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BBA THE BANKRUPTCY BAR ASSOCIATION Southern District of Florida

# Who's the Boss? Dealing with Encumbered Real Property Insurance Proceeds in a Chapter 13

By Ariel Sagre

In the sit-com Who's the Boss? that aired between 1984-1992, retired baseball player Tony Micelli and his daughter, move-in with Connecticut advertising executive Angela Bower and her son so that Tony can work as the live-in housekeeper. Comedy ensues around the fact that Angela is Taony's boss yet Tony can't help but offer advice to Angela regarding parenting, relationships, and family issues. Despite all of Tony's solicited, and unsolicited recommendations, it was clear that Angela had the final say. Much the same way, a debtor in a chapter 13 case receiving insurance proceeds resulting from damage to real property might believe the funds are to be held and spent solely at the debtor's discretion. But this is not so if the subject real property is encumbered by a validly perfected mortgage with appropriate language giving that right to the mortgagee. In that case and absent agreement by the parties, the mortgagee has the final word.

ABOUT THE AUTHOR
**Ariel Sagre** founded Sagre Law Firm, P.A. in 2007. He is a bankruptcy and litigation attorney representing consumer debtors, business debtors, and creditors in chapters 7, 11, and 13. He currently serves as a member of the Pro Bono Committee of the Bankruptcy Court of the Southern District of Florida. He can be reached at *law@sagrelawfirm.com.*

**The plot thickens regarding non-homestead real property.**

Unless lender and borrower agree in writing, the Florida Fannie Mae form mortgage expressly states that any "insurance proceeds shall be applied to restoration or repair of the subject real property, if the restoration or repair is economically feasible and lender's security is not lessened."[1] Moreover, the lender has the right to disburse insurance proceeds to be used for the restoration of the property, not the debtor, and can withhold disbursement subject to satisfactory inspection of work performed.[2] What's more, if the debtor contracted a public adjuster without the lender's approval, the debtor could be compelled to pay the adjuster

*Continued on page 7*

# Student Loan Debt is Destroying the Foundations of our Capitalist System and the Bankruptcy Code Should Be Amended to Address the Problem

*Tina Childers*

*Jeff Childers*

By Tina Childers and Jeff Childers

ABOUT THE AUTHORS
**Jeff Childers, Esq.** is the president and founder of ChildersLaw, LLC. **Tina Childers, Esq.** is the newest associate at ChildersLaw, LLC. The firm practices business law, commercial litigation, commercial and individual bankruptcy, real estate law, asset planning, and fraudulent transfer defense. They can be reached at *jchilders@smartbizlaw.com* and *cchilders@smartbizlaw.com.*

## A. The Problem

A substantial cohort of Millennials surveyed express a preference for socialism over capitalism.[1] One reason—perhaps the main reason—they have lost confidence in capitalism is because of student loan debt. "'[U]nlike any other type of debt, there is *no statute of limitations* [on the collection of student loans]. The government can pursue borrowers to the grave.'"[2] As such, these potential productive members of society have become debt slaves:[3] unable to marry; buy a house; purchase a car; start a family; become independent from their parents; take any career risks; or be able to amass savings to retire.[4] Socialism's offer of "free college" must appear to them to be the answer that capitalism has failed to provide. Government's well-intended intervention in the student loan market has created this distortion, just as it did in the mortgage market. We face two choices: (1) give students, whose degrees have failed to live up to the promise, a way out through bankruptcy—even if they must make a good-faith attempt to pay the loan back within five years in chapter 13—or; (2) possibly face a revolution by younger citizens who vote to

*Continued on page 9*

## TABLE OF CONTENTS

### Features



### Messages



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## MESSAGE FROM THE PRESIDENT

**By Zach B. Shelomith**

Dear Readers,

On behalf of the Board of Directors of the Bankruptcy Bar Association of the Southern District of Florida, I am pleased to present you with this year's BBA Journal. Thank you to everyone involved in its production, especially its Editor-in-Chief, **Ashley Dillman Bruce**.

The BBA has had a very busy and exciting year so far, and we are looking forward to our premier event — the **35th Annual Weekend Retreat**, which will take **May 10-12, 2019**, at the **Ocean Reef Club** in **Key Largo, Florida**.

I encourage you to join us at the Retreat. Five distinguished Bankruptcy Judges from across the United States will serve as group leaders to discuss a broad array of hypotheticals designed to generate thoughtful discussion of relevant and timely issues related to our insolvency practices. Our Sunday morning program will feature **Susan M. Carnicero**, a former security specialist with the Central Intelligence Agency, who will present an interactive discussion on detecting lies and deception, which is an extremely useful tool not only for our practices, but in our everyday lives.

Thanks to generous sponsorships, the BBA has continued to provide extensive and diverse programming throughout all three counties, including pro bono clinics and seminars, Brown Bag CLE lunch programs, happy hours and various other educational and social events. We also continue to host other major events throughout the year, including the annual View From the Bench Seminar and View From the Bench Judge's Dinner, courthouse staff appreciation lunches, and our annual Holiday Party. The BBA has also provided valuable opportunities for its members to interact with other voluntary bar associations in South Florida, having co-sponsored happy hours and other programming throughout the year.

We are extremely proud of the diversity of programming, networking and educational opportunities that we were able to provide to our members this year. Our Brown Bag CLE lunch programs have been particularly informative this year. I encourage you to take advantage of these opportunities, and provide feedback on how we can improve.

I would also like to thank all of our Bankruptcy Judges, led by **Chief Judge Laurel M. Isicoff**, for their continued enthusiastic support of the BBA. We are extremely fortunate to have judges who care so much about our community, the bankruptcy system and the BBA. Judge Isicoff has been a tireless advocate for pro bono services in our legal community, and I am very proud of the efforts made by the BBA to advance these pro bono initiatives.

On behalf of the BBA, I would also like to recognize **Judge Raymond B. Ray**, who is retiring effective September 30, 2019, after more than 25 years of dedicated service as a bankruptcy judge in our district. We are very thankful to Judge Ray for all of his years of service and we wish him the best in his retirement.

In closing, I want to thank everyone who has contributed to the BBA's success over the past year, including the BBA's Executive Director, **Jessica Barbarosh** and the BBA's Officers, Directors, and Committee Chairs, for their tireless work to continue to make the BBA a world-class association. It has been my honor to serve as your President and I thank you for the opportunity.

Sincerely,
Zach B. Shelomith, President

# How to Avoid Simultaneous Litigation in Two Courts: Are You Doing Your Clients a Favor?

**By Judge Sandy Karlan**

ABOUT THE AUTHOR

**Judge Sandy Karlan** is currently a certified mediator and an arbitrator listed with the American Arbitration Association, with expertise in family, commercial and bankruptcy matters. Before serving on the 11th Judicial Circuit Court for 20 years, she was in private practice with a focus on family, bankruptcy and commercial cases. She also continues to serve as a Senior Judge throughout Florida. She currently writes commentary for the Matthew Bender Florida Family Law Commentator on bankruptcy related matters.
She can be reached at *KarlanResolutions@gmail.com*.

