality of forensic analysis to determine actual events and the root cause of an incident, helps to improve initial feedback and recollection of accurate details.

FORENSICS: Forensics is a detailed process requiring experience and expertise to collect, preserve, analyze and determine how and what happened.

Common incidents will move quickly through forensics to the prevention and recovery phases. However, when a compromise is suspected, the incident response takes on a significantly different focus.

It must be treated as a crime scene with consideration for evidentiary support if a criminal, legal or administrative action is needed. Engaging external parties with jurisdiction or certified expertise in handling cybercrimes may be required to support data breach claims.

DATA PRESERVATION: Preservation of the infected system(s) is necessary for a period of time before it can be restored. The restoration process destroys all data on the infected computers. With a compromise, it is preferred to extract and retain the original hard drive of the computer. If not technically feasible, a forensic copy of the storage can be created. The copy can be used for future analysis or the recovery of critical data that may only exists on the compromised computer.

To prevent data loss, it is important to identify what files, folders and databases were affected, where they were stored, and if they can be recovered from a backup. In some case data can be acquired from an unaffected copy or reacquired from its original source such as a website download.

Prevention Phase

The prevention phase focuses on incident containment and prevention in the short, intermediate and long terms.

REMEDIATE RISKS: A technical, physical and procedural risk assessment of the root and cumulative causes of the incident is done to determine viable short and long-term options to remediate security risks. Remediation activity can be temporary such as disconnecting the Internet or permanent such as adding a new firewall rule to block specific activity.

REDUCE EXPOSURE: Following an incident, follow on analysis is done to identify and implement options to reduce exposure to persistent risk issues

like the possession and retention of PII data within the Trustee's environment. Although PII cannot be eliminated, processes and practices to reduce, remove or redact PII can minimize exposure and liability.

PREVENTION: Proactive prevention activities focus on people, practice and technology to help prevent security incidents. Proactive implementation of STACS onsite assessment recommendations and regularly addressing the vulnerabilities in your biweekly Internet scan reports can help you avoid security incidents.

The human in the loop detection problem is why annual security awareness training is a vital prevention activity. Annual computer security awareness training for staff and STACS' STOP, DROP and CALL incident response breakroom poster for computer users are good examples of preventative actions derived from prior incidents.

Recovery Phase

Recovery focuses on restoration of data and systems to their original production state. It is a common error to rush into recovery following initial incident triage when the root cause and incident containment are still undetermined. Important information needed to make these determinations can be destroyed and the potential for real data loss increases. If the incident is not properly contained, continuation of the incident activity can invalidate recovery actions.

SYSTEM RECOVERY: To assure all remanence of an incident are removed, the storage drives of suspect and infected computers must be reformatted which overwrites the entire contents of the storage drives. Once the hard drive(s) are formatted, system and application software can be reinstalled.

Manual cleaning methods and antivirus removal scripts are NEVER acceptable to recover an infected computer. These methods leave undetected pieces of malware behind to re-infect your computers.

DATA/DATABASE RESTORATION: To complete restoration to a functional state, configuration settings, user files, documents, application data and databases must be restored. Compromise incidents involving the case management servers also require the case database to be recovered.

Restoration is the most time-consuming process as data will be restored from one or more sources to make the systems fully functional. Pre-incident planning and determination of your backup solution's worst-case recovery time is critical. You will not want to find out the day of your incident that it will take days or weeks to recover your systems. Know your recovery times and determine if a new recovery strategy is needed.

Data loss can occur when files, folders and databases on infected systems are modified after their last backup. To minimize this data loss, selective data recovery from the forensic backup of the compromised system is possible using specific procedures to prevent a reinfection of the restored systems. However, malware that encrypts, corrupts or deletes files that only exist on the compromised system will be lost forever.

When the case management system is involved, processed claims and other database transactions made after the last good backup will be lost and need to be reprocessed.

AUDIT DATA/DATABASE CHANGES: Validating the integrity of the case data is a critical objective. Audit the restored data to identify, quantify and qualify lost, missing or modified data during the incident.

In an isolated environment, your case software vendor can help produce a list of changes between the restored database and a copy of the database from the compromised system. Scrutinize the transactions for suspicious or anomalous changes.

REPROCESS MISSING DATA: Determine if database transactional changes can be automatically or manually made to update the database restored from backup. It may be quicker to manually reprocess a few hours or days' worth of work.

AUDIT DISBURSEMENT: With a recovered system, restored database and reprocessed transactions, additional attentiveness should be paid to the next disbursement to manually audit the accuracy of the recovered data and system operations. Of particular interest will be additions of creditor/payees and changes to names, addresses, account numbers, balances and disbursement amounts.

Incident Response Summary

The STACS program has an annual allotment of emergency onsite visits available to assist members at no additional cost. When you have an incident, be sure to engage the STACS team as early as possible, even if you have competent IT staff. We can provide remote or onsite confirmation of the incident, help guide the response activity to avoid the pitfalls and help speed the recovery process.

STACS Program Update

ONLINE TRAINING: To assist with annual security training needs, STACS has selected the Security+ certification training courseware from SkillSoft which is available through the STACS web portal. This material is a good introduction to common computers security requirements at a novice to intermediate level.

ENROLLMENT: The 15th year of the STACS program starts on October 1, 2017. Trustees wishing to partici-

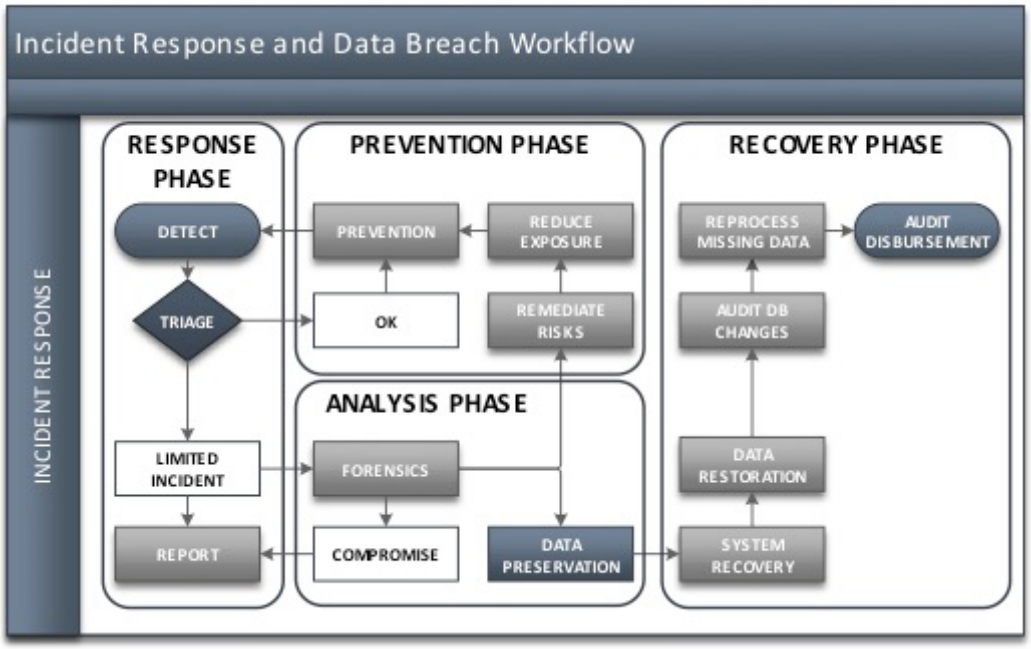
CONTINUED NEXT PAGE

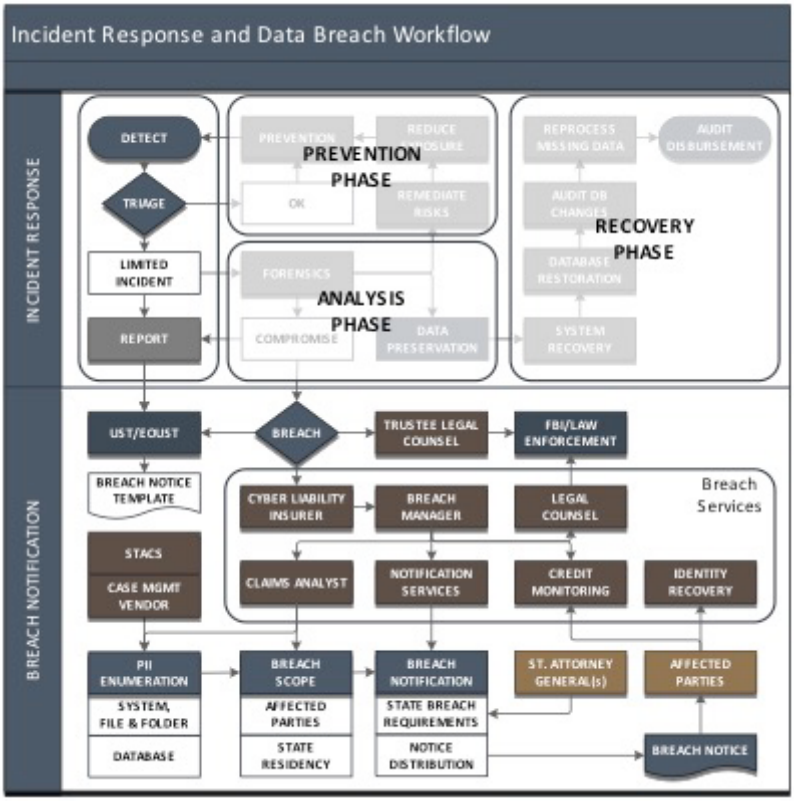
pate this year can enroll online at **www.stacs.net/enroll** or contact the STACS support team at **support@stacs.net** or 866-STACSNEt.

NEW WEB PORTAL: In August 2017, a new STACS web portal was put into service. The portal provides a new look and feel with access to all critical features of the old site plus some new ones. We will be adding new features and updating some of the old ones as the year progresses. We appreciate your feedback on the new site and patience as we work through some bugs as we go.

Contact

Please reach out to the STACS support team at **support@stacs.net** or 866-STACSNEt, if you would like to discuss questions or concerns prompted by this article. ◉





THE NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES

APPLICATION FOR ASSOCIATE MEMBERSHIP

The undersigned hereby applies for Associate Membership in the National Association of Chapter 13 Trustees. Associate membership dues of $150 include a subscription to the quarterly publication NACTT Quarterly, plus notice of all seminars and right to participate as a member, but does not include voting rights.

DUES OF $250 PER YEAR,

renewable annually, must accompany this application. Membership period is October 1 through September 30.

Name: _____ E-mail Address: _____

Address: _____ City, State, Zip: _____

Telphone: _____ Fax: _____

Please check applicable box:

❑ Attorney: _____ ❑ Creditor: _____

❑ Court Officer: _____

❑ Organization: _____ ❑ Other: _____

Date: _____ **Signature of Applicant:** _____

Mail check and application or address changes to NACTT Headquarters:

One Windsor Cove, Suite 305 • Columbia, SC 29223 • (800) 445-8629 • (803) 252-5646 • Fax (803) 765-0860

WELCOME NEW ASSOCIATE MEMBERS:

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NACTT 52ND ANNUAL SEMINAR
We Were Sleepless in Seattle

Mary K. Viegelahn
Chapter 13 Trustee,
San Antonio, TX

Over 875 people arrived in Seattle to be part of the NACTT 52nd Annual Seminar held July 12 through 15, 2017. Seattle was the perfect host city. This fabulous city left many attendees sleepless in Seattle with so much to experience and so little time in which to take it all in. Whether you enjoy the outdoors, cultural events or food Seattle has it all. The hotel was just blocks from the famed Pike Place Market which I hope everyone had a chance to experience. The restaurants were incredible. For art the Chihuly Garden and Glass gallery was breathtaking. The natural beauty surrounding Seattle is second to none. From the views on a ferry to Bainbridge Island, Lake Washington, the Japanese Garden, and Mt. Rainier to name just a few.

Despite all of the temptations that Seattle has to offers attendance for the sessions was outstanding. I am sure this is because of the leadership provided by our Seminar Chair – David Peake, NACTT Vice President; the NACTT Academy for its educational program; and the social events which brought everyone together for a little fun.

The Seminar opened with a warm welcome from Joyce Bradley Babin, NACTT President; David Peake, NACTT Vice President; Mark Leffler, President of the NACTT Academy, and the Honorable Brian D. Lynch. The first morning was plenary sessions for all attendees. Clifford J. White, III, Director, Executive Office of the U.S. Trustees provided his annual update as to the state of the U.S. Trustee Program. He was very informative about continued initiatives on areas of creditor abuse, debtor abuse, bankruptcy crimes, and mortgage industry issues. This was followed by a discussion on the Consumer Financial Protection Bureau (CFPB) and its impact on consumer bankruptcy. The speakers were Alana A. Becket and John Rao with Tammy Terry as Moderator. The morning concluded with a presentation on ethics by the well renowned Professor Mark D. Yochum. The topic was "Personal Contact – Ethical or Not So Much." The afternoon breakout sessions were difficult to choose from for an attendee as all offered much to learn. From the controversial new plan form and rules (which go into effect very soon); to the problems associated with pro se filers and those who prey on them; the status of case law being brought under the Fair Debt Collection Act; why chapter 13 works for a small business; those unique issues when only one spouse files a case; the ever present issue of what to do with student loans in chapter 13 and the student loan crisis that is evolving; proof of claims issues; to how to deal with real property tax sales and non mortgage liens; and finally, what to do with plans that exceed 60 months. The day ended with the Presidential Reception which was well attended and as always a wonderful event for old friends and new friends to relax after a long day.

The next day began with a debate to end all debates between Professor Katherine Porter and Henry ("Hank") Hildebrand - Plan Completions in Chapter 13. Howard Hu had his hands as the Referee of this often spirited debate. This is a topic that I suspect is just heating up. Following the debate was Judicial Splits on Consumer Issues with Jan M. Sensenich as moderator; with the Honorable Paulette J. Delk; the Honorable Brian D. Lynch; and Thomas Hoffman as panelist. They provided a wealth of information as to the consumer issues pending before the courts. The day ended with the last panel speaking on Skill for Effective Negotiations with James L. Henley, Jr. and Professor David P. Dowling. The afternoon was spent be everyone enjoying what Seattle has to offer.

The last day began with the popular plenary session known as "Chapter 13 Case Law Update." This session is never a disappointment with the lively discussions led by: the Honorable Keith M. Lundin; the Honorable John Gustafson; and our own Henry E. Hildebrand, III. These gentlemen read hundreds of cases decisions issued within the last year and pick the best to present to the audience. They encouraged audience participation with gifts of Jack Daniels and Goo Goo Clusters. The afternoon breakout sessions again provided so many choices for attendees. From mortgage issues, which is a topic that is always relevant; to mistakes that even good lawyers make that result in an ethical quandary; to direct pay mortgages versus conduit mortgages (always a hot topic); to confirmation and res judicata issues; to what a bankruptcy attorney should know CONTINUED ON PAGE 42


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CALENDAR OF EVENTS

National Conference of Bankruptcy Judges
91st Annual Meeting
October 8-11, 2017
Paris Hotel, Las Vegas, Nevada
Info: Jeanne Sleeper, NCBJ Executive Director
954 La Mirada St., Laguna Beach, CA 92651-3751
Tel: 949-497-3673 x300, Fax: 949-497-2623
EM: NCBJadmin@NCBJmeeting.org
EM: Jsleeper@JBSmgmt.com

National Association of Retail Collection Attorneys
NARCA 2017 Fall Conference
October 11-14, 2017
Marriott Marquis Washington, Washington, D.C.
Info: NARCA – The National Creditors Bar Association™ , 8043 Cooper Creek Blvd. Suite 206
University Park, FL 34201, Phone: 202-861-0706
Fax: 240-559-0959, www.narca.org

National Consumer Law Center (NCLC)
26th Consumer Rights Litigation Conference
November 16 - 19, 2017
Renaissance Washington, Washington, D.C.
Info: www.nclc.org, or SarahEmily Lekberg;
slekberg@nclc.org; 617-542-8010

Allegheny County Bar Association's
30th Annual Western District of Pennsylvania Bankruptcy Symposium
December 8, 2017
The Westin Convention Center, Pittsburgh, PA
Info: Allegheny County Bar Association
400 Koppers Building - 436 Seventh Ave.
Pittsburgh, Pennsylvania 15219
Phone: 412-261-6161 - Fax: 412-261-3622
E-mail: Staff@acba.org

Institute of Continuing Legal Education & The Bankruptcy Section of the State Bar of Georgia
Consumer and Business Bankruptcy Seminar
December 14-15, 2017
Ritz-Carlton Reynolds, Greensboro, Georgia
Info: www.iclega.org or call ICLE at (770) 466-0886

NACTT
2018 Mid-Year Meeting
January 18 - 20, 2018
The Mayflower Renaissance, Washington, D.C.
Info: NACTT at (800) 445-8629, or visit NACTT at www.nactt.com, One Windsor Cove, Suite 305
Columbia, SC 29223

MBA Mortgage Bankers Association
National Mortgage Servicing Conference & Expo
Feb 6 - 9, 2018
Gaylord Texan, Grapevine, Texas
Info: Mortgage Bankers Association, 1919 M Street NW, 5th Floor, Washington, DC 20036
(202) 557-2700, (800) 793-6222 ,
or email meetings@mba.org