## Concurrent Jurisdiction to Determine Dischargeability of Domestic Support Obligations

The State Court has concurrent jurisdiction with the Bankruptcy Court to decide whether a debt constitutes a nondischargeable domestic support obligatiaon ("DSO") under § 523(a)(5) of the Bankruptcy Code. This critical piece of information can save you and your clients unnecessary litigation and frustration. Bankruptcy courts do not appreciate a filing done merely to avoid a marital settlement agreement ("MSA"), final judgment obligation, or DSO and will dismiss a petition for bad faith under proper circumstances.[1]

This interaction between the Bankruptcy Court and the State Court can be exemplified in a case study of *In re Mark Zhuk*, Case Number 17-12235-BKC-RAM, a relentless ongoing Chapter 13 proceeding, pursued by the debtor-former husband.

## Once Upon A Time

Dr. and Ms. Zhuk entered into an MSA in which the Debtor-former husband, Dr. Zhuk, (the "FH") was to pay his former wife, Ms. Zhuk, (the "FW") $520,000 in payments over time as alimony and child support. The FH did not pay the 4th installment. The FW filed for contempt and in response the FH filed a Chapter 7 bankruptcy petition the day before the scheduled contempt hearing, but thereafter converted the case to Chapter 13. Nevertheless, the State Court conducted a full day contempt hearing (one of the attorneys advised the State Court that the automatic stay did not apply to a contempt hearing) and the State Court found the FH in contempt.

On October 27, 2017, the Bankruptcy Court issued a detailed Abstention Order and Order of Dismissal of the FH's bankruptcy (the "October Opinion"),[2] where the Bankruptcy Court decided that the contempt order entered by the State Court was void because the contempt hearing was conducted while the automatic stay was in effect, even though the Final Judgment was entered after the dismissal of the Chapter 7 and before the refiled Chapter 13 Petition. The Bankruptcy Court also ruled that it would abstain from hearing whether the debt under the MSA was nondischargeable and returned the case to the State Court to make that determination. Case law required the State Court to follow "federal family law" to make this determination (although there is no actual "federal family law").[3]

## The Contempt Hearing and Alimony

The State Court conducted the hearing and after considering of the applicable case law, including various factors, and issued a detailed 13-page opinion thereon.[4] Factors that the courts review to determine whether an award is alimony or support include the following[5]:

1. Any disparity in the parties earning capacity
2. Parties' relative business or employment opportunities
3. Parties' physical condition
4. Parties' education background

*Continued on page 14*

MEET THE JUDGES

35th Annual Weekend Retreat

## Hon. Scott C. Clarkson

**Hon. Scott C. Clarkson** was appointed as a United States Bankruptcy Judge for the Central District of California in January 2011. He received his undergraduate degree in Political Science from Indiana University, Bloomington, Indiana, and his J.D. degree from George Mason School of Law, Arlington, Virginia.

**...Judge Clarkson may be the leading American expert on the bankruptcy ...of the famed Dutch Artist Rembrandt van Rijn (1606 -1669)...**

Prior to his appointment, Judge Clarkson was a legislative assistant to United States Congressman Harold L. Volkmer (D-Mo. 1977-1997) in Washington, D.C., assigned to the United States House of Representatives Judiciary Committee, where he was a direct observer of, and participant in, the creation of the 1978 Bankruptcy Code. Judge Clarkson later clerked for the Honorable William L. Hungate, United States District Judge, Eastern District of Missouri. He served on the first Board of Advisors of the Norton Annual Survey of Bankruptcy Law (1979), and was appointed as a Chapter 7 Panel Trustee by the Office of U.S. Trustee for the District of Columbia and Eastern District of Virginia (now a part of UST Region 4).

Following his move to California, Judge Clarkson practiced bankruptcy law and bankruptcy litigation for more than 20 years in Los Angeles, and served as chair of the Los Angeles County Bar Association's Commercial Law and Bankruptcy Section from 2008 to 2009.

Judge Clarkson is also an established documentary photographer. As a photojournalist, he has documented events throughout the United States, Southeast and Central Asia and South America for over 30 years. Some of his work may be seen at www.scottclarksonphotography.com. His book of photographs, "Windows to Vietnam – A Journey in Pictures & Verse", was published in 2007 and is now in its second edition. The book was designated as "Editors Choice" by the *United States Military Academy (West Point) Association of Graduates Alumni Magazine* in 2008. Judge Clarkson has traveled to and photographed during the Afghanistan conflict, Pakistan and Kashmir during 2008 - 2009, and, in 2014, in Jordan and Israel, including the West Bank. He has also photographed and written of events in and about several Syrian refugee camps. He uses a Leica M7 and Hasselblad 500 C/M for film, and Leica M8 and M9 for digital images.

In an area of unusual esoterica, Judge Clarkson may be the leading American expert on the bankruptcy background and proceedings of the famed Dutch Artist Rembrandt van Rijn (1606 -1669), occurring in The Dutch Republic in 1656. Initially sponsored by the Denver Art Museum, Judge Clarkson has delivered his art history lecture entitled "Rembrandt – the Bankrupt Printmaker" to various art and law audiences in Denver, CO., San Francisco, New York City, Portland, OR, Orange County, CA, Los Angeles and is scheduled for Cincinnati, OH, later this year. His lecture is described in detail within the February 2019 edition of the American Bankruptcy Institute Journal.

Some of Judge Clarkson's notable Chapter 11 cases include *In re Am. Suzuki Motor Corp.,* 494 B.R. 466 (Bankr.C.D.Cal.2013), which dealt primarily with the issue of the preemption of the Florida Dealer Statutes by 11 U.S.C. § 365. A Miami-based automobile dealership was seeking millions of dollars in treble damages based on the Florida Motor Vehicle Licenses Act; however, the Court ruled the remedies sought ran counter to the federal policy of bankruptcy reorganization and thus was preempted by the Bankruptcy Code. Judge Clarkson concluded that the dealership was only entitled to compensation for rejection damages based on actual lost profits. Other significant cases include *In re Am. Spectrum Realty*, Inc., 540 B.R. 730, 737 (Bankr. C.D. Cal. 2015), *In Re Pacific Monarch Resorts, Inc.* (second largest timeshare company in the world), and *In re Air Force Village West, Inc.* ■

## Hon. Catherine J. Furay

**Hon. Catherine J. Furay** was appointed to the United Sates Bankruptcy Court for the Western District of Wisconsin in January 2013 and currently serves as Chief Judge. Judge Furay received both her undergraduate degree (double major in psychology and sociology) and master's degree (psychology) from University of Wisconsin-Eau Claire, and her juris doctorate degree from University of Wisconsin-Madison. She is an avid golfer and enjoys biking and kayaking. She is currently one of three female judges (out of five) on the bankruptcy bench in Wisconsin.

Judge Furay also enjoys a passion for travel and photography. Recently, she was fortunate enough to travel to Africa and spend time with the National Geographic film crew where they toured the vast Sabi Sands reserve in South Africa and observed and photographed a rare litter of 8-week old leopards, whose solid black coats transform into spots as they mature.

Judge Furay currently serves as the Editor and Chief for the Ginsberg & Martin on Bankruptcy desk book treatise, which was founded by her colleagues, Robert Martin and Robert Ginsberg. They are coming out with a new edition next year and she encourages all of our members to let her know if we have any helpful suggestions to help improve the multi-volume reference for current practitioners in the areas of business and consumer bankruptcy law.

This past year, Judge Furay authored an opinion in *In re Cranberry Growers Coop.*, 592 B.R. 325 (Bankr.W.D.Wis.2018), in which she was one of the first judges to disallow the additional 1% UST fee, which resulted in Hon. Ronald B. King, Chief Judge of the Western District of Texas, to reconsider his decision in the *Buffets* bankruptcy case (*In re Buffets, LLC*, 16-50557-RBK, 2019 WL 518318, at *1 (Bankr. W.D. Tex. Feb. 8, 2019)). In the *Cranberry Growers* case, Judge Furay found the new UST fees to be excessive and ruled that certain payments made by the debtor to its lender were not "disbursements" for purposes of calculating the UST quarterly fees, as counting

MEET THE JUDGES

35th Annual Weekend Retreat

such payments disbursements would, in effect, represent "a fee on a fee" and unfairly allowed the UST to "double dip". Here, the approximate $100,000 swing in additional fees would have adversely impacted the feasibility of the debtor's plan and its distribution to creditors.

**Judge Furay also enjoys a passion for travel and photography.**

In another notable case, *In re Modeen*, 586 B.R. 298 (Bankr.W.D.Wis.2018), Judge Furay granted a Chapter 7 debtor a partial discharge of her student loan debt which had previously been consolidated and refinanced with a private lender. While Judge Furay found that while the debtor failed to demonstrate an undue hardship for a full discharge under the test set forth in *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395 (2d Cir. 1987), she nonetheless determined that the debtor lacked a present ability to pay the full amounts owed and could not meet the minimum standard of living, and thus imposed an income-based repayment plan, adjusted annually. The partial discharge of the debtor's student loan payments gave the debtor an opportunity to satisfy the portion of the student loan she could, in fact, repay. ■

## Hon. Robert E. Grossman

**Hon. Robert E. Grossman** was appointed to the United States Bankruptcy Court for the Eastern District of New York in April 2008 and currently serves as a visiting judge in the Southern District of New York. Judge Grossman grew up in the Bronx, New York, and received his undergraduate degree from Rider University and his juris doctorate degree from Brooklyn Law School in 1973. Judge Grossman is a life-long Yankees fan and was named after their 1947 MVP Robert (Bob) Elliot.

Prior to his appointment, Judge Grossman worked in the Division of Enforcement with the Securities and Exchange Commission where he worked with the special prosecutor's office in Washington, D.C. After leaving DC, he spent some time in Seattle where he founded and served as general counsel to a large financial services company that focused on acquiring and operating distressed assets, such as oil and gas. In 1986, Judge Grossman returned to New York and resumed his law practice in the areas of corporate law, business reorganization and litigation. Judge Grossman was previously a partner at Duane Morris and the chair of the restructuring practice group at Arent Fox, directing almost 20 professionals in matters across the United States and in Europe.

Judge Grossman was recently appointed by Chief Judge Roberts to the Bankruptcy Administration Committee of the Judicial Conference which oversees administration of the U.S. bankruptcy courts and judges from around the country and currently serves on the Second Circuit Bankruptcy Committee. He was also elected to the Board of Governors of the National Conference of Bankruptcy Judges. Judge Grossman is also a past Chair of the International Secured Transactions and Insolvency Committee of the American Bar Association, Section of International Law and is a frequent speaker both in the United States and Europe. In addition, Judge Grossman was the past president of the Brooklyn Law School Alumni Association.

**Judge Grossman is a life-long Yankees fan...**

While Judge Grossman mostly sits in the Eastern District of New York, he is also a visiting Judge in the Southern District. Following Hon. James Peck's retirement from the bench after the *Lehman Brothers* bankruptcy, Judge Grossman presided over the involuntary bankruptcy of *In re Signature Apparel Group LLC* involving "reality star" Christopher Laurita from the Real Housewives of New Jersey, as well as an apparel company (Rocaware) owned by Jay Z and Beyoncé. One of his significant decisions from that case, *In re Signature Apparel Group LLC*, 577 B.R. 54 (Bankr.S.D.N.Y.2017), dealt with, among other things, the unlawful transfer of a valuable licensing agreement during the gap period between the filing of the involuntary petition and entry of order for relief. The Court found that Lauritas and another defendant company jointly and severally liable for fraud and negligent misrepresentation, and further found Lauritas liable for his breach of fiduciary duties to the debtor.

Another notable opinion authored by Judge Grossman in *In re MCO Wash, Inc.*, 555 B.R. 159 (Bankr.E.D.N.Y.2016) held that in a Chapter 7 case that had been converted from one under Chapter 11, carve-out from collateral of secured creditor had to be distributed in accordance with distributive priority scheme of Chapter 7, and had to be used to pay Chapter 11 administrative expenses first before any payment was made to general unsecured creditors. The Court found that the services of the Chapter 7 trustee and trustee's professionals, which generated meaningful funds for distribution to creditors, were clearly "necessary" and supported award of reasonable compensation. ■

## Hon. Kevin R. Huennekens

**Hon. Kevin R. Huennekens** was appointed to the United States Bankruptcy Court for the Eastern District of Virginia in September 2006. Judge Huennekens grew up in Los Angeles, California and moved to Virginia during high school, where he later received his undergraduate degree from the College of William and Mary in 1975 and his juris doctor degree from the Marshall-Wythe School of Law at the College of William and Mary in 1978, where he was a member of the Order of the Coif and the Law Review. Like most of us native Floridians, Judge Huennekens enjoys living near the water by Chesapeake Bay, which is a short commute from Richmond, VA. As a native Angeleno, Judge Huennekens is an avid

*Continued on page 6*

MEET THE JUDGES

35th Annual Weekend Retreat

## Hon. Kevin R. Huennekens

*Continued from page 5*

LA Dodgers fan (and also a Green Bay Packers fan!).

Prior to his appointment, Judge Huennekens was a partner with the firm of Kutak Rock LLP. Judge Huennekens served as a Panel Trustee for the U.S. Bankruptcy Court for the Eastern District of Virginia (1988-2006). He also successfully argued the case of *Patterson v. Shumate*, 504 U.S. 753, 92 S.Ct. 885 (1992) before the U.S. Supreme Court.

**...Judge Huennekens is an avid L.A Dodgers fan...**

Judge Huennekens is a Fellow of the American College of Bankruptcy, a member of the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, was recognized in *Who's Who Legal USA: Insolvency & Restructuring* and *The International Who's Who of Insolvency and Restructuring* in 2006, and was listed in the Best Lawyers in America from 1995 to 2006. He is a planning committee member of the *Annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice*. He is the Co-Editor of the Virginia CLE Publication, *Bankruptcy Practice in Virginia* (2017). Judge Huennekens served as Chair of the Advisory Committee on Executory Contracts and Leases of the ABI Commission to Study the Reform of Chapter 11. He is on both the Education and Finance Committees for the National Conference of Bankruptcy Judges.