The Center for American and International Law
5th Circuit Bankruptcy Bench-Bar Conference
Feb 21-23, 2018
JW Marriott Hotel New Orleans, New Orleans, LA
Info: Registrar: 1.972.244.3404, Fax: 1.972.244.3401
E-Mail: cail@cailaw.org

NACTT
Staff Symposium
March 8 - 9, 2018
Denver Marriott City Center, Denver, CO
Info: NACTT at (800) 445-8629, or visit NACTT at www.nactt.com, One Windsor Cove, Suite 305
Columbia, SC 29223

University of Kentucky
Office of Continuing Legal Education
14th Biennial Consumer Bankruptcy Law Conference
March 22 & 23, 2018
Marriott Griffin Gate Resort, Lexington, Kentucky
Info: University of Kentucky Office of Continuing Legal Education, 660 South Limestone Street,
Lexington, KY 40506-0417
phone: (859) 257-2921 • fax: (859) 323-9790
email: ukcle@uky.edu, or visit ukcle.com

2018 Case Power User Conference
April 16 - 18, 2018
Embassy Suites Myrtle Beach, Myrtle Beach, SC
Info: Christel Hockett, Manager of Client Services
Epiq - Trustee Services - 501 Kansas Avenue,
Kansas City, KS 66105
Phone: 913-621-9727 • Mobile: 913-205-5984
email: chockett@epiqsystems.com

2018 NACBA - National Association of Consumer Bankruptcy Attorneys
26th Annual Convention
April 19 - 22, 2018
Denver, CO
Info: NACBA - 2200 Pennsylvania Avenue NW,
4th Floor, Washington D.C. 20037
Phone: (8006) 499-9040, or email
dan.labert@nacba.org

National Association of Retail Collection Attorneys
NARCA 2018 Spring Conference
May 16-19, 2018
JW Marriott Austin
Austin, Texas
Info: NARCA – The National Creditors Bar Association™ , 8043 Cooper Creek Blvd. Suite 206 University Park, FL 34201, Phone: 202-861-0706 Fax: 240-559-0959, www.narca.org

NACTT
Staff Symposium
May 17 - 18, 2018
Baltimore Marriott Inner Harbor at Camden Yards
Info: NACTT at (800) 445-8629, or visit NACTT at www.nactt.com, One Windsor Cove, Suite 305 Columbia, SC 29223

NACTT
53rd Annual Seminar
June 27-30, 2018
Fontainebleau Hotel, Miami, FL
Info:NACTT at (800) 445-8629, or visit NACTT at www.nactt.com, One Windsor Cove, Suite 305 Columbia, SC 29223

Alabama State Bar Association
2018 Annual Meeting
June 27-30, 2018
TBD
Info: Alabama State Bar - 415 Dexter Avenue Montgomery, AL 36104
334-269-1515 • 800-354-6154 (toll free)
334-261-6310 (fax), or visit www.alabar.org

American Bankruptcy Institute (ABI)
Southeast Bankruptcy Workshop
July 26 - 29, 2018
Ritz Carlton Amelia Island, Amelia Island, FL
Info: American Bankruptcy Institute, 66 Canal Center Plaza, Suite 600, Alexandria, VA 22314, Tel. (703)-739-0800, Fax. (703) 739-1060, or visit abiworld.org

American Bankruptcy Institute (ABI)
Mid-Atlantic Bankruptcy Workshop
August 2 - 4, 2018
Hotel Hershey, Hershey, PA
Info: American Bankruptcy Institute, 66 Canal Center Plaza, Suite 600, Alexandria, VA 22314, Tel. (703)-739-0800, Fax. (703) 739-1060, or visit abiworld.org

National Conference of Bankruptcy Clerks (NCBC
2018 Conference
August 12-15, 2018
New York City, New York, NY
Info: Visit www.ncbcweb.com, or email Regina_Thomas@ganb.uscourts.gov

NARCA - National Association of Retail Collection Attorneys
2018 Fall Conference
October 3-6, 2018
Omni Nashville, Nashville, TN
Info: NARCA – The National Creditors Bar Association™ , 8043 Cooper Creek Blvd. Suite 206 University Park, FL 34201, Phone: 202-861-0706 Fax: 240-559-0959, www.narca.org

National Conference of Bankruptcy Judges
Annual Meeting
October 24-27, 2018
San Antonio Marriott Rivercenter, San Antonio, TX
Info: Jeanne Sleeper, NCBJ Executive Director 954 La Mirada St., Laguna Beach, CA 92651-3751 Tel: 949-497-3673 x300, Fax: 949-497-2623 EM: NCBJadmin@NCBJmeeting.org EM: Jsleeper@JBSmgmt.com

American Bankruptcy Institute (ABI)
Southeast Bankruptcy Workshop
October 27 - 30, 2018
Ritz Carlton Amelia Island, Amelia Island, FL
Info: American Bankruptcy Institute, 66 Canal Center Plaza, Suite 600, Alexandria, VA 22314, Tel. (703)-739-0800, Fax. (703) 739-1060, or visit abiworld.org

NACTT
2019 Mid Year Meeting
January 24 - 26, 2019
Ojai Valley Inn & Spa, Ojai, CA
Info:NACTT at (800) 445-8629, or visit NACTT at www.nactt.com, One Windsor Cove, Suite 305 Columbia, SC 29223

NACTT
54th Annual Seminar
July 16-19, 2019
JW Marriott Indianapolis, Indianapolis, IN
Info:NACTT at (800) 445-8629, or visit NACTT at www.nactt.com, One Windsor Cove, Suite 305 Columbia, SC 29223

American Bankruptcy Institute (ABI)
Mid-Atlantic Bankruptcy Workshop
August 1 - 3, 2019
Hotel Hershey, Hershey, PA
Info: American Bankruptcy Institute, 66 Canal Center Plaza, Suite 600, Alexandria, VA 22314, Tel. (703)-739-0800, Fax. (703) 739-1060, or visit abiworld.org

National Conference of Bankruptcy Judges
Annual Conference
Oct. 30 - Nov. 2, 2019
Washington Marriott Marquis, Washington, D.C.
Info: Jeanne Sleeper, NCBJ Executive Director 954 La Mirada St., Laguna Beach, CA 92651-3751 Tel: 949-497-3673 x300, Fax: 949-497-2623 EM: NCBJadmin@NCBJmeeting.org EM: Jsleeper@JBSmgmt.com

Remarks of Clifford J. White III, Director Executive Office for U.S. Trustees 52nd Annual Seminar of the National Association of Chapter 13 Trustees Seattle, Washington – July 13, 2017

Clifford J. White III
Director, Executive Office for U.S. Trustees

I recently joined many of you at the 2017 Annual Seminar of the National Association of Chapter 13 Trustees. I was honored to meet with you and appreciated the opportunity to report on the activities of the United States Trustee Program. Following are major excerpts from my speech.

Introduction

Good morning. Thank you once again for allowing me to help kick off your Annual Seminar. This is the thirteenth time you have invited me to speak as Director and I always appreciate your hospitality. I very much respect the work performed by chapter 13 trustees and am thankful for the cooperative and productive relationship the United States Trustee Program (USTP) enjoys with the NACTT and its leadership.

It is my custom each year to thank your outgoing President and to welcome your incoming President. But this year, that involves recognizing more people than usual. Last year, I told you how much I looked forward to working with then-incoming President Sims Crawford. Well, within weeks of that event, Sims became Judge Crawford and Mary Ida Townson returned as your President until the mid-winter meeting in January. Thereafter, Joyce Babin rose to the position. You are indeed fortunate to have such a deep bench of talent among your ranks.

In many meetings over the years, I was the beneficiary of the expertise and sound judgment of Judge Crawford, Mary Ida, Joyce, and others as we tackled whatever problems or opportunities confronted chapter 13 trustee practice. Joyce, I look forward to working with you over the coming year. I appreciate your immense graciousness and wise analysis that have been such an important factor in addressing challenges of mutual concern.

*****

Let me turn to a few topics that may be of special interest to all of you.

Marijuana Assets in Bankruptcy

As you know, in April, I sent a letter to all chapters 7 and 13 trustees restating the USTP's long-standing legal position that marijuana assets cannot be administered in bankruptcy. It has been the Program's practice to move to dismiss, object to confirmation, or take other appropriate action when there are marijuana assets in a case. Although small in number in relation to the many hundreds of thousands of bankruptcy cases filed each year, it is important that the USTP be consistent in its position on these matters. That requires that we be informed of all cases that involve marijuana assets.

The point of my letter to you was two-fold: to direct your cooperation by informing your United States Trustee when you think a marijuana asset case has been assigned to you; and to reassure you that we will intervene to protect private trustees from the untenable position of administering assets, or proceeds from assets, that are prohibited by the federal Controlled Substances Act. I can tell from communications with our field offices that you have been conscientious in reporting these cases to us. Our offices are analyzing every case that you refer to us, or that we uncover through our ordinary oversight, and we are handling them consistently in every district where they arise.

As you review cases assigned to you, please keep a few points in mind. First, state law and regulations are immaterial to whether a case involves an illicit marijuana asset. It does not matter if the state in which the case was filed has legalized marijuana in any way. We operate in federal courts under federal law that designates marijuana as an illicit substance.

Second, a marijuana asset does not merely include the marijuana plant. In some cases, the marijuana asset is a by-product of the plant, such as oil. In other cases, the asset is in the form of the salary paid by an employer engaged in a marijuana business, an ownership interest in a marijuana business, and income derived from a lease to a marijuana operation. There are many other potential fact scenarios in which the bankruptcy case may involve a marijuana asset in some form.

Third, a debtor with a marijuana asset cannot obtain bankruptcy relief even if that debtor intends to take the marijuana asset out of the bankruptcy estate. That means we will take enforcement action even if the debtor exempts the marijuana asset or proposes to fund a repayment plan without relying on the marijuana asset.

Given the wide variety of fact scenarios in which marijuana assets may be present, it is vital that you promptly notify us whenever you think a case may involve a marijuana asset. It is the USTP's job – not yours – to analyze the particular facts of the case to decide if it is a marijuana case and what enforcement action we should take. From the USTP's perspective,

our position can be summed up by saying that we simply will not allow the Bankruptcy Code to be used to evade federal law regardless of state statutes. This also means that we will not allow trustees to be misused by possessing, selling, or in any way administering marijuana assets. This has been our position under three Attorneys General and we will vigorously advocate this position in the bankruptcy and appellate courts. I am grateful for your continuing assistance in this very important matter.

Stale Debt Claims

I reported to you last year on the Program's efforts to curb the practice of a small number of consumer debt buyers filing a large volume of stale debt claims knowing that those claims must be withdrawn or denied upon objection. These claims are beyond state statutes of limitations and may not be pursued through state court action.

This practice of intentionally filing stale claims may harm debtors in some circumstances, but its certain harm is to legitimate creditors and the integrity and efficiency of the bankruptcy system. These claims may cause legitimate creditors to receive a lower distribution either because a stale debt claim is paid from their share of the distribution or the trustee's cost of objecting to such a claim is passed on to creditors. Furthermore, judicial resources are wasted in processing these claims and objections.

In mid-May, the Supreme Court ruled in *Midland Funding, LLC v. Johnson*, __ U.S. __, 137 S. Ct. 1407 (2017), that filing stale debt claims in bankruptcy does not violate the Fair Debt Collection Practices Act. It is important to note that the Court was not called upon to and did not address the USTP's ongoing litigation in which we assert that the intentional filing of a large volume of stale debt claims is an abuse of process. But the Court did describe the bankruptcy process and the expectation that trustees would object to these claims in bankruptcy court.

Although ongoing litigation may provide a systemic solution to the practice, a final resolution may not be achieved in the near term. If ultimately the courts do not find that the intentional filing of these claims is an abuse of process or other violation of bankruptcy law, then the USTP still will be satisfied that it has done its job because we will have identified a system-wide issue and policymakers can consider whether it is prudent to change the law.

That still leaves us with the issue of the chapter 13 trustees' obligation to review claims. Stale debt filers rely upon these claims proceeding undetected through the claims payment process. Most chapter 13 trustees already routinely file objections to stale debt claims. As a result, it appears that claims filers are avoiding filing such claims in the districts of those trustees. Even though it increases the cost of administration, and those costs ultimately are borne by legitimate creditors, I am calling upon all chapter 13 trustees to identify stale debt claims and to object to stale debt claims that they uncover. Formal guidance is being considered.

I greatly appreciate your assistance in protecting the integrity of the bankruptcy process through your diligent efforts.

Other USTP Efforts to Combat Fraud and Abuse

The USTP remains involved on a number of other fronts in its mission to combat fraud and abuse by debtors, creditors, professionals, and other participants in the bankruptcy system. More than half of the 31,000 formal and informal enforcement actions we took last year were against debtors, including actions based upon the means test and more serious misconduct, such as concealment of assets, that merits denial of discharge. Many of the remainder focused on the protection of debtors, including actions to address continuing issues in the mortgage servicing arena and the problem of underperforming consumer attorneys.

Mortgage Servicing

Our field offices continue to monitor mortgage servicer misconduct. We have a number of actions and negotiations pending. As you know, in early May, we filed a settlement with Chase Bank resolving additional violations of the Bankruptcy Code and Rules. Chase will remediate about 16,000 homeowners by making approximately $2.8 million in refunds or credits for two violations. First, Chase sent inaccurate account statements to customers in bankruptcy; and, second, Chase filed certificates of service with inaccurate dates of mailing that resulted in debtors receiving less than the mandatory 21 days' notice before imposing a mortgage payment change.

Just as our field offices will continue to oversee mortgage servicer conduct, I ask chapter 13 trustees also to identify and report to your United States Trustee patterns of violations and egregious violations. Often, your referrals at the local level help us match patterns of behavior on a national basis so that we can take appropriate action to address systemic misconduct.

Underperforming Consumer Attorneys

I announced last year a new initiative to address the persistent problem of poor performance by some debtors' lawyers. Their failure to satisfy their obligations under the Bankruptcy Code and Rules is detrimental to their clients, trustees, creditors, the courts, and the entire bankruptcy system.

Last year, the USTP increased by about 30 percent the number of actions taken under the disgorgement provisions of section 329 and the debt relief agency provisions of section 526. Although we cannot expect such a magnitude of increases in actions in the future, it does show a concerted crack down by the Program. We also formed teams to address special problems created by national law firms, including those who recruit clients through advertisements on the Internet. We attacked system-wide violations and sought broad relief. We have enjoyed success in court, but remain in some protracted litigation.

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One of the fruits of our initiative has been uncovering evidence of the use of schemes to reel in clients by offering unneeded, if not fraudulent, legal and non-legal services. I ask all chapter 13 trustees to communicate regularly with your United States Trustee about your observations of debtor counsel practices. As in the mortgage servicer and other areas, sometimes we identify national patterns that allow us to address problems on a system-wide basis. You stand as a bulwark against fraud, abuse, and bad practices. Your continued assistance in this joint endeavor is much needed and appreciated.

Credit Counseling and Debtor Education

Our work to protect debtors from bankruptcy petition preparers and legal professionals who fail to serve their clients highlights for us the vulnerability of those in financial distress. Honest and needy debtors deserve comprehensive advice and assistance about financial options, including bankruptcy. Many chapter 13 trustees provided debtors with financial education well before financial education became a requirement under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Currently, more than 50 chapter 13 trustees provide financial education to their debtors free of charge.

After passage of BAPCPA, the USTP retooled its operations to carry out our substantial new duties under the law. To do our jobs properly, we considered both objectives of Congress – to combat abuse and to protect consumers. Those are consistent goals because many scams perpetrated against debtors also harm creditors and the integrity of the whole bankruptcy system.

Currently, there is some renewed attention on the requirement for debtors to obtain a credit counseling certificate before filing bankruptcy. The purpose of the requirement is to ensure that debtors are made aware of any feasible alternatives to bankruptcy, including repayment plans.

The USTP is charged with the responsibility to approve credit counselors who will deliver the counseling services mandated in the statute. The good news is that there are about 120 credit counseling agencies that provide services through 700 walk-in facilities, over the telephone, and over the Internet. Basically, there is universal access to credit counseling. The other good news is that the average cost of credit counseling is about $25. While that is not inconsequential to a consumer in dire financial straits, it is as affordable as any one of us would have imagined when BAPCPA was passed. Moreover, that average cost calculation excludes about 19 percent of debtors whose fees are reduced or waived entirely based upon income, as required by our regulations.

Bankruptcy commentators often opine upon the effectiveness of the counseling. That is a legitimate inquiry that deserves scholarly research. Initial reviews comparing the number of petitions to the number of certificates issued indicated that about 10 to 15 percent of debtors seeking a bankruptcy certificate do not file bankruptcy, at least not immediately. There are challenges to calculating this percentage, including our inability to track the same debtor through the process. But the number does suggest that counseling may assist some individuals in identifying non-bankruptcy options to resolve their financial turmoil.

There probably are a number of reasons why counseling does not lead to more debt repayment plans or other alternatives to bankruptcy. Let me suggest two possible explanations. First, most debtors choose bankruptcy as a last resort, not as a preferred option out of extreme financial difficulties. As almost every consumer practitioner will tell you, by the time debtors visit a lawyer, their situation is usually pretty dire. The second reason I suggest is a bit more subject to dispute. Consumer lawyers generally are very critical of credit counseling. If that is reflected in their legal counsel to the clients or in their interactions with counseling providers, then perhaps the counseling process becomes less valuable, thereby only adding to the criticism of its ineffectiveness.

Loss mitigation by mortgage servicers, fair and reasonable debt repayment plans, and other alternatives to bankruptcy are worthwhile pursuits. I think that current commentaries about credit counseling would benefit from a more balanced consideration of the potential consumer benefits of counseling and more consideration of how the content of the counseling sessions could be more useful for debtors and creditors alike.

Consistency in Chapter 13 Practice

The final topic I would like to cover is consistency in chapter 13 practice. It has long been the USTP's observation that local legal culture and court practices create far more inconsistency in chapter 13 than in other aspects of bankruptcy practice. That is why the Department of Justice endorsed a proposal for a uniform national chapter 13 plan. Although a compromise was reached within the Judicial Conference's Bankruptcy Rules Committee, and a modified form plan will take effect this December, we understand that most districts are "opting out" of the prescribed plan. On a positive note, at least the new rules require some commonality among the plans throughout the country.

In so many ways chapter 13 practices diverge from district to district, and even from judge to judge. For example, local practices vary with respect to the re-vesting of estate property at confirmation, use of conduit or non-conduit plans, and varying applications of confirmation standards. Sometimes, this may place chapter 13 trustees in the crossfire between disagreeing judges. Some suggest the USTP should take a more active role in forging consistent chapter 13 practice. That is advice we will keep in mind.

Recently, the American Bankruptcy Institute's Commission on Consumer Bankruptcy, on which I serve *ex officio*, held a public meeting in conjunction with the annual conference of the National Association of Consumer Bankruptcy Attorneys. Many consumer lawyers appeared at the public meeting to

express their views on consumer issues. There were a fair number of comments about inconsistencies among trustees supervised by the USTP. In particular, the discussion pointed out to me the importance of additional training on the USTP's "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases." The discussion also identified some chapter 13 practices that the USTP should correct, such as refusal to accept electronic documents. Other issues pertained to lack of coordination among trustees in the same district with respect to document requests, attorney's fees, service requirements, objection practices, and other actions that arguably should be more consistent. We are following up on some of the specific complaints heard at the meeting.

Overwhelmingly, chapter 13 trustees perform superbly and with great efficiency. I would ask all of you to consider whether there is maximum coordination and consistency within your district and how the USTP may promote greater consistency that makes sense. I also look forward to receiving a report on the public meeting that will be held in conjunction with this conference by a committee of the ABI Consumer Commission. I hope a number of members of the NACTT will express their thoughtful views on chapter 13 issues.

Conclusion

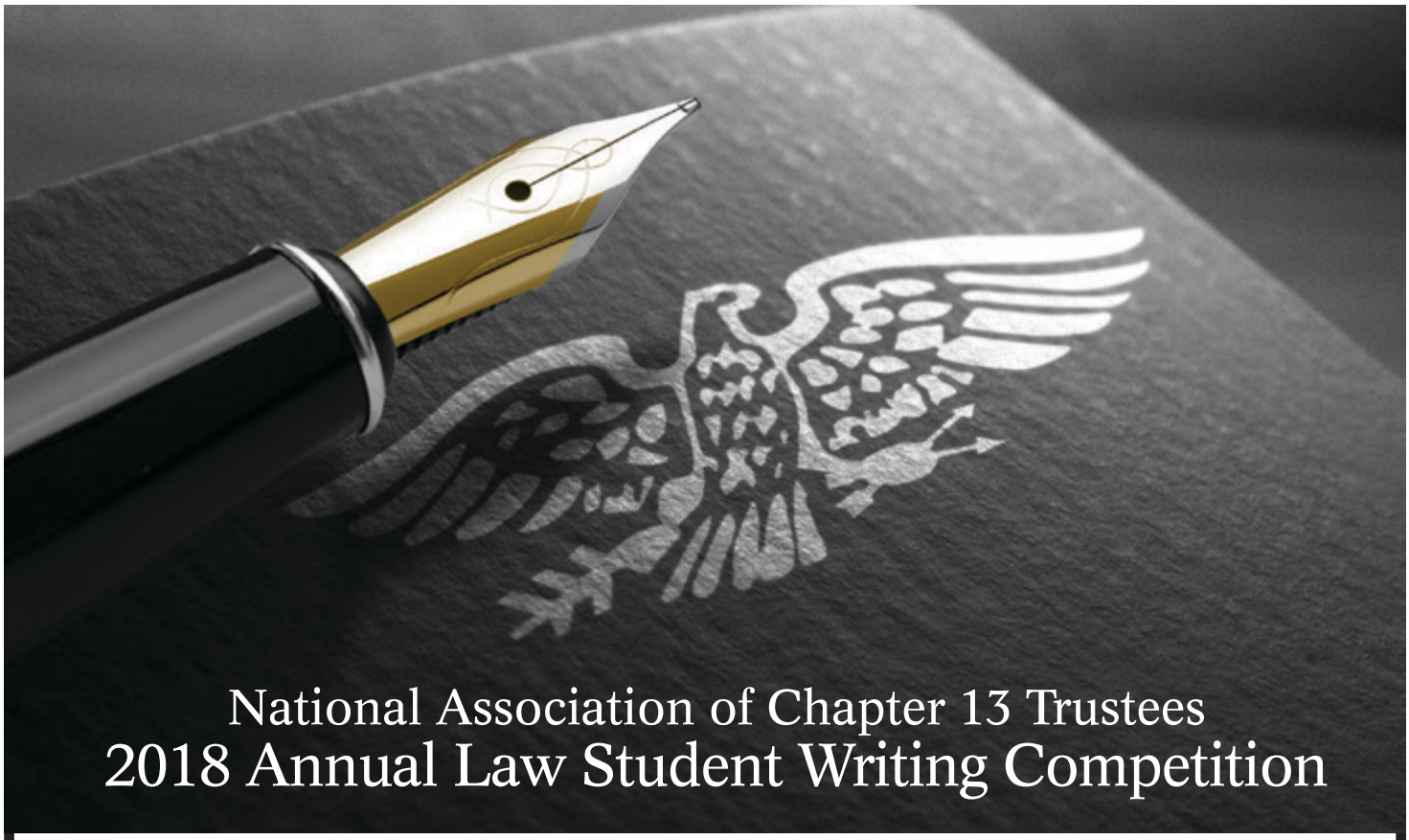
I appreciate the chance to cover so much ground with you about matters vital to the USTP in the chapter 13 realm. You are an essential part of the solution of so many issues arising in the consumer bankruptcy practice.

Our continued collaboration with your President and the NACTT leadership will benefit greatly the USTP. Your steady and professional approach to business, your diligence in maximizing returns to creditors, and your determination in protecting the rights of vulnerable consumer debtors are what make chapter 13 practice such an important part of the economy.

I wish you a productive conference in the beautiful city of Seattle. All the best, and thank you so much for your time. ◉

Generous Donation Benefits NACTT Foundation

Congratulations to Mary Beth Ausbrooks of Nashville, Tennessee, for winning the handcrafted jewelry box made by Keith Lundin from wood of trees uprooted in a tornado on the Hermitage estate in Nashville! The box was sold at auction during the National Association of Chapter 13 Trustees 2017 Annual Meeting in Seattle, and the proceeds benefit the NACTT Foundation.



National Association of Chapter 13 Trustees
2018 Annual Law Student Writing Competition

The National Association of Chapter 13 Trustees has established an annual student writing competition to encourage and reward original law student writing on issues concerning consumer bankruptcy and the law. The rules for the competition are as follows.

TOPIC
Entrants should submit an essay, article, or comment on an issue concerning Chapter 13 of the Bankruptcy Code.

ELIGIBILITY
Essays will be accepted from students enrolled at any law school during the 2017-2018 school year. The essays must be the law student author's own work and must not have been submitted for publication elsewhere. Notwithstanding the foregoing, students may incorporate feedback as part of a course requirement or supervised writing project.

FORMAT
Essays must be typed, double-spaced in 12-point font, and Times New Roman font type. All margins must be at least one inch. Entries must not exceed fifteen (15) total pages of text, including notes, with footnotes placed as endnotes. Citation style should conform to the most recent edition of *The Bluebook - A Uniform System of Citation*. Essays longer than 15 pages of text, including notes, or which are not in the required format will not be read. The winner may be required to abridge the winning article for publication in the *NACTT Quarterly*.

JUDGING
The *NACTT Quarterly* Editorial Committee will judge the competition. Essays will be judged based upon content, exhaustiveness of research, originality, writing style, and timeliness.

QUESTIONS
Questions regarding this competition should be addressed to the chair of the Writing Competition at the address that appears below.

SUBMISSION AND DEADLINE
Entries must be received by April 30, 2018. Entries received after the deadline will be considered only at the discretion of the NACTT Publications Committee. Entries may be submitted via email (in Microsoft Word format) to the *NACTT Quarterly* c/o Robert G. Drummond, *Trustee@MTChapter13.com*.

AWARD
The author of the first-place essay will receive a $1000.00 cash prize. The winning essay will be published in the *NACTT Quarterly - The Quarterly Journal of the National Association of Chapter 13 Trustees*. The winner will also receive free registration and a room for the 2018 NACTT annual seminar in Miami, Florida.

NACTT Honors Retiring Trustees

Peter C. Fessenden

Rarely will there be so few who have affected the lives of so many. Peter Fessenden is one of those few. Pete has been the standing Chapter 13 Trustee in Maine since 1981 and recently announced his retirement. We always have appreciated Pete's personal birthday and holiday messages and of course his Fessedenisms of wise observations. We thank him for all of his good work as Chapter 13 Trustee and his thoughtful contributions to the NACTT. His genuine spirit and practical advice to us will be difficult to replace. Our retirement wish for Pete is that he enjoys what's ahead to its fullest. We will miss you.

Craig Shopneck

Craig is highly respected and well-liked by his employees and peers. He cares greatly about his office, his employees, his fellow chapter 13 trustees and the vendors who provide daily support to the office. He contributed a lot of time and attention to the NACTT and NDC seeking to improve all aspects of chapter 13. He has generously shared his administrative gifts with his fellow trustees. He similarly devotes time toward making this office a professional, well organized and pleasant place to work which includes measured doses of fun and humor for the employees. Craig demonstrated to us all how to be a great trustees and we are looking forward to him teaching us all how to enjoy retirement.

Kelley Skehen

Kelley Skehen has been the Standing Chapter 13 Trustee in Albuquerque New Mexico since 1998, and has recently announced her retirement. For many years, Kelley has been an active NACTT member and someone who has always been willing volunteer, pitch in, and assist when needed. We are all fortunate to have had the privilege to have known Kelley Skehen. She lights up every room she enters. As someone has said, those who bring sunshine to the lives of others also bring it to themselves. Kelley deserves the sunshine and everything else good that comes her way in retirement, and we wish her the very best. ◉

Meet The New Trustees

Brad Caraway

Where did you work before becoming a Trustee?

Staff Attorney, Linda B. Gore, Chapter 13 Trustee

Are you a dog or a cat person?

Dog (of course)

Why did you want to become a Trustee?

It seemed to be a natural extension of what I was doing

What is the most funny or shocking thing that happened to you in the first three weeks as Trustee?

Someone mentioned the phrase "budget due."

Who have you learned the most from in the bankruptcy world?

Linda B. Gore

What goals would you like to accomplish in the first five years as Trustee?

Maintain the level of excellence that already exists in this office.

What is the one lesson you learned in kindergarten that makes you the Trustee you are today?

Never pet a barking dog.

How did you celebrate the evening you learned you were selected as Trustee?

Dinner with family and friends.

How did you celebrate or commiserate the first week after being the Trustee?

Dinner with family and friends.

What is your favorite word?

Epiphany

Michele T. Hatcher

Where did you work before becoming a Trustee?

I was the staff attorney for Michael Ford prior to his retirement as Chapter 13 Trustee. Before joining the Trustee's office as staff attorney, I was in private practice representing debtors for approximately 17 years.

Are you a dog or a cat person?

Dog.

Why did you want to become a Trustee?

I felt my experience representing debtors and as staff attorney for a Trustee would hopefully allow me to assist all parties in increasing the effectiveness of the Chapter 13 bankruptcy process.

What is the most funny or shocking thing that happened to you in the first three weeks as Trustee?

So far nothing really funny or shocking, except maybe the number of gray hairs I seem to be finding now.

Who have you learned the most from in the bankruptcy world?

I learned a great deal from former Trustee, William N. Pitts, who took me under his wing as a young attorney and taught me bankruptcy from the ground up. I also benefited from working with my predecessor, Michael Ford, in learning the organization and administrative duties required of a Trustee.

What goals would you like to accomplish in the first five years as Trustee?

Minimize mistakes, increase office productivity and develop programs to assist in the growth of our caseload and completion rate.

What is the one lesson you learned in kindergarten that makes you the Trustee you are today?

Be kind.

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Historical Roots of Individual Chapter Choice: The Long Road to Chapter 13[1]

The Honorable Rebecca B. Connelly is the Chief United States Bankruptcy Judge for the Western District of Virginia. She is a former Standing Chapter 13 Trustee for the Western District of Virginia.

Recently Chapter 13 has been the subject of criticism. Some charge that Chapter 13 is a failure because many of those who file Chapter 13 never receive a discharge of their debts. Others insist that Chapter 13 is an inappropriate and expensive means to achieve debt forgiveness. Part of these arguments note that Chapter 7 cases have a higher discharge rate and apparently a lower attorney fee for counsel in a Chapter 7 case, as if Chapter 13 and Chapter 7 are merely interchangeable. Against these allegations, some now ask, should we eliminate Chapter 13 altogether? To answer this, and to best appreciate the criticisms, one should bear in mind the intent, purpose and context of Chapter 13. The long background and revolutionary purpose provide a useful framework to evaluate the merits of Chapter 13.

This article will tell some of the history of Chapter 13. I discuss why enacting Chapter 13 required a fundamental and radical shift in the law (namely individual choice). I describe the original purpose of Chapter 13 (which was not solely debt forgiveness). Finally I observe the features of Chapter 13 (a range of diverse attractions). With all this in mind, I conclude Chapter 13 is not a failure.

The Early Attempts at Chapter 13 Type Relief

Chapter 13 is a fairly recent option. Before Chapter 13, insolvent wage earners could not restructure debt, or reinstate and cure a default over time, absent the express consent of their creditors.

For most of our history, debt forgiveness was conditioned upon surrender of property. This concept remains true in Chapter 7 today: turnover of nonexempt assets is *quid pro quo* for a Chapter 7 discharge.

For some of our history, lawmakers tried to provide an alternative to surrender of property for individuals. Over the course of decades, Congress attempted to create an option under federal bankruptcy laws to permit an individual to retain control over property, restructure his debt, and potentially discharge unpaid indebtedness. In other words, our lawmakers were looking for Chapter 13 long before it was born.

Why did it take so long enact Chapter 13?

At least three roadblocks are among the reasons it took so long to enact what is today Chapter 13.

The First Roadblock: The Absence Of Voluntary Bankruptcy

The prospect to voluntarily seek bankruptcy relief first surfaced in 1841. At the time, the idea that a debtor chose to be declared a bankrupt so that he could obtain a discharge of his debts was revolutionary. Until 1841, a bankruptcy was filed against the debtor in order to remove him from his property because of his failure to repay his debts. As described by an opponent of the legislation, "[v] oluntary bankruptcy is a new term. Who ever heard such language before? Under this bill, discharge of debtor is the thing principally aimed at. Under previous acts, surrender of property was the chief object."[2] The Act was short lived. The voluntary bankruptcy experiment was met with skepticism. Part of the distaste was that the debt forgiveness was not commensurate with surrender of property (that is, voluntary bankruptcy allowed disproportionately large amounts of debt to be forgiven for relatively small amount of property to be surrendered).[3] It would be almost a century later before consideration was made for repayment through wages in return for not surrendering property. This new twist (found in Chapter XIII) was the first time that neither the surrender of property nor debt forgiveness was the aim. Instead the chief objective was protection from wage garnishment.[4]

A Second Roadblock: The Problem Of Wages

Prior to 1933, wage earners were excluded from eligibility for relief under the Bankruptcy Act of 1898.[5] On the one hand, a bankruptcy could not be filed against the wage earner. On the other hand, the wage earner who had the ability to make payments simply

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could not use federal bankruptcy laws to remain in possession of his property and simultaneously attempt a debt payment plan in return for certain concessions from his creditors. That is, until 1933.