Over the recent years, Judge Huennekens has authored several intriguing opinions, such as *In re Health Diagnostic Lab., Inc.*, 578 B.R. 552 (Bankr.E.D.Va.2017), in which he held that a debtor's S corporation status was not "property" under federal tax law, and therefore could not be considered "property" of the bankruptcy estate for purposes of 11 U.S.C. §§ 544 and 548(a). One of the central issues was the loss of tax refunds as a result of the board of director's election to revoke the S corporation election on the eve of bankruptcy which trapped tax liabilities within the debtor rather than passing through to the shareholders. The Chapter 11 liquidating trustee attempted to argue that the debtor's "property" interest was lost without consideration to the debtor. This case departs from other circuits which hold that an S corporation status constitutes a property right in bankruptcy.

In another case of first impression involving the same debtor, *In re Health Diagnostic Lab.*, Inc., 588 B.R. 154 (Bankr.E.D.Va.2018), Judge Huennekens ruled that the rarely invoked federal priority statute (31 U.S.C § 3713) was inapplicable in bankruptcy and does not trump the Bankruptcy Code's statutory priority scheme. This case involved a multi-million dollar judgment under the False Claims Act by the United States obtained during the pendency of the bankruptcy case. ■

## Hon. Michael E. Romero

**Hon. Michael E. Romero** was appointed to the United States Bankruptcy Court for the District of Colorado in 2003, and was appointed as Chief Judge of that Court in 2014. He is also one of the nine judges serving on the Tenth Circuit Bankruptcy Appellate Panel. Judge Romero received an undergraduate degree in economics and political science from Denver University in 1977 and his juris doctor degree from the University of Michigan in 1980. Since becoming a judge, he has served on numerous committees and advisory groups for the Administrative Office of the United States Courts, is the past chair of the Bankruptcy Judges Advisory Group, and has also served as the sole Bankruptcy Court representative/observer to the Judicial Conference of the United States, the governing body for the federal judiciary.

Judge Romero just completed his term as the President of the National Conference of Bankruptcy Judges and actively participates in several committees of that body. He also serves on the Executive Board of *Our Courts*, a joint activity between the Colorado Judicial Institute and the Colorado Bar Association which provides programs to further public understanding of the federal and state court systems. He is a member of the Colorado Bar Association, the American Bankruptcy Institute, the Historical Society of the Tenth Circuit and the Colorado Hispanic Bar Association. In what little spare time he has, Judge Romero can be seen participating in musical theater productions throughout Colorado. While he admits he can sing a bit, his dancing skills leave much to be desired.

**In what little spare time he has, Judge Romero can be seen participating in musical theater productions throughout Colorado.**

Recently, Judge Romero authored an opinion in *In re Midway Gold US, Inc.*, 575 B.R. 475 (Bankr. D. Colo. 2017), in which he held third-party releases may be permitted under the law of the Tenth Circuit in certain limited circumstances. This decision brought case law within the District of Colorado closer in line with the majority view of this issue, including courts within the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits. Judge Romero has also been involved in cases dealing with the availability of bankruptcy relief for companies involved in the cannabis industry, including *In re Way to Grow, Inc.*, 2018 WL 7357408 (Bankr. D. Colo. Dec. 14, 2018). Under the fact-specific circumstances of that case, Judge Romero dismissed a bankruptcy case filed by a hydroponic supply company where its sales to individuals and companies in the cannabis industry violated provisions of the Controlled Substances Act. ■

## Who's the Boss? Dealing with Encumbered Real Property Insurance Proceeds in a Chapter 13

*Continued from page 1*

not from the insurance proceeds but rather from the debtor's own pocket.[3]

### A. Whose money is it?

The threshold issue becomes who owns the insurance proceeds. Insurance proceeds resulting from damage to real property are not personal property. For example, in the chapter 13 case of *Altegra Credit Company v. Ford Motor Credit Company, et. al. (In re Brantley)*,[4] the court held that the mortgagee had the superior interest in the insurance proceeds. There, three distinct claims were made regarding the insurance proceeds, i.e. one claim by Altegra Credit Company ("Altegra") as mortgagee, one by Ford Motor Credit ("Ford") as perfected judicial lienholder (with no contractual interest in the insurance proceeds), and one by the debtors.[5] Thus, only Altegra had a record interest in the insurance proceeds. In resolving the dispute between Altegra and Ford, the court looked to the express terms of the mortgage and Georgia's recording laws to determine that Altegra had a valid mortgage interest in the real property, and hence the insurance proceeds.[6] Regarding the debtors, the court reasoned that insurance proceeds are subject to a lender's mortgage interest before payment to the debtors or their creditors, including Ford.[7]

In the context of a chapter 11 but still applicable, the court in *Kelvin R. Crews and Louann D. Crews v. TD Bank, N.A., et. al. (In re Crews)*, [8] faced competing claims for real property damage insurance proceeds between the mortgagee and the individual chapter 11 debtor-mortgagors who were attempting to exercise their strong-arm powers. The debtors contended that the insurance funds were personal property and as such the mortgagee's claim could be avoided because no UCC-1 financing statement was recorded in conformity with Article 9 of the Uniform Commercial Code.[9] The court determined that the insurance proceeds which *stemmed from the destruction of real property* upon which the bank held a mortgage were not personal property subject to the UCC, but rather fell within the express exception found in Article 9, as it related to the creation or transfer of an interest in or lien on real estate.[10] The court concluded that the underlying interest was in real estate and thus no UCC was required to perfect the lender's interest.[11]

In *In re Financial Resources of America, Inc.*, [12] Judge Mora, explaining the misapplication of the "merger doctrine" relative to the rights of a mortgagee, held that the express terms of the mortgage govern who gets the insurance proceeds. The court noted that while the "mortgage and the promissory note it secures "merged" into the foreclosure judgment upon its entry, it does not follow that every aspect of the mortgage, including all of the express agreements and representations of the parties therein, somehow vanished into thin air."[13]

#### i. Pre-petition Damage

While the mortgagee might have a controlling interest in the insurance proceeds, the purpose of the proceeds is germane to the chapter 13 estate. If the damage occurs pre-petition, the chapter 13 debtor is required to list the possible insurance claim on schedule A/B. The potential pre-petition claim would also be listed in the nonstandard provisions set out in section VIII of the local form chapter 13 plan. A motion for court order to approve utilization of the insurance proceeds would be required to determine, if possible, what portion of the funds were allocated exclusively for real property repair and what portion was paid for personal property replacement.

In the context of homestead property, the amount received only for personal property replacement could increase the chapter 7 liquidation test in the chapter 13. The chapter 7 liquidation test is the over-exemption amount that would have been paid to creditors had the debtor filed in chapter 7 rather than 13.[14] For chapter 13 plan confirmation, a debtor is required to pay that amount to unsecured creditors.[15] Thus, if the personal property replacement award exceeds the value for the personal property the debtor listed on schedule A/B, then the chapter 13 debtor would increase the payment to the unsecured creditors.

The plot thickens regarding non-homestead real property. Concerning non-homestead real property, the insurance proceeds received for *both* real property repair and personal property could increase the chapter 7 test. The equity in non-homestead real property held exclusively in the name of the debtor is not exempt from creditors. Thus, if the insurance proceeds exceed the value of debtor's undisclosed equity in non-homestead real property, that difference is not exempt from creditors and could increase the chapter 7 test. As with homestead property, the insurance proceeds awarded for personal property regarding the non-homestead could increase the chapter 7 test.