In 1933, Congress amended the Bankruptcy Act to open extensions and compositions[6] to wage earners.[7] Generally, an extension was a request to permit a longer time period in which to pay debts, but not discharge the unpaid indebtedness. A composition agreement permitted a debtor to pay less than the entire indebtedness in return for a release.[8]

These 1933 amendments for wage earners ultimately were too limited and incomplete to provide any meaningful relief. For example, to obtain confirmation of the plan, the wage earner was required to deposit with the court, in cash, the payments required to be made under the plan (an impossibility for the cash strapped debtor). At confirmation the payments were immediately disbursed. After confirmation, the case was dismissed[9] and the court no longer had jurisdiction over his wages (stated differently, the court had no supervision and control over the debtor's future earnings). Consequently, the court could not enforce the composition plan.[10] Hence "wage earner plans" were rarely attempted.[11]

In 1938, Congress passed the Chandler Amendments to the Bankruptcy Act. These amendments fixed some of the flaws from the 1933 Act. As amended, Chapter XIII could now provide results. The "wage earner plan" under Chapter XIII caught on and popular support grew. Cries to open the option to more individuals joined cries to expand the relief.[12]

The primary attraction for this novel alternative was protection from wage garnishment and retention of property, even property that was not otherwise exempt from collection. As described by William McCarty, "the single most important benefit . . . is that when he files his Chapter XIII petition the court will enjoin any and all garnishment proceedings against him. Since it is common knowledge that garnishments are the most potent weapon for driving debtors into bankruptcy, the importance of any measure to stop them cannot be overemphasized."[13] That an individual who was in default of his obligations to his creditors could obtain some form of protection from creditor collection activity and ultimately some debt forgiveness, without having to give up his property, was ground-breaking. At first blush, the concept seemed to condone irresponsibility: after all, it did not punish the debtor for his misconduct of seeking credit yet failing to honor it.[14] But upon closer assessment, lawmakers recognized that denying someone who is in default from any alternative to liquidation resulted in *less* debt repayment. By amending bankruptcy laws to permit a strapped individual who wanted to repay his debts, as best he could, the opportunity to try would lead to potentially some greater debt repayment than under liquidation. More than that, allowing an alternative to liquidation ("straight bankruptcy") permitted an opportunity for rehabilitation.[15]

As explained by then Solicitor General and U.S. District Judge Thomas D. Thacher in 1931, wage earners in need of protection from garnishment resorted to liquidation even though they had the desire to repay their debts—they simply could not do so when subject to garnishment. Worse, they resorted to loans with exceedingly high interest rates solely to avoid the stigma of bankruptcy.[16] In his *Proposed Change to the Bankruptcy Act*, Solicitor General Thacher noted that the current system failed in providing sufficient debt repayment:

> In practice we have found that debtors usually have such meagre assets by the time they go into bankruptcy that it would make little difference whether these assets were paid preferentially to one creditor or were distributed to all in fractional proportions or (as is generally the case) were consumed in fees and expenses of administration.
>
> The bankruptcy court has increasingly become a dumping ground for the refuse of commercial wreckage, and a sanctuary where debtors obtain cancellation of their debts regardless of how they may have wasted their property.[17]

And so he argued for statutory changes to allow and encourage debtors "if wage earners, to have the aid of the court, with full relief from garnishments and other attachments, in providing for the amortization of debts out of earnings."[18]

The Third Roadblock: Balance And Power

A hurdle to enacting what is today Chapter 13 was concern over its Constitutionality. First, many raised concerns that Congress did not have the power to enact laws for insolvency relief different from "bankruptcy." States have the power to enact laws regarding insolvency, and the Constitution conferred Congress only with the power to draft uniform laws regarding *bankruptcy* which appeared to be distinct from insolvency. Since the relief envisioned (by what is today Chapter 13) was something other than liquidation, for someone other than "a bankrupt"[19]

(someone who could not pay his debts as they came due but whose assets may *exceed* his debts), it was not clear that Congress had such authority. This concern was alleviated when the Supreme Court determined that a) insolvency and bankruptcy are indistinguishable and b) laws addressing such options as compositions are within the purview of bankruptcy law.[20]

A second Constitutional challenge was more potent. Critics challenged that certain laws which prevent a secured creditor from exercising his rights as to his collateral without compensation violate the Fifth Amendment as a taking of property without due process. And they were right, in part. Critics challenged the Constitutionality of the Bankruptcy Act's Section 74 (the wage earner plan provision) and Section 75 (farmer relief). These sections permitted a bankruptcy court to approve a composition plan or extension plan by vote of a majority of creditors, potentially infringing the rights of the minority in opposition. As to this point, the United States Supreme Court upheld the Constitutionality of a *court approved* composition.[21] But the most problematic, and ultimately indefensible, provisions were found in Section 75 which afforded dramatic relief to farmers.[22] In short order, Section 75 of the Act was challenged, and the United States Supreme Court struck down the provisions.[23] After this decision, Congress responded. Congress revised the law and placed conditions upon the debtor's retention of property without the mortgagee's consent. This time, the Supreme Court upheld the Constitutionality.[24] Yet concerns regarding just how to achieve the appropriate balance between a secured creditor's rights and a debtor's rights to the same property continue to plague lawmakers and courts alike from 1935 to the present.[25]

Achieving the Alternative to "Straight Bankruptcy"

Yet another reason it took so long for Chapter 13 to get off the ground was simply unfamiliarity with the option. Even though Chapter XIII was added to federal bankruptcy law in 1933 and expanded in 1938, it was little used for much of the next thirty years. As described in one law review article from 1963, more Chapter XIII cases would be filed if more attorneys knew of the option and could explain it to their clients.[26]

Ultimately, as word of the wage earner option grew, use of the option grew as well. And as use of the option grew, the weaknesses of the Chandler Act became more obvious. For example:

- Only individuals with wages under a certain threshold qualified; those self-employed or those with income from other sources were excluded from this option.
- The individual could not separately classify his unsecured debts; all unsecured debts had to be treated alike and without discrimination.[27]
- The plan had to be accepted by all affected creditors.[28]
- Actions against co-signers were not stayed.
- A wage earner could not cure a defaulted mortgage without the express consent of the mortgage holder.

The alternative to "straight bankruptcy" needed to be improved.[29]

Then in 1978, Congress passed the Bankruptcy Code, replacing the Chapter XIII wage earner plan with Chapter 13. This change provided extraordinary statutory incentives for the alternative to "straight bankruptcy."[30]

For the first time, an individual with debts within certain amount limits could file a bankruptcy petition under Chapter 13 and could:

- obtain a stay of collection actions against a co-signer *who did not file bankruptcy*;
- modify secured debts *without* consent of the secured creditor;
- cure mortgage defaults *without* the consent of the mortgage holder;
- cure defaults over time;
- use income from various sources *other than* "wages" to fund a plan for a period no longer than five years;
- obtain a hardship discharge;
- voluntarily dismiss or convert;
- separately classify his debts;
- combine extension and composition options;
- satisfy priority claims without interest;
- remain in possession and control of property;
- use the services of a Chapter 13 trustee to administer payments (rather than the court, a creditor's attorney, the debtor's attorney or the debtor); and
- retain the option to file a new case after dismissal or completion of a prior Chapter 13 case.

These statutory changes permitted individuals to creatively navigate resolutions to their insolvency. Now the individual had the freedom to choose options for debt restructuring and debt relief all the while under protection from collection action. A debtor could strategize how to tackle his financial

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insolvency and meet his individual needs. The individual could experience personal recovery and rehabilitation coupled with protection and debt forgiveness.

Is It Still A Good Idea Today?

Perhaps to answer whether Chapter 13 is still a good idea today, one must acknowledge whether individuals were better off without Chapter 13. After a century and a half of efforts to achieve an alternative to involuntary surrender of property in return for discharge of indebtedness, our lawmakers derived a voluntary system of options for liquidation, reorganization, restructuring and rehabilitation.

The voluntary aspect was momentous. For the first time, debtors could remain in possession and control of their property, could draft their own plan to provide for their creditors' claims, and could elect to remain in bankruptcy or elect to convert to a different chapter of bankruptcy. No longer were debtors punished for their choices or their circumstances. These were no small benefits.

From its inception, Chapter 13 was not intended to provide an easy discharge; it was meant to be an alternative to "straight bankruptcy." As such, many of the incentives are unrelated to discharge. It is not surprising then that as an alternative to "straight bankruptcy"(Chapter 7), the discharge rates will differ from that of "straight bankruptcy" (Chapter 7).

In contrast to prior years, bankruptcy relief today is available by choice. The Chapter 13 election is inspired by its various options. Chapter 13, tolerant of an individual's choices, functions as a significant alternative to the other chapters of bankruptcy. In the end, success may be better measured within the context of the individual's motivations (that is, whether the individual achieved his intended goal).

A century and a half after our first attempts at voluntary bankruptcy, today insolvent individuals have options to address their financial challenges. The current federal system permitting individuals the freedom to elect chapter choice, retain property, restructure debt, and choose rehabilitation benefits debtors and creditors alike. This is hardly a hallmark of failure. ◉

Footnotes

1 This article draws from, and shares parts of, an article written by Rebecca Connelly for ConsiderChapter13.org (October 23, 2016) with the permission of The Academy for Consumer Bankruptcy Education. It may be expanded and further developed for other publications.

2 Charles Warren, Bankruptcy in United States History 72 (1935) (describing comments of representative Joseph Trumbull of Connecticut).

3 *See* John Hanna, *Bankruptcy Amendments of 1933*, 2 Mercer Beasley L. Rev. 113, 114 (1933) ("In the 18 months of [the Act granting a discharge to debtors who filed a voluntary petition in bankruptcy] more than 28,000 debtors had been relieved of nearly $445,000,000 of obligations by the surrender of less than $45,000,000 in property.").

4 "[C]hapter XIII of the Bankruptcy Act was intended as a rehabilitating device for insolvent wage earners." Melvin Kaplan, *Chapter 13 of the Bankruptcy Reform Act of 1978: An Attractive Alternative*, 28 DePaul L. Rev. 1045, 1045 (1979) (citing S. Rep. No. 95-989, at 12 (1978)).

5 Bankruptcy Act of 1898, ch. 541, § 4(b), 30 Stat. 544, 547 (1898).

6 Compositions were first introduced in the Bankruptcy Act of 1874, and the concept was included in the Bankruptcy Act of 1898 under section 12. *See* An Act, ch. 390, § 17, 18 Stat. 178, 182–84 (1874); Bankruptcy Act of 1898, ch. 541, § 12, 30 Stat. 544, 549–50 (1898).

7 An Act, ch. 204, 47 Stat. 1467, 1467–70 (1933).

8 As described by the Tenth Circuit Court of Appeals in 1937, "[a] composition by creditors with their debtor in bankruptcy is an agreement between them that the latter will pay down and the former will accept a named per cent. of their claims in full satisfaction. …An extension proposal is an agreement on the part of the creditors that they will extend the time within which their claims are probably to be paid, in full as to secured creditors, on the terms proposed by the debtor and approved by the court." *Heldstab v. Equitable Life Assurance Soc'y of the U.S.*, 91 F.2d 655, 658–59 (10th Cir. 1937).

9 Bankruptcy Act of 1898, ch. 541, § 12(e), 30 Stat. 544, 550 (1898).

10 Vincent L. Leibell, Jr., *The Chandler Act—Its Effect upon the Law of Bankruptcy*, 9 Fordham L. Rev. 380, 404 (1940).

11 *See id.*

12 Theodore J. Biagini, *Emergence of the Wage Earner's Plan*, Notes and Comments, 4 Santa Clara L. Rev. 72, 84 (1963) (citing 1961 Reports of the Judicial Conference of the United States 91 (1961)); *see also* Clarence W. Allgood, *Chapter XIII—Referee Allgood of Alabama Replies to Referee Walker*,

33 J. Nat'l Ass'n Ref. Bankr. 51 (1959) (responding to Referee Walker's "rebellion against Chapter XIII"). *But see* Ronald Walker, *Is Chapter XIII a Milestone on the Path to the Welfare State?*, 33 J. Nat'l Ass'n Ref. Bankr. 51 (1959) (presenting "simply a frank discussion of some of the demerits presented by Chapter XIII").

[13] William E. McCarty, *Wage Earners' Plan–Chapter XIII*, 45 Marq. L. Rev. 582, 598 (1962).

[14] The 1898 Act's objective was primarily the facilitation and equitable and efficient administration and distribution of the debtor's property to creditors, not relief for the debtor. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 ABI L. Rev. 5, 25; *see also id.* at 27.

[15] *See id.* at 28 (describing the intent of the 1933–1938 amendments as measures intended to facilitate rehabilitation through bankruptcy).

[16] Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come From and Where Should It Go?*, 10 Am. Bankr. Inst. L. Rev. 741, 743–45 (2002) (describing the nationwide study of bankruptcy proceedings performed under the direction of former U.S. District Judge Thacher).

[17] Hon. Thomas D. Thacher, *Proposed Change in Bankruptcy Act Submitted by Thomas D. Thacher*, 3 N.Y. St. Bar Ass'n Bull. 532, 534–35 (1931).

[18] *Id*. at 545.

[19] Under the Bankruptcy Act of 1898, a bankrupt was one whose debts exceeded his assets. The proposed option for the wage earner plan was open to a person whose debts *did not* exceed his assets and yet who could not pay his debts as they came due. The effort to allow relief under federal bankruptcy laws for those who did not qualify as "bankrupt" opened the door to the Constitutional challenge. Interestingly, the 1898 Act was in part a reaction to the 1867 Act which permitted a bankruptcy to be filed against a person who temporarily could not pay his obligations as they came due even though if he had been permitted the opportunity to liquidate his assets he would be solvent. *See* Leibell, *supra* note ix, at 384.

[20] *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902); *see Wilmot v. Mudge*, 103 U.S. 217, 218 (1880) ("[T]he provision for composition is a proceeding in bankruptcy ….").

[21] For these reasons, the legislation authorized a court to disapprove a plan, even if sufficient numbers of creditors voted in favor.

[22] *See* An Act, ch. 869, 48 Stat. 1289, 1289–91 (1934) (adding subsection (s) to section 75 of the Bankruptcy Act); *see also Myers v. Int'l Trust Co.*, 273 U.S. 380 (1927); *Nassau Smelting & Ref. Works v. Brightwood Bronze Foundry Co.*, 265 U.S. 269 (1924); *Cumberland Glass Mfg. Co. v. De Witt*, 237 U.S. 447 (1915); *Wilmot v. Mudge*, 103 U.S. 217 (1880).

[23] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[24] *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937).

[25] *See id.* at 463 ("[T]he language of the Act is not free from doubt….").

[26] Kaplan, *supra* note iii, at 1046–47; *see also* McCarty, *supra* note xii, at 582–83.

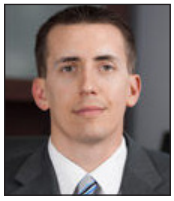
[27] Chandler Act, ch. 575, 52 Stat. 840, 934 (1938) (amending Bankruptcy Act of 1898 to add, in part, section 646 to Chapter XIII).

[28] *See id.* at 932 (amending Bankruptcy Act of 1898 to add, in part, section 633 to Chapter XIII so that after the petition is filed, the referee provides 10 days' notice and calls a meeting of creditors at which the creditors submit their written acceptances); *id*. at 934 (adding section 651 so that if the plan is accepted by all of the affected creditors, it may be confirmed by the court); *id*. (adding section 652 that an application for confirmation of the plan may be filed if the plan has been accepted by a majority in number and amount of unsecured creditors and all secured creditors "dealt with by the plan").

[29] *See* Biagini, *supra* note xi, at 72 (discussing contents of wage earner plans).

[30] The Bankruptcy Code amendments in 2005 (BAPCPA) removed some of the incentives under Chapter 13 but did not remove the benefits mentioned in this article.

Chapter 13: A Place to Protect Debtors from the "Bullies" in their Lives



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Bullying is a real problem in today's society. Too many people believe that they can get what they want by talking tough, making threats, and general psychological intimidation. In the schoolyard, it may be a kid that shakes down the smaller kids for their lunch money. In the adult world, it can be creditors that resort to taking people's wages, cars, and homes if they don't get what they want when they want it. The perspective of many of my clients when they first walk through my door is, "I want to qualify for Chapter 7 so I can get rid of my debt and move on with my life." However, for so many of my clients, eliminating the general unsecured debt only solves part of the problem and doesn't address the "bullies" that may be causing significant stress in their lives. By filing a Chapter 7, the debtor may be left on their own to deal with some of the toughest "people" that are in their lives. Chapter 13 can help debtors with some of the following challenging individuals.

Uncle Sam

One of the scariest things that anyone can see is a letter from the IRS addressed to you personally. I know that my heart always skips a beat when I see an envelope with "Internal Revenue Service" on the return address label (and my taxes are all in order). Chapter 7 will discharge the older tax debt (assuming that the IRS didn't file a substitute tax return before the debtor did). However, Chapter 13 is still the best place to reorganize priority income tax liability in an environment where the debtor is sheltered by the automatic stay from levies and garnishments by the IRS. It also can be a very efficient way to determine the amount that the Debtor actually owes the IRS through the claims objection process. Sometimes these claims will reflect tax years where the return was not received or was unfiled altogether. This leads to inflated assessments for these unfiled tax return years. In my experience, this tax liability is normally close to triple the actual tax owed. I recently had a client who did not remember whether she filed a tax return for tax year 2014. She had a car repossessed (more on that later) so we didn't have the time to do a lot of due diligence before filing the Chapter 13 case to get the car back. The proof of claim filed by the IRS confirmed that she did not file her 2014 tax return. I submitted the 2014 tax return directly to the IRS claim representative, who promptly amended the claim to confirm the actual tax liability owed rather than the exorbitant assessment that was previously on record for my client.

Mortgage Creditors

Many of my clients have suffered sleepless nights from the fear of losing their homes. Mortgage payments may have been missed when the debtors got sick and were out of work or were laid off altogether. After they return to work, the hole they have fallen into with their mortgage payments is too great for them to climb out of without assistance. Up until now, the pursuit of loan modifications has been the holy grail of many debtors. This has led some borrowers to opt for a loan modification workout while pursuing a Chapter 7 to wipe out their unsecured debt rather than file Chapter 13 for cure and maintain treatment of the mortgage. This made a lot of sense during times where mortgage loans were being modified to interest rates that were at or even below 4% fixed. However, the Wall Street Journal prime interest rate has already increased three times since the last presidential election with the rate sitting at 4.25% as of the date of this article.[1] For many borrowers, it may now be preferable to cure their existing mortgage arrearage under the current terms of their loan in an interest and penalty free environment. Pursuit of a loan modification today, based upon the current interest rates, may result in a change to the borrower's terms of repayment that could cost them thousands of dollars in increased interest over the life of the mortgage loan.

Even if the debtor is committed to obtaining a loan modification, Chapter 13 can allow borrowers to have the protection of the bankruptcy court while going through this sometimes long and arduous journey. I personally have had debtors where the loan modification took more than a year to be finalized. Chapter 7 only protects the borrower by the automatic stay for a limited amount of time. A typical Chapter 7 will last three to

four months and that assumes that the mortgage lender doesn't seek relief from the automatic stay before the bankruptcy closes. As soon as the Chapter 7 completes or the motion for relief from stay is granted, the debtor is back to facing the possible loss of their home through foreclosure while they navigate through the mortgage modification labyrinth. Granted, the debtor will need to resume making mortgage payments in some form or fashion to pursue a loan modification while in an active Chapter 13. However, if the debtor can't make any mortgage payment, then going down the road of loan modification is probably a dead end.

The cure of a mortgage inside of Chapter 13 forces the lender to have transparency in the amount that is being repaid to them over the life of bankruptcy to become contractually current on the debtor's residential mortgage. Form 410A, which is required to be filed as an attachment to the proof of claim under Rule 3001(c)(2)(C), requires that the mortgage creditor give great specificity to the amounts that are being repaid to the lender in cure of the mortgage delinquency. Failure to provide this information can result in the mortgage creditor being prohibited from presenting the information as evidence in **any** contested matter or adversary proceeding. It also can give rise to attorney's fees and expenses that resulted from the failure being awarded. Outside of the Chapter 13 bankruptcy realm, debtors may feel like they have no tools in their proverbial toolbox to see what they are actually paying to the mortgage creditor.

As a result of the implementation of Rule 3002.1, mortgage creditors are also required to provide appropriate notice for any changes to the debtor's mortgage account over the life of the Chapter 13 case. This includes notice of fees, expenses and charges incurred, with a requirement to notify the debtor through a filing with the Bankruptcy Court within 180 days of the date in which the fees, expenses or charges are incurred. The mortgage creditor must also file a notice of payment change at least twenty-one days prior to the effective date of any mortgage payment change. This keeps the debtors from having a surprise "gotcha" moment at the end of their Chapter 13 where the escrow account may have run a significant deficiency over the life of the Chapter 13 without appropriate notice being provided to the debtor. This happened to one of my clients where the mortgage creditor was advancing property taxes over the life of the Chapter 13 but failed to notify the Bankruptcy Court when it occurred. The mortgage creditor filed a notice of mortgage payment change close to the conclusion of the case that would have increased my clients' monthly mortgage payment by over $1,000.00 per month. Beating me to the punch in this case, the United States Trustee immediately interceded and requested records from the mortgage creditor as to why this did not violate Rule 3002.1. The mortgage creditor fell on their sword, waived the escrow deficiency and also waived the amount necessary to create the RESPA cushion in my client's escrow account.

There are also times when the the escrow account is being over-funded and may allow the debtor to find opportunities for cost savings on their mortgage payment. These savings can result from having their tax valuation challenged so that their property taxes may be lowered or by shopping for better and more cost-effective homeowner's insurance. Recently, a mortgage creditor filed a notice of mortgage payment change in one of my client's case that confirmed the overpriced premium that the debtor was paying for homeowner's insurance. I encouraged her to shop for better insurance. She obtained insurance at a far better rate and had the insurance refund returned to the escrow account. This caused her mortgage payment to stay in check and also probably improved the quality of insurance that my client has. Too often, when the mortgage creditor chooses the homeowner's insurance, it is insurance that protects the mortgage creditor…but not much more.

By paying an ongoing mortgage payment through the Chapter 13 Trustee as a conduit, the borrower also receives the benefit of having the Trustee's financial records in case there is a dispute on whether the Debtor is current or delinquent on these payments at the completion of the Chapter 13 case. An outstanding example of this very situation arose in *In re Greene*.[2] In this case, the Debtor proposed to cure the outstanding arrearage owed at the time of the bankruptcy case inside the Chapter 13 plan and make the ongoing mortgage payment to the mortgage creditor through the trustee as a conduit. The mortgage creditor failed to file a proof of claim in the bankruptcy case, so the Debtor filed one for the mortgage creditor with the Debtor's estimate of the arrearage to be cured. At the completion of the case, the Chapter 13 Trustee filed the required notice of final cure payment and completion of payments under the plan confirming that the pre-petition arrearage had been cured and that the post-petition payments had been paid through October 1, 2014. The mortgage creditor filed a response confirming that the Trustee's final notice was accurate.

Following the completion of the Chapter 13 case, the debtor was notified that he was allegedly $2,000.00 in arrears on his mortgage payment. This led to a series of frustrating and duplicative communications between the debtor and a variety of representatives with the mortgage creditor, who provided inconsistent and hostile information to the debtor. This included statements where the debtor was threatened with the loss of his home if he didn't bring the loan current. The debtor, an Army

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veteran diagnosed with post-traumatic stress disorder, testified in this case that he would receive correspondence from the creditor at the end of the weekend and then spent the weekend worrying about whether he would lose his home. This stress included at least one dream where he was locked out of his house and had lost "all [he has] to show for a life's work."[3] Although the mortgage creditor indicated that the arrearage that was being sought was the result of post-discharge payments otherwise due, this was contradicted by the Debtor's records that were presented in court.

The door that would not be re-opened was the pre-petition arrearage or the payments made to the Chapter 13 Trustee over the life of the bankruptcy plan. These records would not be nearly as bulletproof unless the Chapter 13 Trustee was the one that was disbursing the ongoing mortgage payment. The court stated that the conduit mortgage payment process and the resulting order confirming that the mortgage was current is "to safeguard debtors from exactly the type of problems that the Debtor has endured."[4] The court ultimately issued sanctions against the mortgage creditor in the form of civil damages for the debtor, attorney fees for debtor's counsel and punitive sanctions payable to the clerk of the Bankruptcy Court. But for the debtor's pursuit of Chapter 13, he may not have had the venue to keep this bullying mortgage creditor accountable.

Subprime Lenders

Many of my clients do not have the litany of favorable lending options that so many of us take for granted. Whether it is the result of poor credit or no credit, debtors often have no choice to get a car other than to plunge into lending traps with sub-prime car lenders financed through "buy here pay here" car lots. This leads to interest rates of over 20% for cars that were never worth what the debtor agreed to pay for them. Following BAPCPA, the debtor now has to wait 911 days to file a Chapter 13 bankruptcy case to cram down the value of the car to its fair market value. However, Chapter 13 still allows the debtor to modify the interest rate to a more reasonable rate calculated consistent with the *Till*[5] decision. This can result in savings of thousands of dollars in interest over the life of the Chapter 13 plan, even if the value of the car can't be crammed down. These are savings that the debtor will not realize by retaining their car through reaffirmation in Chapter 7, where the debtor is stuck with the terms of the loan as they exist in the contract. Many of my clients are behind on their car loan, sometimes to the point where the car was repossessed prior to the filing of the bankruptcy (such as with the client I mentioned earlier). If the debtor files a Chapter 7, this may get the car returned to them but they still need to figure out how they will get current with the loan. In my experience, most car lenders will not reaffirm a loan unless it is brought contractually current. Chapter 13 allows for a restructure of the loan so that the Debtor does not have to find the missed car payments that they may not have.

Chapter 13 also gives debtors a means to break out of the title loan trap. For those of you not familiar with these loans, this is a more toxic version of the payday loan where the debtor pledges their car as collateral. The turnaround time to pay these loans off is normally 30-60 days and can come with significant origination fees that are structured in a way to skirt the usury interest rate laws. If the debtor didn't have this kind of money when the title loan was made, they're probably not going to have the money to repay the inflated title loan off two months later. Just like with a payday loan, if the debtor can't repay the loan when it comes due, they can re-up the loan and build a new origination fee into the loan. This stacking of origination fees can cause the loan to balloon to thousands of dollars, even when the amount received by the debtor originally may have only been hundreds of dollars. Remember that the "910 rule" only applies to purchase money security interest transactions and does not apply to loans where the lender did not provide the financing to obtain the vehicle.[6] By repaying these title loans inside the Chapter 13 case, it breaks the cycle of the loan being repeatedly re-upped by the debtor to protect their car from repossession. It also amortizes the amount owed to the car lender over three to five years (instead of two months) and lowers the interest rate to single digits. By forcing the title loan creditor to file a proof of claim, it may also bring light to a very dark part of the lending world and could open the door for the debt itself to be challenged as a violation of consumer protection laws.

Chapter 13 is an essential part of the bankruptcy system that would leave so many problems unsolved for the debtor without it. Without Chapter 13, debtors are left on their own to deal with creditors that have the power to take their means of getting to work and the place they call home. In short, Chapter 13 is the confident kid that stands alongside the bullied in the schoolyard and says "no more" to the tough guy demanding their lunch money. ◉

Footnotes

1 **http://www.bankrate.com/rates/interest-rates/prime-rate.aspx** (accessed August 10, 2017)
2 Case No. 10-06466; April 28, 2017 (Bankr. E.D. N.C. 2017)
3 *Id.* at ¶18
4 *Id.* at ¶26
5 541 U.S. 465 (2004)
6 11 U.S.C. §1325(a)(9)

Benefits of Chapter 13 from a Trustee's (Staff Attorney's) Perspective

Thomas Hooper
Staff Attorney to
Russell C. Simon
Standing Chapter 13
Trustee for the
Southern District
of Illinois

Prior to joining the trust operation of Russell C. Simon, I cut my teeth as a debtor attorney. I was fortunate to learn from an experienced firm and an experienced bankruptcy bar. One resonating moment demonstrated the effect a chapter 13 trustee's actions can have on the bankruptcy process as a whole: My former jurisdiction conducted 341(a) meetings of creditors in a 'cattle call' format. All debtors with meetings scheduled were instructed to arrive at the courthouse at the same time. The trustee would conduct meetings over the course of the morning/afternoon while debtors waited in the gallery. After that particular day's docket had been concluded, I was assisting the trustee's staff in straightening up and making small talk as normal. The courtroom doors burst open to reveal a disheveled, out of breath debtor followed by a man in coveralls. She frantically pleaded with the trustee to conduct the meeting. She explained that she did not receive paid leave for time missed from work and could not afford a second missed day. Compounding matters was that her car broken down *en route* to the courthouse. The man in coveralls was a tow truck driver whom she had paid what money she had to drive her to the courthouse.

The trustee calmly instructed his staff to set up the equipment. They gladly obliged. While the staff unpacked, the trustee approached the debtor, explained that he would conduct the meeting and the case would proceed. He then opened his wallet and handed her an undisclosed amount of cash, suggesting she get herself lunch after the meeting. She clutched the bills, visibly overwhelmed with relief. The trustee then approached the tow truck driver, thanked him for going out of his way, and compensated him for his additional time and expense. The meeting was conducted and concluded. Everyone left the courtroom satisfied that the process had worked in spirit and by design.

This single act of altruism likely produced a benefit to all parties in interest in the underlying bankruptcy case: the debtor did not have to miss another day of work and compromise her ability to make plan payments; the trustee's office was not tasked with re-setting the meeting and having to prepare appropriate pleadings; the trustee's generosity in assisting the debtor in covering an unexpected expense would lead to a greater ability of the debtor to continue making plan payments; because confirmation was not further delayed, creditors and debtor's counsel would receive disbursements more quickly. To be sure, this anecdote is the exception rather than the norm. However, chapter 13 trustees have a number of established statutory mechanisms at their disposal that produce benefits to both chapter 13 debtors and their creditors. The benefits provided are often unique to the bankruptcy system and chapter 13 administration. The trustee's adherence to these statutory duties can (and should) make the chapter 13 process more transparent, more uniform, and more efficient for all parties in interest. Transparency, uniformity, and efficiency necessarily result in additional benefits to all parties.

Trustee's Role In Claims Allowance Process – Benefits to Debtors and Creditors

The Bankruptcy Code[1] and Federal Rules of Bankruptcy Procedure[2] provide broad authority for the chapter 13 trustee to assume the role of gatekeeper as a participant in the claims allowance process. The Code charges the chapter 13 trustee with examining all proofs of claim and mandates that the trustee "shall" object to the allowance of improper claims "if a purpose would be served."[3] The United States Trustee has specifically highlighted this duty imposed by the Code.[4] The Supreme Court has identified this command to "examine proof of claim and, where appropriate, pose an objection" as the chapter 13 trustee's "burden of investigating claims and pointing out that a claim is [unenforceable]."[5] Circuit courts of appeal have further stated that the chapter 13 trustee is "duty-bound to object to improper claims"[6] when performing their "statutory obligation to object to unenforceable claims."[7] The Chapter 13 Handbook provides that "the standing trustee must verify that

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claims are proper with respect to timeliness of filing, dollar amount and supporting documentation."[8] In performing the statutory duty to review and object to claims as appropriate, the trustee benefits debtors by preventing disbursements on account of unenforceable claims. Remaining creditors benefit from claim disallowance to the extent that they receive an increased *pro rata* share of available funds. It is worth noting that while the trustee bears the burden of examining and objecting to filed claims, "a trustee should not, and is not charged with the obligation to, examine a claim with a purpose and a view to increasing the claim or improving a claimant's status over that asserted by other creditors."[9] Rather, "[i]t is a trustee's principal duty object to unsubstantiated, excessive, or unallowable claims."[10]

The Rules provide a number of points of review for the trustee to examine proofs of claim for potential objection. While opportunities for objection are too voluminous to be discussed in detail, common issues for which a trustee may review include attachment of required writing upon which claim is based (Rule 3001(c)(1)), evidence of perfection of security interest (Rule 3001(d)), untimeliness (Rule 3002(c)), and stale-dated or previously discharged claims.[11] A trustee's objection to claim may generally seek reclassification or disallowance of the claim at issue. The effect of reclassification or disallowance benefits other creditors of all classifications. Reclassification of a previously secured or priority claim provides more funds for the benefit of allowed general unsecured claims to the extent that funds previously dedicated to the reclassified claim are redirected to the general unsecured pool. Reclassification may permit remaining secured and priority creditors to receive distributions more expeditiously, depending on the jurisdiction's order of distribution. While a debtor may not receive a direct benefit from claim reclassification (as the existing plan base is merely redistributed among creditors in a different priority), disallowance may yield significant benefits to debtors. Whereas remaining claims benefit from disallowance in the same manner as reclassification (though perhaps more dramatically), the debtor benefits to the extent the claim is removed from disbursement scheme altogether.

Neither the Code nor Rules provide any deadline by which an objection to claim must be filed. Jurisdictions have established independent deadlines for claims objections by plan provision[12], local rule[13], or equitable case law[14]. Some Circuit Courts of Appeal have determined that the *res judicata* effect of confirmation acts bars the challenge of validity of a pre-confirmation claim when the challenge seeks treatment contrary to the confirmed plan.[15] The rationale of *Hope* may be exacerbated somewhat in jurisdictions who prioritize expedited confirmation, particularly in light of the new claims bar date and filing procedures effective December 1, 2017. Specifically, the amended Rules have reduced the claims bar date to 70 days from the order of relief,[16] though mortgage creditors secured by debtor's principal residence are afforded an additional 50 days to provide required security documents.[17] Trustees may be placed in a position where confirmation should be delayed pending submission of evidence of security in instances of pre-confirmation proofs of claims filed by mortgage creditors. As a general rule, it will behoove the trustee to be proactive in reviewing and objecting to proofs of claim as expeditiously as possible. Such a practice puts all parties on notice of potential issues with claims allowance and case administration. Further, prompt review and objection ameliorates the risk of improper trustee disbursements.

Trustee's Role in Mortgage Administration – A Court-Appointed Accounting Service

As more jurisdictions move toward mandatory conduit mortgage administration, more debtors and creditors are benefiting from trustees' record keeping, disbursement schedule, and the formal requirements of Rule 3002.1.[18] Pursuant to the NACTT survey of conduit chapter 13 trustees most recently revised July 20, 2017, approximately 85 of the 200 districts responding identified as 'primarily conduit' jurisdictions when a pre-petition mortgage default exists. Another 17 districts identified as 'case-by-case basis' with regard to mandatory conduit mortgage payments. The Bankruptcy Code permits a debtor to cure pre-petition mortgage arrearages and maintain ongoing mortgage payments to the creditor (whether directly or as a conduit).[19] The requirements of Rule 3002.1 are designed to provide assurances to both the debtor and the mortgage creditor that, upon completion of payments under the plan, the debtor's mortgage is deemed current as of a date certain.

The Rules provide that a creditor secured by an interest in debtor's property must include with its proof of claim a breakdown of amounts necessary to cure pre-petition default.[20] This filing provides both debtors and trustees the opportunity to review the pre-petition arrearage figure for any error in calculation or other potential objection. While the trustee will not have immediate access to debtor's records necessary to challenge payment history, the trustee may still analyze the proof of claim and its attachment for figures that are internally inconsistent. In the event

of inconsistency, appropriate objections to the claim should be raised to ensure proper administration of the claim. Pursuant to the Chapter 13 Handbook, "the trustee must, at a minimum…verify that there is an itemization of the pre-petition fees, costs, and other charges attached to the proof of claim."[21]

When creditor's claim is secured by a mortgage against the debtor's principal residence, the creditor is subjected to enhanced provisions of Rule 3002.1. Among the obligations placed upon the creditor is to file timely notices of post-petition changes in the mortgage payment.[22] In the event of a conduit mortgage plan, the trustee can easily update the disbursement system to adjust and account for the same. The trustee is charged with maintaining a financial record keeping and reporting system that, among other requirements, "allow[s] the standing trustee or auditor to trace and verify transactions."[23] Accordingly, both the debtor and the mortgage creditor should have access to real-time disbursement records regarding the cure of any pre-petition arrearage and ongoing post-petition mortgage payments disbursed by the trustee.