#### ii. Post-Petition Damage

If the damage occurred post-petition, the schedules would not reflect the claim. Nor would the chapter 13 plan reference the post-petition asset. However, once the post-petition insurance proceeds are received, the debtor would then need to file a motion for court order to approve use of insurance proceeds as indicated above.

### B. Who gets to spend the money?

The lender may seek to hold the insurance proceeds and disburse payments subject to satisfactory inspection pursuant to the express terms of the mortgage. These disbursements to restore or repair real property could be tricky. The chapter 13 plan itself does not provide for disbursements by the Chapter 13 Trustee to restore or repair real property as those would need to be handled between the parties outside of the chapter 13 plan. In a chapter 13, the trustee maintains a payment ledger (online access is available to all parties registered in that case) providing a detailed accounting of the funds received and payments issued throughout the life of the chapter 13 case.[16] The payment ledger affords all concerned much-appreciated transparency in tracking were the money goes. On the contrary, if the lender solely holds the insurance funds, the debtor would not have such informational access. In addition to the previously referenced the motion to approve insurance proceeds, best practice suggests that the debtor should always seek a court order outlining the contours for disbursements. Such material issues as which contractor(s) gets hired, what is the scope of work, what is the timeframe for inspection, and by what date are disbursements to be sent after work is approved could all delay project completion if not addressed beforehand, preferably by court order.

*Continued on page 8*

## Who's the Boss? Dealing with Encumbered Real Property Insurance Proceeds in a Chapter 13

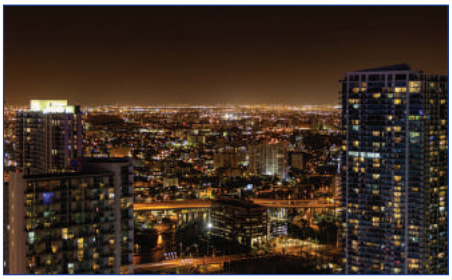
*Continued from page 7*

### C. Who pays the adjuster? (Thanks, but no thanks)

If a public adjuster was utilized and the lender did not expressly agree to the employment, the debtor may have an issue. The Fannie Mae mortgage expressed that "fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower." Courts outside of the Eleventh Circuit have upheld that provision of the mortgage against the borrower.[17] If the debtor retained a public adjuster pre-petition with a contract holding the debtor liable, that adjuster must be listed as a creditor of the chapter 13 estate. If a lender subsequently refuses to pay the adjuster from the insurance proceeds, the debtor could become liable.

It is a reasonable assumption that a bank will prefer a performing loan over foreclosing on the mortgage. Accordingly, lenders may want to carefully consider the wisdom of exercising the option of forcing the debtor to personally pay the adjuster. It might behoove the lender to understand that the debtor who actually resides at the property, or who has the relationship with the tenant at the property, may be in the better position to ensure the requisite repairs get correctly done. Faced with the possibility of having to personally pay the adjuster while residing at or leasing out a home in disrepair, an insolvent debtor may think twice about attempting to retain the real property.

Tony and Angela needed each other. At the end of the show, Tony and Angela never actually married but they did profess their love for one another. The mortgagee and the debtor will never profess their love for one another but they are both better off when they work together. Until a satisfaction of mortgage is recorded, the allocation of insurance proceeds should be thought of as a cooperative undertaking to maximize value; more of a family affair. ■



**NOTES**

[1] FLORIDA--Single Family--Fannie Mae/Freddie Mac UNIFORM INSTRUMENT (Form 3010). Even if a lender uses a differing form mortgage, this article assumes insurance proceeds language resembling that of the Fannie Mae form mortgage would be used in any well-drafted form of mortgage.

[2] *Id.* at 7.

[3] *Id.* (Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower).

[4] *Altegra Credit Co. v. Ford Motor Credit Co.*, et. al. *(In re Brantley)*, 286 B.R. 918 (Bankr. S.D. Ga. 2002).

[5] *Id.* at 920.

[6] *Id.* at 923.

[7] *Id.* at 924.

[8] *Kelvin R. Crews & Lousann D. Crews v. TD Bank, N.A., f/k/a Mercantile Bank (In re Crews)*, 477 B.R. 835 (Bankr. M.D. Fla. 2012).

[9] *Id.* at 838.

[10] *Id.; see also* Fla. Stat. § 679.104(10). The court drew a contrast with *In re Royal West Properties, Inc.*, 441 B.R. 158 (Bankr. S.D. Fla. 2010) where the instrument used to assert an interest in the insurance proceeds, i.e. collateral assignments, were not an interest in the underlying realty itself and thus insufficient to perfect interests.

[11] *Id.* at 839.

[12] *In re Financial Resources of America, Inc.*, No. 16-17275-BKC-MAM, 2018 WL 7017739, at *1 (Bankr. S.D. Sept. 26, 2018).

[13] *Id.* at *3.

[14] 11 U.S.C. § 547(b)(5)(A).

[15] *Id.*

[16] *See* https://www.13network.com/login/loginb.aspx?tc=mih (Miami-Dade County); https://www.13network.com/login/loginb.aspx?tc=ftl (Broward and Palm Beach Counties).

[17] *James R. Cox, et. al. v. David J. Wightman, et. al.*, No. 03-0988-A2007 WL 708611 (W.D. La. Mar. 5, 2007).

## Student Loan Debt is Destroying the Foundations of our Capitalist System and the Bankruptcy Code Should Be Amended to Address the Problem

*Continued from page 1*

throw the capitalist baby out with the student loan bath water.

### B. The Evolution of Discharging Student Loan Debt through Bankruptcy

Prior to 1976, "[s]tudent loans used to be presumptively discharged in a general discharge."[5] However, "in 1976, Congress . . . ma[de] it more difficult for debtors to discharge student loan debts guaranteed by States."[6] This change is enumerated in "11 U.S.C. § 523(a)(8), which provides that student loan debts guaranteed by governmental units are not included in a general discharge order unless excepting the debt from the order would impose an 'undue hardship' on the debtor."[7] "Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt."[8]

"Clearing § 523(a)(8)'s undue hardship hurdle is challenging and confusing for debtors because the [Bankruptcy] Code does not define what constitutes undue hardship. Courts apply a variety of judicially formulated tests that are frequently criticized by commentators because debtors 'must establish a certainty of hopelessness to achieve discharge.'"[9] Some courts have "adopted the Second Circuit's *Brunner* test for determining the dischargeability of student loan debt."[10]

> "Undue hardship" requires a three-part showing (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[11]

"[T]he Debtor must prove each element of the Brunner test by a preponderance of the evidence."[12]

Again, because the Bankruptcy Code does not define "undue hardship," we must look to judicial interpretation. Additionally, judicial interpretation is required to determine how a debtor proves each prong of the *Brunner* test.