Confirmation of a plan that provides for trustee disbursement of ongoing post-petition mortgage payments affords the debtors and creditors access to the trustee's enhanced disbursement record keeping system. The NACTT Mortgage Committee has been active in working with mortgage servicers and other parties in interest to establish agreed-upon disbursement procedures for mortgage claims. The procedures implemented include adjustments to the trustees' disbursement software and language on payment vouchers to clarify whether disbursements are to be applied to a pre-petition arrearage claim, the first post-petition 'limbo/gap' payment, ongoing post-petition payments (including specific month and year), or notices of post-petition fees/costs/expenses. These records can greatly assist both debtors and creditors in instances of post-confirmation dismissal to determine what amounts the trustee has disbursed on account of the creditor's claim and how those disbursements were to have been applied. Moreover, such access to the trustee's records is invaluable at the conclusion of the case to evidence that all payments have been made under the plan, as is required for the debtor to obtain a discharge under § 1328 (discussed further, *infra*).[24]

Perhaps the most worthwhile joint benefit flowing to both debtors and residential mortgage creditors is derived from Rules 3002.1(f)-(h). Combined operation of these Rules provides a mechanism by which the debtor's payments to the mortgage creditor are deemed current as of a date certain. Rule 3002.1(h) "provides the procedure for the judicial resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence…."[25] Specifically, upon the trustee's notice of final cure payment filed under Rule 3002.1(f), the creditor is provided the opportunity to file a response under Rule 3002.1(g). "If a creditor disputes that a claim for which the trustee is responsible for payment has been made…the trustee will, of necessity, have to file a motion for determination that the debtor has cured the pre-petition default and paid all required post-petition amounts before the trustee can file the final accounting."[26] The motion for determination filed by the debtor or the trustee is made under Rule 3002.1(h). In instances of conduit mortgages, the trustee's records are easily referenced for purposes of filing the requisite motion for determination. The trustee's system clearly and unequivocally evidences specific dates and amounts of disbursements. This provides the debtor the benefit of assurance that their mortgage will be deemed current as of a specific date. This also benefits the creditor to the extent it can review and adjust its records and accounting practices to avoid/mitigate potential violations of RESPA, the National Mortgage Settlement, and/or other relevant statutes or regulations. In the event of ongoing post-petition mortgage payments made directly by the debtor, should a creditor dispute a notice of final cure, the debtor will be required to a produce payment history reflecting payments made over life of the plan to prevail on motion under Rule 3002.1(h).

It is worth noting the trending line of cases holding that the debtor's failure to maintain direct ongoing post-petition mortgage to the creditor is a deemed a failure for the debtor to complete payments under the chapter 13 plan.[27] This line of cases holds that the result of debtor's failure is the denial of discharge under § 1328 and potential dismissal or conversion under § 1307. This concern can be ameliorated if debtors avail themselves of conduit mortgage payments. The benefit of the trustee's record keeping system and the provisions of Rule 3002.1(h) leave little room for doubt whether all required payments under the plan have been made. The alternative is that debtors are charged with maintaining meticulous records regarding post-petition payment history over the life of the chapter 13 plan to contest any potential creditor response made under Rule 3002.1(g).

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It is not required (nor necessary) for chapter 13 trustees to go outside of their statutory parameters, or those standards set by the Handbook, for the chapter 13 process to benefit both debtors and creditors. There

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are a number of statutory provisions that provide demonstrable benefits to debtors and creditors alike. These provisions are unique to a chapter 13 system that has continued to evolve and adjust to ensure all parties in interest share in its benefits and protections. As debtors' counsel, creditors' counsel, and trustees increase their sophistication in practicing under BAPCPA, the chapter 13 process can be expected to continue its evolution and spur even further benefits. ◉

Footnotes

[1] 11 U.S.C. § 101 et. seq.

[2] Fed. R. Bankr. P. 1001 et. seq.

[3] 11 U.S.C. §§ 1302(b)(1) and 704(a)(5).

[4] Handbook for Chapter 13 Standing Trustees, Chapter 1-1 (C)(4) (eff. Oct. 1, 2012).

[5] *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1413-14, 197 L. Ed. 2d 790, 795-97 (2017).

[6] *Owens v. LVNV Funding, LLC*, 832 F.3d. 726, 736 (7th Cir. 2016).

[7] *Nelson v. Midland Credit Management, Inc.*, 828 F.3d. 739 (8th Cir. 2016).

[8] Handbook for Chapter 13 Standing Trustees, Chapter 3(D)(1) (eff. Oct. 1, 2012).

[9] *In re Padget*, 119 B.R. 793, 798 (Bankr. D. Col. 1990).

[10] *Id*.

[11] See, generally, *Midland Funding, LLC v. Johnson* (holding that while filing of a proof of claim evidencing a stale-dated debt is not a violation of the F.D.C.P.A., the trustee is nonetheless charged with objecting and seeking disallowance of the same).

[12] See, e.g., S.D. Ill. Uniform Plan eff. Apr. 1, 2017.

[13] See, e.g., LBR S.D. Fla. 3007-1(B).

[14] See, e.g., *Shook v. SBIC (In re Shook)*, 278 B.R. 815 (9th Cir. BAP 2002) (holding that debtor's objection to claim was barred by laches when undue delay resulted in objection being filed for four years).

[15] *Hope v. Acorn Fin., Inc.*, 731 F.3d. 1189, 1193 (11th Cir. 2013) (citing *Simmons v. Savell (In re Simmons)*, 765 (F.2d. 547, 553 (5th Cir. 1985)).

[16] Amended Fed. R. Bankr. P. 3002(c) eff. Dec. 1, 2017.

[17] Amended Fed. R. Bankr. P. 3002(c)(7)(B) eff. Dec. 1, 2017.

[18] Having represented both debtors and a chapter 13 trustee, the author takes no position with regard to the efficacy and/or propriety of (quasi-)mandatory conduit mortgage jurisdictions. That is a matter best suited for another article.

[19] 11 U.S.C. §1322(b)(5).

[20] Fed. R. Bankr. P. 3001(c)(2)(B).

[21] Handbook for Chapter 13 Standing Trustees, Chapter 3(D)(2)(b) (eff. Oct. 1, 2012).

[22] Fed. R. Bankr. P. 3002.1(b).

[23] Handbook for Chapter 13 Standing Trustees, Chapter 4(C)(1)(d) (eff. Oct. 1, 2012).

[24] 11 U.S.C. §1328(a).

[25] *Bodrick v. Chace Home Fin., Inc. (In re Bodrick)*, 498 B.R. 793, 800 (Bankr. N.D. Ohio 2013).

[26] *Id*. at 801.

[27] See, e.g., *In re Kessler*, 655 Fed. Appx. 242 (5th Cir. 2016), *In re Hoyt-Kieckhaben*, 546 B.R. 868 (Bankr. Colo. 2016), *Evans v. Stackhouse*, 2017 U.S. Dist. LEXIS 5495 (E.D. Va. 2017), *In re Perez*, 339 B.R. 385, 390 at n.4 (Bankr. S.D. Tx. 2006), *In re Tumblson*, 2016 Bankr. LEXIS 735 (E.D. Ok. 2016), *In re Formaneck*, 534 B.R. 29 (Bankr. D. Colo. 2015).

MEET THE NEW TRUSTEES - *continued from page 20*

How did you celebrate the evening you learned you were selected as Trustee?

Albeit very late, I was able to enjoy my favorite home cooked meal with my husband and two teenage boys my first night as Trustee.

How did you celebrate or commiserate the first week after being the Trustee?

I had a long quiet dinner with family at a local restaurant to celebrate my appointment.

What is your favorite word?

It's actually two, "No worries."

Case Decisions

Linda B. Gore
NACTT Treasurer,
Chapter 13 Trustee,
Gadsden, AL

1ST CIRCUIT

Andrade v. Essenfeld, 2017 Bankr. LEXIS 1917 (Bank. D. Mass. July 12, 2017) (Katz) The Bankruptcy Court dismissed one of the Debtor's counts of a complaint that requested relief under section 363(h) which allows the forced sale of property co-owned with a non-debtor. The Court ruled that the Debtor could not proceed under this section. The Court refused to read section 363(h) as incorporating section 363(b) which grants trustee's powers to a debtor in a chapter 13 case. Therefore, the Debtor could not amend to correct this lack of standing issue so that count of the Debtor's complaint was dismissed.

Santiago v. Scotiabank, 2017 Bankr. LEXIS 1770 (Bankr. D. P.R. June 27, 2017) (Tester)No formalities are required for an assignment of a contract to be valid in Puerto Rico so the fact that the assignment was done via a rubber stamp of the assignor's signature was irrelevant. The perfection of the security interest was well outside the preference period so section 547 is inapplicable to the transaction. An alleged violation of Truth in Lending laws was also not supported by the facts as the traded-in value was described as required by law and credit was properly not provided for since more was owed on the vehicle than it was worth.

Vazquez v. Oriental Bank, 2017 Bankr. LEXIS 1405 (Bankr. D. P.R. May 24, 2017) (Flores) The Bankruptcy Court ruled on Debtors' motion for summary judgment that the creditor had violated the automatic stay by sending monthly statements that demanded payment after the creditor received notice of the filing of the Debtors' bankruptcy petition. The Court examined the statements and found that most of the letters contained a demand for payment without any disclaimer and that was a violation of the stay that interfered with the Debtors' peace that the automatic stay is designed to protect. The violation of the stay was willful as the creditor had received notice of the filing of the petition before the letters were sent. The attempted defense by the Oriental Bank that a computer error caused the problem was determined not to be a valid defense as an error is not a defense regardless of whether the error was made by a human or a computer. A hearing will be held later to determine damages including attorney's fees.

United States Bank, N.A. v. Foremost Ins. Co., 2017 U.S. Dist. LEXIS 92065 (D. N.H. June 14, 2017) (DiClerico, Jr.) Mortgage holder Bank brought suit against Chapter 13 Debtor and homeowner insurance company and requested a declaratory judgment that the Debtor and the insurance company had breached a contract and a third-party beneficiary contract. The insurance company filed a motion to dismiss them from the suit. The Debtor had suffered fire damages and since the Debtor was in Chapter 13 the insurance company contacted the Debtor's attorney for a direction to pay. The Debtor's attorney asked that the money be sent to him and the chapter 13 case was voluntarily dismissed. The Court granted the insurance company's motion to dismiss the breach of contract claim as the mortgage holder was not listed as the loss payees on the insurance policy.

In re Ladona, 2017 Bankr. LEXIS 1530 (Bankr. D. N.H. June 2, 2017) (Harwood) The Debtor's Motion for Sanctions against the IRS for violation of her discharge order by setting off a state refund for a 2009 tax liability and demanding repayment of additional sums was denied. The Debtor's completed, confirmed plan provided to pay non-dischargeable 2009 taxes in full but did not provide for the payment of any interest associated with that debt. The interest was non-dischargeable so the IRS did not violate the discharge order by attempting to collect it from the Debtor after her plan was paid in full and she received a discharge.

In re Sjogren, 2017 Bankr. LEXIS 2004 (Bankr. D. Mass. July 12, 2017) (Katz) The Bankruptcy Court sustained the Trustee's disposable income objection to confirmation and required the Debtor to file an amended plan, amended schedules I and J, and an amended CMI (Current Monthly Income) calculation. The Debtor had left out his monthly police pension from his CMI calculation. The Debtor and the Trustee agree that the pension is not property of the estate but they disagree about whether the pension payments should be included in the CMI calculation. The Court pointed out that the Bankruptcy Code allows for only three types of payments to be excluded from CMI and those are social security payments, payments to victims of terrorism, and payments to victims of war crimes. The Court found that the income should be reported as income on the CMI calculation included income from all sources regardless of any exemptions

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and that the monthly police pension payments needed to be included.

2ND CIRCUIT

Barretta v. Wells Fargo Bank, N.A., 2017 U.S. App. LEXIS 9750 (2nd Cir. June 2, 2017) (Katzmann, Jacobs, Leval)(Not for Publications) The Second Circuit Appeals Court held that the Motion for Stay pending appeal was properly denied by the District Court as the *Rooker- Feldman* doctrine prevented the Bankruptcy Court from reviewing the state court foreclosure. The Debtor lost in state court before the bankruptcy was filed and was attempting to collaterally attack the state court judgment of foreclosure. The Court held that the interest of finality outweighs other considerations.

In re Wynn, 2017 Bankr. LEXIS 2113 (Bankr. W.D.N.Y. July 27, 2017) (Warren) Debtor's Chapter 13 case was converted to a Chapter 7 case as the Debtor was not acting in good faith to sell property that he agreed to sell in his confirmed chapter 13 plan. The Chapter 13 Trustee moved to dismiss the case due to unreasonable delay caused by Debtor not selling property in a timely manner. The Trustee believed that the delay was prejudicial to the creditors. The Court sent out a notice that it would also consider conversion of the case to a chapter 7 case as the Court has discretion to consider that option under 11 U.S.C.S. section 1307. After the hearing, the Court ruled that conversion was appropriate instead of dismissal to insure the creditors receive as much money as possible as conversion is in the best interest of the creditors and the estate. Furthermore, the Debtor could have the surplus equity if the property was sold for an appropriate value. The Court thought that the Chapter 7 Trustee could maximize the sales price but the Debtor would not get any exress money if the property was foreclosed upon.

In re Sharak, 2017 Bankr. LEXIS 1373 (Bankr. N.D.N.Y. May 18, 2017) (Davis) The Court found that the loan servicer for the Debtor's mortgage company was guilty of violating the discharge injunction. The Debtor defaulted on post-petition mortgage payments and did not oppose the mortgage company's motion for relief. The Court granted the Debtor's modification to surrender property and forgive missed payments. The Debtor completed the plan payments and received a discharge. The debtor's plan provided for the debt and his personal liability was discharged. The creditor's correspondence sent to the Debtor was not merely informative but demanded or coerced payments and lacked a disclaimer so it did violate the discharge injunction. A hearing was scheduled to determine damages.

In re Coughlin, 568 B.R. 461(Bankr. E.D.N.Y. June 15, 2017) (Trust) Combining two unrelated cases, the Court determined that debtors are not entitled to get a discharge if they fail to make mortgage payment provided to be paid directly as they are payments made under the plan. However, if a debtor has already received a discharge, the order will not be set aside even if creditor proves direct payments were not made as the discharge order would not have been obtained by fraud and the order was not issued due to a mistake. The Debtors in the second case were allowed to modify their plan and surrender their home as the modification was filed prior to the last payment being made and before the plan term expired and no party objected to the modification.

Beckford v. Bayview Loan Servicing, LLC, 2017 U.S. Dist. LEXIS 91287 (D. Conn. June 14, 2017) (Bolden) Bankruptcy Court decision was affirmed as the Court found that dismissal of the adversary proceeding was appropriate. The Second Circuit precedent established that the Debtor did not have standing to challenge the assignment of his mortgage in the complaint. He does not have standing to challenge agreements that he is not a party to and not an intended beneficiary of especially in light of fact that he does owe someone for the debt.

3RD CIRCUIT

In re Ross, 2017 U.S. App. LEXIS 10236 (3rd Cir. June 8, 2017) (Vanaskie) The Third Circuit Court of Appeals held that a Bankruptcy Court does have the authority to issue a filing injunction against a Debtor who has voluntarily dismissed his case as neither 11 U.S.C. section 1307(b) nor any other provision of the bankruptcy statute prevents such an order. However, this injunction that allowed the Debtor to only file bankruptcy with permission of the Bankruptcy Judge seemed overly broad and without further explanation from the Bankruptcy Judge should be set aside. Therefore, the Court reversed and remanded the case. The Third Circuit felt, without further explanation, that the Judge had abused his discretion with an injunction broader than requested by the creditor, less than what was given to the Debtor's wife and more than the normal 180 days that is supported by similar statutes.

Giacchi v. United States, 856 F.3d 244 (3rd Cir. 2017) (Roth) The Debtor got a Chapter 7 discharge in 2010. In 2012, the Debtor filed a Chapter 13 case and commenced an adversary proceeding seeking a determination that his taxes for 2000, 2001, and 2002 were discharged in his 2010 Chapter 7 case. The Court determined that the Internal Revenue Service (IRS) debt was not discharged as the documents were submitted years too

late after the IRS had already assessed the taxes. The Court ruled that these late filed documents did not count as "returns" and did not make the debt dischargeable.

Klaas V. Shovlin, 858 F.3d 820 (3rd Cir. 2017) (Krause) Debtors who completed their Chapter 13 plan after the expiration of the 60 month term due to an increase in the Chapter 13 Trustee's fee were still entitled to a discharge. The Trustee filed a motion to dismiss when the plan was not completed in the sixtieth month. When the Debtors were made aware of the shortfall they cured the deficiency within sixteen days of the filing of the motion to dismiss. Before the Trustee could withdraw her Motion to Dismiss, it was joined by a creditor who had purchased some debt. That same creditor also filed an adversary proceeding objecting to the Debtors' discharge and both matters were combined on appeal. The Third Circuit Court of Appeals determined that the Bankruptcy Court has discretion to give the Debtor a grace period to complete their plan and cure arrears. The Court reasoned that early on in a case a Debtor would be able to cure an arrearage without filing a modification and it was not logical to prevent a good paying debtor a short period of time to correct a shortfall.

In re Fayson, 2017 Bankr. LEXIS 1931 (Bankr. D. Del. July 13, 2017) (Shannon) The Debtor's original plan proposed to pay for a vehicle as fully secured as it was a 910 claim. After experiencing difficulties, the Debtor moved to modify her plan to surrender her vehicle and reclassify the deficiency as an unsecured claim. The Court ruled that even though the claim was for a purchase money debt securing a car incurred within 910 days of the filing of the petition, the modification would be granted if the Debtor was proposing the modification in good faith. The Bankruptcy Court set a further hearing to establish the good faith of the Debtor. The Court has discretion to reclassify any claim for a deficiency as unsecured.

Price v. Devos, 2017 Bankr. LEXIS 1748 (Bankr. E.D. Pa. June 23, 2017) (Frank) A Chapter 7 Debtor proved that she could not maintain a minimum stand of living for her and her dependents and repay her student loan debt so the Court determined the student loan debt to be dischargeable. The facts that the Debtor was only able to get part-time job, that full-time employees at her place of employment would not be retiring in the next seven years, the Debtor was facing a divorce, and that she is a single mother of three small children helped the Court to determine that it was likely her inability to make payments would continue for most of the repayment term. The Court determined that the current student loan contract repayment period of seven years was the applicable term to consider if the situation would improve and it did not matter that she would have money when kids were grown or that she qualified to further extend the term of note. The court stated that "certainty of hopelessness" was not the test.

4TH CIRCUIT

Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC, 859 F.3d 295 (4th Cir. 2017) (Duncan) The Debtors had an equity line of credit with Wells Fargo that they refinanced with PNC Bank. Wells Fargo notified PNC that they had frozen the Debtors' line of credit and provided a payoff. PNC paid off Wells Fargo and they received full payment but they failed to close the credit line. The Debtors borrowed additional sums from Wells Fargo on the credit line totaling over $300,000 and filed a chapter 13 bankruptcy case. Wells Fargo's attorney filed a notice of appearance. The attorney for PNC filed a motion for relief, of which Wells Fargo's attorney received notice, and the Court granted the motion, determined that PNC's deed of trust had priority over Wells Fargo's deed of trust and cancelled Wells Fargo's Deed of Trust. PNC foreclosed on the property and it was purchased by AMH Roman Two NC, LLC who is a bona fide good faith purchaser for value. Wells Fargo moved to set aside the two-year old order that cancelled its deed of trust. The Court ruled that the motion was not timely, that the delay was unreasonable, that failure to obtain an order cancelling the deed by adversary proceeding instead of by a motion for relief was not required, that Wells Fargo's attorney's notice constituted notice to Wells Fargo and that setting aside order was inappropriate due to harm that would be caused to a bona fide purchaser for value. The Court pointed out that Wells Fargo was repeatedly in the best place to protect its own interest and failed to do so.

Ekweani v. Thomas, 2017 U.S. Dist. LEXIS 98292 (D. Md June, 26, 2017) (Bredar) The District Court affirmed the Bankruptcy Court's order and ruled that the Court did not abuse it's discretion when it denied confirmation of the Debtor's plan and denied him leave to amend. The Debtor had originally proposed to pay nothing for zero months and proposed to refinance Wells Fargo's home mortgage after an Adversary proceeding determined the amount due. The second plan proposed to make payments but again proposed to pay Wells Fargo by refinancing after the amount due was determined in the adversary proceeding. The Court denied confirmation of the Debtor's plan without leave to amend, and ordered that the case may be dismissed for failure to prosecute within 14 days if not converted or voluntarily dismissed prior to that time. The Court ruled that the Debtor's plan was not filed in good faith especially in light of fact that that Debtor had filed

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six other cases in an attempt to delay foreclosure by Wells Fargo. The Court stated that the Debtor had violated the spirit of the bankruptcy legislation and the automatic stay.

Cooper v. Crow, 2017 U.S. Dist. Lexis 120626 (W.D.N.C. Aug. 1, 2017) (Reidinger) The District Court affirmed the Bankruptcy Court's order allowing the Debtor to amend her schedule of exemptions without the necessity of proving a change in circumstances. The Debtor had mistakenly failed to schedule her retirement accounts (IRA) on her schedules but was allowed to amend to list the retirement account and claim it as exempt. The Court pointed out that debtors may amend exemptions if the Debtor has a changed circumstance or if a mistake or error is made but only one reason must exist as both are not required.

In re Matusak, 2017 Bankr. LEXIS 1338 (Bankr. E.D.N.C. May 17, 2017) (Humrickhouse) The Court denied the Debtor's request for a directed verdict on a motion to modify filed by his ex-wife. The ex-wife had objected to confirmation asserting that the Debtor's income should be higher due to undisclosed anticipated increases. The Debtor countered that increases in his income could be accounted for in future modifications. Based on this representation, the ex-wife withdrew her objection to confirmation. The Court held that Debtor was now judicially estopped from claiming that his ex-wife could not modify the plan based on his increased income due to the prior representation that this was possible. The Court further found that the increase in the Debtor's income was significant and justified a modification.

In re Thaxton, 2017 Bankr. LEXIS 1460 (Bankr. S.D. W.Va. May 30, 2017) (Volk) Debtors were liable for post-petition interest on non-discharged debt that the Debtors proposed to pay in full through their plan but for which the payment or discharge of post-petition interest was not provided. The Court determined that the Internal Revenue Service could collect interest after the Debtors received their chapter 13 discharge.

Gillespie v. Gillespie, 2017 Bankr. LEXIS 2073 (Bankr. S.D. W.Va. July 24, 2017) (Volk) The Court rejected ex-wife's argument that money he was supposed to pay her after the sale of property as ordered by Family Court was a breach of fiduciary duty since the relationship was merely debtor/creditor one and not a fiduciary relationship. The Court determined that the child support arrears was a domestic support obligation even though the order used words "equitable distribution" since payments ceased when the Debtor's kids were no longer a dependent due to emancipation, marriage, reaching age of majority or death. The remainder of debt was determined to be dischargeable as there was no indication that the debt was in the nature of child support as the order clearly states that no spousal support was to be paid.

In re Green, 2017 Bankr. LEXIS 2104 (Bankr. E.D.N.C. July 27, 2017) (Humrickhouse) A chapter 13 case was dismissed because the Debtor was not eligible because his debts exceeded the statutory limits. The Court ruled that his ex-wife's debt was unliquidated as to any disputed amounts but should be included in the debt limit calculation as to any agreed upon amounts. The mortgage debt was included in debt limit calculation even though the Debtor had quitclaimed his interest to his ex-wife as he was still liable on debt. However, the mortgage debt was counted as unsecured debt since he no longer owned the property securing it. Furthermore, the Debtor was only liable on one of his debts if the original debt was in default. Since the original debt was not in default, the debt was contingent and was not included in the debt limit calculation. Nevertheless, the debtor's debt limit calculation exceeds the debt limit and the case was dismissed.

In re Ortiz-Peredo, 2017 Bankr. LEXIS 2003 (Bankr. W.D. Tex. July 18, 2017) (Gargotta) Consistent with the majority view, the Court held that exempted lawsuit proceeds (workmen's compensation) that the debtors received after the Chapter 13 Bankruptcy case was filed are still disposable income. The Court sustained the Trustee's objection to confirmation of a plan that proposed to pay only 23% to unsecured claimholder because it did not included the exempted lawsuit proceeds which the Court ruled was part of the Debtors' disposable income.

In re Banks, 2017 Bankr. LEXIS 2125 (Bankr. W.D. La. July 28, 2017) (Kolwe) Mortgage holder's motion for relief was denied as the Debtor was current on payments to the Chapter 13 Trustee although payments to the mortgage holder were behind. The Court ruled that the delinquency that is a result of the way payments are disbursed by the Trustee will not be imputed to the Debtor. Furthermore, the court disregarded the creditor's proof that no equity exists in the property and that the property was not necessary for the debtor to reorganize as the creditor could not raise that issue now since the issue was not raised at the confirmation hearing.

In re Hazlewood, 2017 Bankr. LEXIS 1301 (Bankr. N.D. Tex. May 12, 2017) (Mullin) The Court denied the Trustee's plan modification that offered proceeds of a pre-petition lawsuit to the unsecured claimholders. The confirmed plan did not provide for the lawsuit proceeds although the suit was disclosed. Therefore, the lawsuit property, vested back into the Debtor free and clear of the creditor's interests pursuant to 11 U.S.C.S

section 1327. The Court ruled that the Trustee could not force the Debtor to offer the lawsuit proceeds once they have vested in the Debtor.

21st Mortgage Corp. V. Glenn, 2017 U.S. Dist. LEXIS 104813 (N.D. Miss. July 7, 2017) (Aycock) When valuing a mobile home, the delivery and setup costs should not be included in the value. The Debtor and creditor agreed on value of mobile home and agreed on the setup and delivery costs but they did not agree on whether the setup and delivery costs should be included in the value. The District court affirmed the decision of the Bankruptcy Court, that agreed with all the reported bankruptcy decisions on the issue, which held that the costs of set up and delivery are not included in the value. The plain meaning rule has Courts consider the proposed disposition and use of the property and the price a merchant would charge for property of this kind considering the age and condition. Furthermore, common sense and equitable concerns would lead you to believe that setup and delivery costs should not be considered as the lender would only get a security interest in the mobile home when purchased even if they financed setup and delivery costs too.

In re Briggs, 2017 Bankr. LEXIS 1333 (Bankr. W.D. La.. May 15, 2017) (Norman) Even if the Chapter 13 Trustee and all creditors have not filed an objection to confirmation the Judge must still insure that the plan comports with the Bankruptcy Code and may raise his own issues. The Court refused to confirm the plan because the Debtor was claiming a rent expense when she did not have one since she owned her home and the mortgage expense was less than the claimed rent expense. The Court further noted that the plan was not confirmable because her phone expense was excessive. The Court pronounced that the debtors who are above-median may only deduct in the means test the lesser of the National Standard or the local standard limited by the amount actually spent by the debtor. Debtors must pay unsecured claimholders in full or pay all of their disposable income and Court may raise *sua sponte* disposable income issue under good faith provisions. This Court refused to allow objections to disposable income issues to be raised only by the Chapter 13 trustee or unsecured claimholders since unsecured claimholder participation is minimal and the chapter 13 trustee is new and has no way of knowing the Court's position on matters unless the Court raises them.

In re Shank, 2017 Bankr. LEXIS 1827 (Bankr. S.D. Tex. June 20, 2017) (Rodriguez)The Debtors' confirmed plan was *res judicata* as to mortgage holder and debtors are to receive a discharge because they completed all the plan payments. Parties may not relitigate issues that were or could have been determine at the confirmation hearing. An adversary proceeding to avoid lien was not necessary as the validity, priority and extent of the lien was not challenged. Instead, the plan did not void a lien but proposed to pay it in full. The mortgage holder's claim even though filed by the debtors is a valid claim. The creditor did receive notice of the plan and confirmation hearing and did not object. The Debtors are entitled to a discharge and, upon its entry, the mortgage is deemed fully paid and the mortgage holder must release the lien.

In re Harris-Nutall, 2017 Bankr. LEXIS 1549 (Bankr. N.D. Tex. June 9, 2017) (Houser) Co-counsel agreement is cancelled and fees reduced when it was determined that Debtor's counsel and special litigation counsel had improper fee sharing arrangement which was against public policy. Special Counsel admitted that a fee was being paid to the Debtor's attorney to encourage him to let them pursue certain claim on behalf of his clients. Fee for special litigation counsel was reduced by 25% as that is the amount he agreed to pay the Debtor's counsel and the fact that the fee was to be paid by third party and not taken from the estate did not alleviate fee sharing issue.

6TH CIRCUIT

In re Fierke, 567 B.R. 322 (Bankr. W.D. Mich. 2017) (Dales) The Bankruptcy Court denied the creditor's post-discharge motion to hold a creditor who had a security interest in his mobile home in contempt. He alleged damages of $435.00 in rental expense that he incurred due to creditor's delay and $500.00 in attorney's fees. The Debtor alleges he incurred these costs because he had the property sold and the closing was delayed due to the failure of the creditor to release the lien. The Court held that the release was delayed but could not find that the creditors conduct was vexatious, wanton or oppressive as is required before a party is found to be in contempt. The creditor did not have a pattern of acting inappropriately, so the relief requested was denied.

In re Baxter, 569 B.R.153 (Bankr. S.D.E.D. Mich. 2017) (Tucker) According to 11 U.S.C section 1329(a), a modification filed by a creditor is timely if it is filed before the last payment is made on the plan. The fact that the last payment was made before the Court heard the modification and objection thereto does not make the motion to modify untimely. The date the Court rules on the motion and objection is not important only when it is filed. The Court having found that the motion is timely, set a hearing on the modification.

Dempsey v. Fla. Department of Revenue, 2017 U.S. Dist. LEXIS 94685 (E.D. Tenn. June 20, 2017) (McDonough) The confirmed chapter 13 plan provided for

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the Miami Dade Child Support to be paid in full by the Chapter 13 trustee. At the time the plan was confirmed there was an issue as to whether the Miami Dade Child Support could collect the child support arrears after the plan was confirmed. The District Court and the Bankruptcy Court agreed that the confirmation order required the creditor discontinue collection efforts but that the plan was not specific enough about the issue to justify a finding of contempt.

In re Walter, 2017 Bankr. LEXIS 1471 (Bankr. W.D.N.D. Ohio June 2, 2017) (Whipple) The Court denied the Chapter 13 Trustee's motion to deny discharge. The Trustee alleged that the Debtor was not qualified because it had been less than four years since the Debtor had converted her chapter 13 case to a chapter 7 case and received a chapter 7 discharge so the Trustee argued that the Debtor was not qualified for a discharge. The Court ruled that when a Debtor converts from chapter 13 to chapter 7, the order converting the case is backdated to the date the chapter 13 case was filed. Since the original chapter 13 case was filed more than four years prior to the filing of the latest petition, the Debtor was qualified for a discharge in her new chapter 13 case.

Ball v. United Cumberland Bank, 2017 Bankr. LEXIS 1972 (Bankr. E.D. Kty July 17, 2017) (Schaaf) Debtor's Chapter 13 case was dismissed and later reinstated. While the case was dismissed, a creditor set off their claim against monies in her checking account. The Debtor brought an adversary proceeding against the creditor to obtain the return of the funds but the creditor's motion to dismiss the adversary proceeding was granted. The Court ruled that when a case is reinstated, that the automatic stay is not retroactively reinstated. While the case was dismissed, the Debtor was not protected by the automatic stay, the bankruptcy estate no longer existed and the funds in the checking account revested back into the Debtor so the setoff was not a violation of the stay. The Debtor could not cite a section of the code that would allow her to obtain the return of the funds so the adversary proceeding was dismissed.

In re Herrig, 2017 Bankr. LEXIS 1741 (Bankr. W.D.N.D. Ohio June 23, 2017) (Whipple) A secured creditor's motion to file a late filed claim was denied. The creditor did not allege that it did not received notice of the filing of the petition. At the confirmation hearing, the Debtor was made aware of the fact that the creditor had not filed a claim and he made the decision he was not filing a claim on the creditor's behalf and would deal with that issue at later time. The Court found that the proof of claim filing deadline was for all claims including secured claims. The Court ruled that the facts did not fall within one of the exceptions allowing her to enlarge the time to file a proof of claim so the motion to file a late claim was denied.

In re Munroe, 568 B.R. 631 (Bankr. S.D.E.D. Mich. June 1, 2017) (Tucker) Debtors who filed a chapter 13 case while their chapter 7 case was pending in order to get a stay to prevent his home from being sold was found to have violated the stay since he was attempting to exercise control over property of the estate. The Chapter 7 Trustee had not abandoned any property of the Chapter 7 case. The Chapter 13 case was void as it was filed in violation of the stay and was due to be dismissed. The Court agreed with majority of Courts who have held a Debtor should not have two cases pending at the same time.

In re Robinson, 2017 Bankr. LEXIS 1472 (Bankr. E.D.N.D. Ohio June 2, 2017) (Kendig) The City filed a priority tax claim for income taxes for the years 2012 and 2015. The 2012 were not entitled to priority status as the taxes fell due more than three years before the Debtors filed bankruptcy so the Debtors' objection to the priority status of that portion of the claim is sustained. Although the Debtors admit that the 2015 taxes are entitled to priority status, the Debtors also objected to the fines and fees associated with the 2015 taxes as the Debtors did not believe these charges were to be given priority status. The fact that the City has an ordinance to assess fees and fines does not make these charges entitled to priority status. The City did not produce any evidence that these charges were not deterrents and punishment so without this proof the priority status will not be allowed.

In re Brumley, 2017 Bankr. LEXIS 2124 (Bankr. W.D. Mich. July 24, 2017) (Dales) The Debtor's objection to her lenders notice of fees and expense and charges in the amounts totalling $90.00 for six inspections was sustained. The lender said that they were collecting fees based on non-bankruptcy law and their underlying agreement. The covenants in the documents allowed the inspections if the property was abandoned, vacant or in default but allowed collection of fees if the Secretary of HUD has authorized the fees. The Lender failed to identify any Secretary of HUD regulation that allowed the fee collection so they did not carry their burden of proof. The objections to their fees are sustained.