#### 1. First Prong of *Brunner* – Cannot Maintain a Minimal Standard of Living

"The first prong of the *Brunner* test . . . involves looking not only at the Debtor's current monthly income and expenses, but also whether the Debtor could, hypothetically, adjust her budget in the short-term to make room for student loan payments."[13] "A minimal standard of living includes sufficient expenditures 'for basic necessities such as food, shelter, clothing and medical treatment' as well as a small allocation for discretionary or recreational purposes."[14]

#### 2. Second Prong of *Brunner* – Additional Circumstances Exist

The second prong of the *Brunner* test involves determining whether there are "[a]dditional circumstances[, which] are any circumstances beyond the more current inability to pay, that show the inability to repay is likely to persist for a significant portion of the repayment period."[15] "A court may consider a number of factors not limited to the following: the debtor's age, training, physical and mental health, education, assets, ability to obtain a higher paying job or reduce expenses."[16] In In re Nys, the court compiled "a non-exclusive list of twelve factors to review in determining whether a debtor has satisfied the second prong of the *Brunner* test."[17]

#### 3. Third Prong of *Brunner* – Good Faith Efforts to Repay

The third prong of the *Brunner* test involves "the court measur[ing] the debtor's efforts to obtain employment, maximize income, minimize expenses, and negotiate a repayment plan."[18] "What matters for a showing of good faith is that the Debtor was not willful or negligent in bringing about her unfortunate financial condition."[19]

### C. The Solution

The "undue hardship" test of § 523(a)(8) "'sets a near-impossible burden for which reform [of the Bankruptcy Code] is needed.'"[20] This country is being economically stifled by the growing amount of student debt. "As of June 30, 2016, outstanding student loan debt reached $1.259 trillion and comprised ten percent of household debt."[21] "'Student loans are by far the fastest growing component of non-housing consumer debt.'"[22]

Our younger citizens have been caught in a trap of good intentions that threatens to destroy the economic foundations of the country itself. The dischargeability analysis must shift away from whether it is *possible* under any hypothetical set of circumstances for a citizen to repay unsecured student debt. The analysis should be more like an analysis of *secured* debt; because, after all, the calculus behind non-dischargeability is to transform the otherwise unsecured obligation into one that is secured *by the citizen's future earning potential.*

Viewed through this frame, helpful options come into view. If bankruptcy courts were permitted to estimate the value of the education in terms of its *reasonable* earning potential in light of what was promised, then the courts could "strip" or reduce the balance of the loan to the value of the asset—here, the future earning potential of the degree awarded.

Put another way, a critical part of the analysis should be whether the young person received the benefit of their bargain commensurate with the loan obligation. If, for example, a citizen borrows $100,000.00 and receives a marketing degree, the assumption must be that the citizen was induced into the loan on the promise that the investment in the student loan would produce a superior financial result than what the citizen would have received absent the degree. Part of that promise must be that the citizen would benefit from *more* disposable income—not less—after investing in obtaining the degree.

So, a payment plan must fail if it deprives a citizen of all her disposable income over an extended period of time, making it impossible for that citizen to enjoy simple life accomplishments like moving out of her parents' house, buying a car, a

*Continued on page 12*

CLERK'S CORNER

By Joseph Falzone

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## Bankruptcy Case Filing Statistics

For the calendar year ending December 31, 2018, bankruptcy case filings in the Southern District of Florida have increased by 4.23% to 16,167 cases for the first time after sustaining eight consecutive years of decreased filings.

The Southern District of Florida continues to rank amongst the top bankruptcy courts in the nation: 11th in total filings, 6th in chapter 13 filings, 9th in chapter 11 filings, 14th in chapter 7 filings, and 11th in adversary proceeding filings. Additionally, the percentage of case filings by Pro Se debtors is 9.4%.

According to data published by the Administrative Office of the U.S. Courts, bankruptcy case filings across the federal court system in 2018 decreased by 2% to 773,418 as compared with 789,020 in 2017. This represents the lowest number of bankruptcy filings for any calendar year since 2006, and the eight consecutive calendar year that nationwide filings have decreased. For more information on national bankruptcy filing statistics, visit the **Administrative Office of the U.S. Courts statistics web page**.

## Bankruptcy Court Space and Facilities

### Miami C. Clyde Atkins Courthouse Entrance Renovation Project —

The public entrance to the C. Clyde Atkins Courthouse will be getting a makeover, as the renovation project would extend the current lobby and security screening area out by enclosing the open space in front of the main structure. This buildout would provide a physical security presence and enhanced visibility of individuals and vehicles approaching the building.

### Fort Lauderdale New Federal Courthouse —

As you may have heard, funding has already been secured for the government's landlord General Services Administration (GSA) to construct a new federal courthouse in the downtown Fort Lauderdale area. The existing 37-year old, 4-story federal courthouse that is located at 299 E. Broward Blvd. in Fort Lauderdale is in need of significant repair and lacks basic security safeguards. Although site selection has not been determined, construction is expected to be completed by December 2024.

**2018 Bankruptcy Case Filings by Chapter**

| | |
|---|---|
| Chapter 7 | 8,908 |
| Chapter 11 | 215 |
| Chapter 13 | 7,024 |
| Chapter 15 | 20 |

### West Palm Beach —

In January 2017, the bankruptcy court that is located at the Flagler Waterview Building, 1515 Flagler North Flagler Drive, West Palm Beach, renewed its lease for another 10-year period. This divisional office houses two bankruptcy judges' chambers and courtrooms along with the clerk's office support staff.

## Next Generation of CM/ECF

Case Management/Electronic Case Files (CM/ECF) is a judiciary-developed case management program offering Internet access to official case records in the federal courts. This program enables participating attorneys and litigants to file pleadings and allows courts to file, maintain, and retrieve case file information using electronic format. Today, CM/ECF is LIVE in every federal court in the country.

The Next Generation of CM/ECF (NextGen CM/ECF) provides new and replacement modules that integrate with existing CM/ECF functionality. The most exciting feature of NextGen CM/ECF is central sign-on [CSO]. This functionality will allow users of CM/ECF and PACER to maintain only one account across ALL CM/ECF NextGen courts (appellate, district, and bankruptcy) and to sign in one time to access PACER and all the courts in which they have permission to e-file. This will eliminate the need for separate PACER and CM/ECF access credentials. NextGen will also include *Electronic Self-Representation* [eSR]. The eSR module will allow a pro se debtor to prepare and submit (NOT FILE) to the court either a partial or fully complete, Chapter 7 or Chapter 13 individual petition. Debtors will be able to work on their petition packages over time by using their self-selected login and password.

In Florida, we have many attorneys that practice bankruptcy across district boundaries (Northern, Middle & Southern). As a result, the three Florida Bankruptcy Courts have decided to implement NextGen CM/ECF as a state-wide initiative with a "Go LIVE" schedule sometime in the first quarter of 2021.

## U.S. Bankruptcy Judge Raymond B. Ray to Retire in September

After more than 25 years of dedicated service as a bankruptcy judge in this district, the **Honorable Raymond B. Ray** announced his intent to retire effective September 30, 2019. The Eleventh Circuit is currently in the process of selecting Judge Ray's successor.

## Pending Changes in the Bankruptcy Forms — Revised Dollar Amounts in Specific Forms Effective April 1, 2019

On April 1, 2019, automatic adjustments will be made to dollar amounts stated in various provisions of the Bankruptcy Code, one provision in Title 28, seven Official Bankruptcy Forms which contain adjusted dollar amounts, the Instructions for Individual and Non-Individual Debtors, two Director's Forms which include dollar amounts, and one set of instructions for a Director's Form which includes a dollar amount. The

CLERK'S CORNER

adjustments will apply to cases filed on or after April 1, 2019.