7TH CIRCUIT

In re Carr, 2017 Bankr. LEXIS 1976 (Bankr. E.D. Wis. July 17, 2017) (Kelley) The Court ruled that funds in the Chapter 13 Trustee's possession at the time a case is dismissed should be returned to the debtors. The Chapter 13 debtor's post-petition earnings vest in debtors when the case is dismissed unless otherwise

ordered by the Court. The Court agreed with the majority of other Courts who considered that issue that 11 U.S.C. section 1326 does not answer question on who should be paid money the trustee has on hand when a case is dismissed. However, 11 U.S.C.S. section 349 instructs that all parties should be in same position as they were in before the case was filed which requires the money to be refunded to the Debtor.

In re Manor, 2017 Bankr. LEXIS 1769 (Bankr. W.D. Wis. June 27, 2017) (Furay) The Court overruled the Debtor's objection to car lender's claim and did not allow the debtor to bifurcate the car lender's claim. The claim did not lose its purchase money claim status that is provided for 910 claims just because it also included taxes, insurance, a service contract and the negative equity from the debtor's trade-in as those items were all necessary to allow the Debtor to purchase a car.

In re Renner, 2017 Bankr. LEXIS 1760 (Bankr. S.D. Ind. June 26, 2017) (Carr) The Court granted the creditor's motion to dismiss a complaint alleging that the creditor had violated the stay when it foreclosed on the Debtor's home in state court. The Court ruled that the property was not property of the estate as the Debtors' plan was confirmed and the confirmation order vested the property back in the Debtor.

In re Etnire, 586 B.R. 80 (Bankr. C.D. Ill. 2017) A Domestic Support Obligation (DSO) can be owed to a governmental unit. The Debtor was overpaid child care benefits and owed money to the Illinois Department of Human Services. The Court ruled the debt owed to Illinois Department of Human Services is entitled to priority status as it did qualify as a DSO because the overpayment was in the nature of support for her two children.

In re Lucas, 2017 Bankr. Lexis 1663 (Bankr. C.D. Ill. June 16, 2017) (Gorman) The Court denied the Debtor's motion to convert his case from chapter 7 to chapter 13. The Court ruled that the Debtor does not have the absolute right to convert his case if the conversion is not in best interest of the creditors and would allow him to escape the consequences of conduct that might prevent him from obtaining a chapter 7 discharge. The Debtor failed to disclose he had a business, a Honda Civic , a trailer and that he made transfers to insiders and other creditors within two years of filing the petition. He also failed to disclose his income from that business, and monies in the bank. The Court held that this case was an extraordinary case, not typical for a honest debtor that the bankruptcy code was due to protect, so the motion to convert was denied as his bad faith made him ineligible for chapter 13 relief.

In re Gillen, 568 B.R. 74 (Bankr. C.D. Ill. 2017) (Perkins) The Trustee's Objection to Confirmation was overruled. The Trustee objected to the failure of debtor to propose to pay interest to unsecured claimholders. The plan proposed to pay unsecured claims in full but did not offer an interest factor and the Chapter 13 Trustee believes that an interest factor is required if the debtor is not submitting all of his disposable income to the plan. The Court ruled that only full payment is required and that the "effective date of plan" phrase in 11 U.S.C.S. section 1325(b)(1)(A) only refers to the time when the comparison of claims and amounts to be distributed under the plan on the claims is made to determine if they will be paid in full.

In re Haynes, 2017 Bankr. LEXIS 2036(Bankr. E.D.N.D. Ill. July 20, 2017) (Hollis) The Court denied the City of Chicago's Motion for Allowance of Administrative Expense for post-petition tickets. The City of Chicago did not prove by a preponderance of the evidence that it was entitled to allowance as an administrative expense. There was no evidence that either debtor deliberately violated the City's Parking laws or Red Light Laws. The Court noted that the City's debts would not be discharged since claims were post-petition but held that they did not qualify as an administrative expense as the City did not prove that the tickets were transactions with the estate and that the payment of the tickets benefited the estate.

8TH CIRCUIT

In re Reiser, 2017 Bankr. LEXIS 1781 (Bankr. D. Minn. June 26, 2017) (Ridgway) The Court denied the creditor's motion to dismiss the case and the creditor's administrative expense request because the confirmed plan is binding. The confirmed plan does not treat the creditor's claim as an administrative expense and since the confirmed plan is binding, the creditor request was denied

In re Tucker, 2017 Bankr. LEXIS 1782 (Bankr. N. D. Iowa June 26, 2017) (Collins) The Court held that a power company violated the co-debtor stay by continuing to garnish the co-debtor's wages after receiving notice of the bankruptcy filing. The creditor stopped the garnishment and returned the funds garnished. The debtor requested compensatory damages and attorney's fees but the creditor insists that the bankruptcy code does not provide for damages or remedies for violation for of the co-debtor stay. The Court recognized that the co-debtor stay is meant to protect the debtor. The co-debtor stay is in 11 U.S.C.S. section 1301 but it does not specifically mention that damages are available if violated. However, this Court found power under section 105 to sanction the creditor with damages and attorney's fees to carry out the purpose of the co-debtor stay provisions. The Court also found that the creditor

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violated the stay and separate damages were awarded.

Situm v. Coppess, 567 B.R. 893 (8th Cir. BAP May 16, 2017) The Court denied the creditor's motion for rehearing on the confirmation of the Debtor's plan. First, the Creditor thought that the Court should not have confirmed the plan as the debtor had not produced and filed tax records. The Court pointed out that the most recent year's tax records had been received by the Chapter 13 trustee and nothing further was required. Secondly, the creditor argued that confirmation was not appropriate as the Debtor's real property was undervalued but the Bankruptcy Court had found that the appraiser's testimony was credible and the creditor had not provided any evidence to support his position.

In re Cunningham, 2017 Bankr. LEXIS 2099 (Bankr. W.D. Ark. July 27, 2017) (Barry) Debtor's complaint alleging a violation of the stay and state court causes of action was dismissed and her bankruptcy case was dismissed because she was ineligible to be a debtor under chapter 13. She was ineligible because she did not receive credit counseling before she filed the petition and she did not prove she fit into one of the exceptions to the counseling requirement. The original petition stated that she was not required to get credit counseling due to a disability but a motion to waive the credit counseling requirement was never filed. Although the filing of the petition did stay the creditors, the Court found that retroactive annulment of the stay was appropriate since the debtor was ineligible for chapter 13 relief. Due to the dismissal of the bankruptcy case, the Court dismissed the remaining counts of her complaint relating to state court issues as he found he was without jurisdiction and abstained from hearing the issues.

Wojciechowski v. Wojciechowski, 568 B.R. 682 (8Th Cir. BAP June 15, 2017) (Nail) The Appeals Court found that the Bankruptcy Court was not clearly erroneous in confirming the Debtor's second amended plan and overruling the creditor's objection. The Court ruled that the Bankruptcy Court did not abuse its discretion if it denied a creditor's request for a hearing on good faith issues but the record was unclear whether such a request was made. The Appeals Court stated that the Bankruptcy Court's statement that he would find it hard to believe his Chapter 13 trustee would miss this many issues and if not raised by the trustee he would overrule them was a statement recognizing the good job normally done by the Chapter 13 trustee and not a statement that he was not considering the creditor's objection.

In re Clark, 2017 Bankr. LEXIS 1404 (Bankr. W.D. Mo. May 23, 2017) (Federman) The Court sustained the Chapter 13 trustee's objection to confirmation as the Debtor was an above-median income Debtor and had to propose a sixty month plan. The debtor had rental property and the Court ruled that she should use the gross rental income in calculating "current monthly income" which makes her income over-median. The Court ruled that regardless of what the Bankruptcy form says that the bankruptcy statute should be followed and gross income should always be used when calculating the current monthly income and the applicable commitment period.

9TH CIRCUIT

First Southern Nat'l Bank v. Sunnyslope Housing, 2017 U.S. App. LEXIS 11257 (9th Cir. June 23, 2017) (Hurwitz) Although valuation issue was for a company in a chapter 11 case, the Ninth Circuit Court of Appeals made clear that it did not matter if we were talking chapter 13 case or chapter 11 that the item of collateral should be valued based on a replacement value in light of its continued use. Therefore, the Bankruptcy Court did not err when it valued the rental property based on its continued use as low income housing and the order confirming the plan and valuation was affirmed.

Keller v. New Penn Financial, 568 B.R. 118 (9th Cir. BAP 2017) (Brand) Debtor sued a credit reporting agency alleging the creditor had violated the stay and the confirmation order by reporting on his credit report that his payments were overdue and delinquent. The Court ruled that the creditor could not be held in contempt for violating the confirmation order because that order did not mention credit reporting and if a party is to be held in contempt for violating an order it must be specific. The Court further found that the reporting to credit agency of overdue and delinquent payments is not a per se violation of the automatic stay provisions as the reporting is not solely for the purpose of coercing the Debtor into paying the debt. Perhaps the reporting is to share information so people in the credit industry can make credit granting decisions. The Bankruptcy Courts order denying contempt and sanctions was affirmed.

In re Simpson, 2017 Bankr. LEXIS 1387 (Bankr. N.D. Ca. May 19, 2017) (Jaroslovsky) A lawyer who stepped in to clean up the mess of another attorney was due $ 954.50 in fees that the Court said was well-earned. The lawyer was concerned since the last payment would soon fall due and the trustee would not have enough to pay her fee. She requested that she be allowed to collect the fee directly from the debtor after he received his discharge. The Court was concerned about the collection of fees after a discharge and suggested that the Debtor pay for a couple of more months to pay the fees of the counsel through the plan. He recognized that some courts considered attorney's fees as post-

petition claims that were not discharge but he felt the safer approach was to extend the case a few months. The Court mentioned in dicta that he disagreed with cases that did not allow Debtor's attorney to collect fees directly when cases were dismissed as most attorneys have a contract for such fees and the debtor has not received a discharge as in this case.

In re Alonso, 2017 Bankr. LEXIS 1204 (Bankr. D. Idaho May 2, 2017) (Pappas) Debtor and Trustee filed dueling modifications concerning tax refunds that were not paid to the trustee per the plan. The confirmed plan offered net tax refunds. The Court determined that net tax refunds included the Earned Income Credit (EIC) and ACTC (Additional Child Tax Credit) payments although both of those items are exempt. Under facts of this case, the Court refused to allow the debtor to modify her plan to treat EIC and ACTC payments different from the confirmed plan. Therefore, the Court denied the debtor's modification. The Trustee's modification was granted only to increase payments by $108.00 as that is the amount the Trustee could prove the increase should be with her evidence. The Court encouraged the Debtor to file a new modification and recommend the term be extended from 55 to 60 months and the monies paid during that five month period could be counted toward what is owed for the tax refund and he instructed the Debtor that any amounts from next year's refund that she would be allowed to keep could be used to pay this year's tax shortfall.

10TH CIRCUIT

Kansas v. Swafford, 2017 Bankr. LEXIS 1344 (Bankr. D. Kan. May 16, 2017) (Nugent) (Not for publication) A state labor agency's motion for summary judgment was denied in their complaint to determine a debt was non-dischargeable in the Debtor's chapter 13 case. The agency did not prove that statements made by the Debtor to obtain overpayments were statements that she knew were false when she made them and that the statements were made with intent to deceive. The issues must be resolved at a trial so the motion for summary judgment was denied.

Southwind Bank v. Denning, 2017 Bankr. LEXIS 1520 (Bankr. D. Kan. June 6, 2017) (Nugent) The Bankruptcy Court denied the Debtor's motion for summary judgment concerning the bank's adversary proceeding to declare his debt non-dischargeable. The creditor loaned the money to the Debtor to convert a barn into a home. For many months the Debtor submitted loan draw with statement of materials to be purchased. After the Debtor had borrowed $194,786.25, the bank inspected the property and decided he would no longer be able to borrow additional sums. The bank consolidated the loan draws into one note with one payment. The Debtor claims that the old notes were satisfied and the bank could no longer allege he fraudulently obtained the funds since the notes were consolidated and the old debts were satisfied. The Court disagreed and held that the new note evidenced the same debt and that the Court may look to original transaction to determine if money was obtained by fraud.

Peel v. Cooney, 2017 Bankr. LEXIS 1952 (Bankr. D. Kan. July 13, 2017) (Somers) The creditor filed objections to discharge of claims and the Debtor files a motion to dismiss the complaints due to late filed complaints. The Court found that the creditor's complaint objecting to discharge under section 1328(a)(2) for false pretenses or fraud was not timely even though attorney tried to file it before midnight the night it was due and had technical difficulties and did not get it filed until the Clerk assisted him the next day. However, the objections to discharge under 1328(a)(4) alleging willful and malicious acts causing personal injury were timely filed as the deadline did not apply to that type of discharge objection complaint.

In re Purcell, 2017 Bankr. LEXIS 2074 (Bankr. D. Kan. July 19, 2017) (Karlin) The Court denied the Trustee's Motion for Turnover funds that the debtor was due to receive as a settlement in a Pelvic Mesh case and directed the Clerk to re-close the case. The Court found that the settlement proceeds were not property of the estate. The cause of action arose, under Kansas law, when the debtor discovered the device may cause injury to her and that did not occur until after the case was closed.

Ridley v. M & T Bank, 2017 Bankr. LEXIS 1476 (Bankr. E.D. Okla. May 31, 2017) (Cornish) Although the Court did not find that the Debtors met their burden of proving the mortgage creditor violated the stay, the Court found that the mortgage creditor violated the discharge order when the creditor threatened the Debtors, reported them in default and added unexplained charges after they had completed their plan, cured the default, and obtained a discharge. The Creditor was held in contempt and Debtors were awarded $620.00 in lost wages, punitive damages of $12,000.00 and attorney's fees and cost to be determined later. The creditor was further ordered to correct their records concerning this Debtors' debt.

11TH CIRCUIT

Pollitzer v. Gebhardt, 860 F.3d 1334 (11th Cir. 2017) (Parker) The Court found that 707(b) applied to cases converted from Chapter 13 to a Chapter 7. The Court ruled that the debtor's chapter 7 case was properly

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dismissed because to allow the debtor to proceed with a chapter 7 case would be an abuse of the bankruptcy system since the debtor's income exceeded the means test by a large sum and the debtor could afford a large dividend to unsecured claimholders. The Court interpreted the abuse dismissal provision to include converted case as a converted case is still a case filed under chapter 7. Congress would have specifically provided otherwise if a converted cases were excluded and they would have removed Bankruptcy Rule 1019(2)(A) that gives a time period to file a 707(b) request in a converted case.

Narcisi v. Aamodt, 2017 U.S. App. LEXIS 13493 (11th Cir. July 26, 2017) (Tjoflat, Pryor, Jordan) (Unpublished) In a chapter 7 case, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court and Bankruptcy Courts and found that creditor alleging that a debt should not be discharged due to fraud during a fiduciary relationship under 11 U.S.C.S. section 523(a)(4) had not carried his burden of proof. The complainant filed for summary judgment and the Court denied the motion and *sua sponte* entered an order of summary judgment for the debtor. The debtor was an auctioneer and the Court said that the creditor had not proved a fiduciary relationship existed between the debtor and the creditor. Furthermore, the Court did not abuse it discretion when it refused to allow an embezzlement claim that did not relate back to be added to the complaint because it was past the sixty days after first date set for the creditor's meeting deadline to object to the debtor's discharge. The Court further found that the Bankruptcy Court did not err when entering summary judgment in favor of the debtor without a request. The one page agreement between the parties did not evidence a fiduciary agreement and even if such a relationship existed there is no evidence he breached it or that he committed larceny. The summary judgment without notice was appropriate because the plaintiffs knew they had to produce all their evidence on the summary judgment motion.

Edwards v. Colin, 2017 U.S. Dist. LEXIS 68834 (D.M.D. Ala. May 5, 2017) (Starrett) At suggestion of mediator, a divorcing husband and wife agreed to a provision for the debtor to pay his soon to be ex-wife money. In the agreement the money was labeled as a property settlement but it was clear that due to disparagement in income (wife never worked during marriage) that the money was actually support payments. The Court pointed out that the Eleventh Circuit has determined that a property settlement can be in the nature of support and non-dischargeable. The District Court found that this money due the ex-wife is for support so the Court reversed the Bankruptcy Court.

In re Solomon, 2017 Bankr. LEXIS 1596 (Bankr. M.D. Ga. June 12, 2017) (Laney III) It is undisputed that the creditor filed a late claim. The Court sustained the debtor's objection to a late filed claim even though the creditor and debtor had entered into a consent order that provided for the claim of the creditor to be treated as an unsecured claim. The consent order did not excuse or even address the timely filing requirement and the Court was without power to enlarge the time since this scenario did not fall within one of the exceptions to the bar date rule. ◉

WE WERE SLEEPLESS IN SEATTLE - *continued from page 10*

about the Fair Credit Report Act if considering litigation; and finally discharge issues. The afternoon concluded with a public meeting of the Chapter 13 Committee of ABI Commission on Consumer Bankruptcy. If you missed this, that was a mistake. The testimony given by so many bankruptcy professionals was overwhelming to say the least. By far the most compelling testimony was that given by Debra Miller, Chapter 13 Trustee in South Bend, Indiana. The event ended with the Farewell Reception where we shared food, drink and a slide show of photos from the entire event. The photos reminded us that the seminar was a success.

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