**Case Management/ Electronic Case Files (CM/ECF) is a judiciary-developed case management program offering Internet access to official case records in the federal courts.**

Section 104 of the Code provides that the Judicial Conference make the adjustments, which are calculated at three-year intervals on the basis of the change in the Consumer Price Index for the most recent three-year period ending immediately before the year in which the adjustment is made and rounded to the nearest $25. The Conference has delegated that authority to the Administrative Office. The Official Forms, Director's Forms, and instructions impacted are:

- Official Form 106C, The Property You Claim as Exempt, Line 3
- Official Form 107, Your Statement of Financial Affairs for Individuals Filing for Bankruptcy, Line 6
- Official Form 122A-2, Chapter 7 Means Test Calculation, Lines 29 and 40
- Official Form 122C-2, Chapter 13 Calculation of Your Disposable Income, Line 29
- Official Form 201, Voluntary Petition for Non-Individuals, Line 8
- Official Form 207, Statement of Your Financial Affairs, Lines 3 and 4
- Official Form 410, Proof of Claim, Line 12
- Director's Form 2000, Required Lists, Schedules, Statements, and Fees, Pages 2, 3, and 4
- Director's Form 2830, Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q), Part III
- Instructions for Individual Debtors, Pages 9 and 24
- Instructions for Non-Individual Debtors, Page 12
- Director's Form 2500E, Instructions, Page 1

## Proposed Amendments to the Federal Rules of Practice and Procedure Effective December 1, 2019

On September 13, 2018, the Judicial Conference of the United States approved the following proposed amendments to the Federal Rules of Appellate, Bankruptcy, Criminal Procedure, and the Rules of Evidence. These amendments were subsequently submitted to the Supreme Court for review. If adopted by the Court and transmitted to Congress by May 1, 2019, absent congressional action, these amendments will take effect on December 1, 2019:

- **Appellate Rules** 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39.
- **Bankruptcy Rules** 4001, 6007, 9036, and 9037.
- **Criminal Rule** 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts.
- **Evidence Rule** 807.

## In Closing

I hope you find the information contained in this article helpful and informative, as my staff and I always welcome your comments and/or suggestions on how we can better assist and serve you. As I begin my twenty-seventh year of federal service with the United States Bankruptcy Court (including five years as your Clerk of Court), I remain extremely grateful for your continued support and confidence throughout the years. ■

## Student Loan Debt is Destroying the Foundations of our Capitalist System and the Bankruptcy Code Should Be Amended to Address the Problem

*Continued from page 9*

starter home, getting married, taking a vacation, obtaining simple luxuries, or raising children and paying in turn for *their* education. For these are all the things that were an implicit promise of the student loan to begin with.

The authors propose a simple fix, which could be implemented first by the Courts, and then hopefully prompt Congress to amend § 523(a)(8) in a similar way. Courts should adjust the first prong of the *Brunner* test as follows:

> The first prong of the Brunner test . . . involves looking not only at the Debtor's current monthly income and expenses, but also whether the Debtor could, ~~hypothetically~~, reasonably adjust her budget in the short-term to make room for student loan payments while also providing for a substantial benefit of the Debtor's original bargain.
>
> The second prong of the *Brunner* test should be adjusted by adding a single additional factor: whether the student realized—or could reasonably realize—the benefit of their bargain from incurring the loan obligation.

Our young citizens are faced with an impossible Hobson's choice: work very hard but pay nearly all their disposable income against student loans for up to twenty years (what appears to be their entire lives),[23] or languish in relative poverty while their student loans are deferred (but increasing due to interest) with no prospect of discharge or ultimate payment. Or, the citizen can destroy the trap and have a chance at a "normal" life by voting for an inferior economic system that promises to forgive this ghastly student loan debt obligation. Through our policies we are forcing our young citizens to make choices like this, and we are recklessly putting capitalism on trial. No wonder so many Millennials hold a favorable view of socialism despite its obvious failures around the world. ■

### NOTES

[1] A "YouGov survey [] reported that given a choice, 44 percent of young people between the ages of 16 and 29 would prefer to live in a socialist nation rather than a capitalist county." Lee Edwards, What Americans Must Know About Socialism, THE AMERICAN SPECTATOR, Nov. 30, 2018, https://spectator.org/what-americans-must-know-about-socialism/.

[2] *In re Engen*, 561 B.R. 523, 546 & 551 n.186 (Bankr. D. Kan. 2016) (quoting EANNE LOONIN & PERSIS S. YU, ET AL., STUDENT LOAN LAW § 6.1.3.1, at 75 (National Consumer Law Center, 5th ed. 2015, updated at http://www.nclc.org) (emphasis added)) (emphasis added). "The Higher Education Technical Amendments of 1991 (HETA) eliminated all statutes of limitations on actions to recover on defaulted federally guaranteed student loans." *Id.* at n.186.

[3] *Cf. Id.* at 550 (warning that "[n]ondischargeable student loans may create a virtual debtor's prison, one without physical containment, but assuredly a prison of emotional confinement").

[4] *See id.* at 544, 546-47 & 551 nn.192-95 (specifically listing some of these issues, "point[ing] to one threat: soaring student debt).

[5] *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 449 (2004).

[6] *Id.*

[7] *Id.* (emphasis added).

[8] *Id.* at 450 (citing Norton § 47:52, at 47-137 to 47-138).

[9] *Engen*, 561 B.R. at 531-32 (quoting Jennifer Grant & Lindsay Anglin, *Student Loan Debt: The Next Bubble?*, 32–DEC AM. BANKR. INST. J. 44, 44 (2013)) (emphasis added).

[10] *In re Butler*, No. 14-07069, 2016 WL 360697, at *3 (Bankr. C.D. Ill. Jan. 27, 2016) (citing *Matter of Roberson*, 999 F.2d 1132, 1135 (7th Cir.1993) (following *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2d Cir.1987)).

[11] *Id.*

[12] *Butler*, 2016 WL 360697, at *3 (citing *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 777 (7th Cir. 2002).

[13] *Id.* (citing *In re Rhodes*, 464 B.R. 918, 923 (W.D. Wash. 2012).

[14] *Id.* (citing *In re Larson*, 426 B.R. 782, 789 (Bankr. N.D. Ill. 2010).

[15] *In re Edwards*, No. 3:15-ap-26-PS, 2016 WL 1317421, at *4 (Bankr. D. Ariz. Mar. 31, 2016) (quoting *In re Jorgensen*, 479 B.R. 79, 88 (9th Cir. B.A.P. 2012).

[16] *Id.*

[17] 308 B.R. 436, 446-47 (9th Cir. B.A.P. 2004). Those factors include the following: (a) serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; (b) the debtor's obligations to care for dependents; (c) lack of, or severely limited education; (d) poor quality of education; (e) lack of usable or marketable job skills; (f) underemployment; (g) maximized income potential in the chosen educational field, and no other more lucrative job skills; (h) limited number of years remaining in work life to allow payment of the loan; (i) age or other factors that prevent retraining or relocation as a means for payment of the loan; (j) lack of assets, whether or not exempt, which could be used to pay the loan; (k) potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; and (l) lack of better financial options elsewhere.

[18] *Id.* (quoting *Jorgensen*, 479 B.R. at 89).

[19] *Butler*, 2016 WL 360697, at *6 (citing *In re Clark*, 341 B.R. 238, 255 (Bankr. N.D. Ill. 2006).

[20] *Engen*, 561 B.R. at 532 (quoting Jennifer Grant & Lindsay Anglin, *Student Loan Debt: The Next Bubble?*, 32–DEC AM. BANKR. INST. J. 44, 88 (2013)).

[21] *Id.* at 547 (citing Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, August 2016, available at: www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC 2016Q2.pdf)

[22] *Id.* at 548 (citing *Quarterly Report*).

[23] Compare the unlimited period of non-dischargeable student loan debt with the twelve-year period of involuntary servitude that our Founders rejected.










## How to Avoid Simultaneous Litigation in Two Courts: Are You Doing Your Clients a Favor?

*Continued from page 3*

**5.** Parties' probable future financial needs
**6.** Benefits that each party would have received if the marriage had continued
**7.** The agreement's language
**8.** The parties' financial positions when the agreement was made
**9.** The amount of the division
**10.** Whether the obligation ends upon death or remarriage of the beneficiary
**11.** The frequency and number of payments
**12.** Whether the agreement waives other support rights
**13.** Whether the obligation can be modified or enforced in state court
**14.** How the obligation is treated for tax purposes

These factors are very similar to both the Florida alimony statute (Fla. Stat. § 61.08), which sets forth the types of alimony and factors the court must consider to award alimony, and the Equitable Distribution statute (Fla. Stat. § 61.075), which is used to divide the assets and liabilities of the parties. Under § 523(a)(5), a DSO is not dischargeable if it is alimony, support or property settlement. However under § 523(a)(15), a property settlement/division is subject to discharge in a Chapter 13 plan which is why the FH ultimately filed under that chapter. A dischargeability complaint § 523(a)(15) can only be filed in the bankruptcy court.

However, Florida statutes and bankruptcy discharge can be confusing because sometimes an equitable distribution operates as a form of support since it may generate income or can be distributed to the party who needs alimony so that s/he can sell it for income. Nevertheless, after applying the foregoing factors, the State Court decided that the payments were intended to be alimony and in the nature of support, and therefore constituted a nondischargeable DSO.

### Bankruptcy Court redux and Attorneys' Fees

The case returned to the Bankruptcy Court where Judge Mark entered the next Order (the "Claim Objection Order") which overruled the FH's objection to claim because the State Court had already determined that his DSO was non dischargeable. The FH argued that he owed only $250,000 of the $289,436 claim. Consequently, the Bankruptcy Court returned that portion of the claim to the State Court to determine how much of the claim the FH owed.

As part of the Claim Objection Order, the Bankruptcy Court also granted the FW stay relief to return to the State Court to seek an award of attorneys' fees and costs, and reserved jurisdiction for the Bankruptcy Court to determine the dischargeability of any attorneys' fees awarded.

**Don't ever mislead a trial court judge!**

Generally, attorneys' fees awarded under Fla. Stat. § 61.16 in a marital matter are nondischargeable.[6] Florida statutes and cases make clear that § 61.16 fees are based upon need and ability to pay and are considered a support item. However attorneys' fees awarded as a sanction can be discharged as they are not in the nature of support.[7]

### Where are the parties now?

While the attorneys' fees issue is still pending before the State Court, the FH filed a 7th Amended Plan. The FW filed an Objection to Confirmation of Plan and a Motion to Dismiss for Cause, both of which motions were set for a March 2019 hearing before the Bankruptcy Court. The FW argued that the FH filed bankruptcy simply to avoid paying alimony and that the FH avoided making those payments for over two years.

The FH's plan proposed to pay the FW over five (5) years at a minimal monthly amount with a substantial balloon in the fifth year. The FW argued that the plan was not feasible and filed in bad faith. The FW further argued that the bankruptcy case should be dismissed entirely and the matter returned to the State Court that is more familiar with the parties and previously found FH in contempt.

Shortly before the March 2019 hearings scheduled in front of the Bankruptcy Court, the FH voluntarily dismissed his Chapter 13 case. So what did he accomplish in these two years of litigation? He still owes the DSO and now he owes an increased amount to his former wife.

### What can we learn from this case?

**1.** Don't ever mislead a trial court judge! In this case, incorrect information to the State Court judge resulted in a void judgment after a full day evidentiary hearing. What a terrible waste of resources and money for both parties. Although the FW convinced the State Court that the FH had the ability to pay and was in contempt for willfully not paying, this order was set aside as void.

**2.** If a hearing is held in violation of the bankruptcy automatic stay, even if the Order is entered after the bankruptcy is dismissed and therefore there is no stay in effect, the Order is still void.

**3.** In making the decision as to which court should decide whether an MSA provision or final judgment award is a DSO and therefore non-dischargeable, consider whether there has been a state court finding that noncompliance with a payment provision is contempt of court. This should help you decide where to have a determination of dischargeability hearing. Under Florida law, only support obligations can be the subject of contempt proceedings. Property settlements cannot be enforced by contempt.[8] If the State Court judge has previously found contempt then it is likely that s/he will find that the obligation is a DSO. Under those circumstances perhaps filing in Bankruptcy Court would be a better choice for the debtor. But remember, both courts look at the language in the Final Judgment or agreement and consider the intention of the parties.

*Continued on page 15*

## How to Avoid Simultaneous Litigation in Two Courts: Are You Doing Your Clients a Favor?

*Continued from page 14*

**4.** Abstention is not necessarily the choice of Bankruptcy Courts, however the facts of the case are significant. How much work has the State Court done on the case? Is there an appearance of forum shopping by the debtor?

**Even if the issue is to be determined by the Circuit Court, federal law must be followed.**

**5.** Even if the issue is to be determined by State Court judge, s/he will still have to decide it in accordance with federal law.

**6.** Reminder: if an alimony award is determined to be a property settlement award or an equitable distribution property award, it will not be a DSO and therefore under a Chapter 13 plan it will be treated as an general unsecured debt and dischargeable in whatever Chapter 13 plan is approved by the Bankruptcy Court (so it could be a 20% payment). This 20% payment must be fully paid under the Chapter 13 plan. Under Chapter 7 and Chapter 11, all obligations arising out of a dissolution judgment or agreement are excepted from discharge whether the obligation is a DSO or equitable distribution.[9] However, the DSO obligation is entitled to priority in the distribution of funds by the chapter 7 trustee.

**7.** Compare bankruptcy schedules (which includes a list of debts, assets, and schedules of income and expenses) with the family law financial affidavit (which also includes debts, assets and income) – especially in connection with contempt proceedings. (Remember to advise your client that these documents, whether in Bankruptcy or State Court, are filed under oath).

### Conclusion

Be a good lawyer and counselor. Dissolution proceedings are difficult enough for both parties regardless of who "prevails". No one in a family dispute wins. Prolonging litigation is expensive, both emotionally, physically, and financially. The Zhuk case has gone through unnecessary court proceedings. And what has been accomplished by the Debtor? After a substantial amount of time and expense in the bankruptcy court, he has only increased his nondischargeable support obligation.

If your advice to a client depends on an area of law in which you do not have expertise, make friends with a colleague who practices family law to check your instincts. If you are in doubt, you and your client should consult with family law counsel. Try to avoid litigating in two courts.

**NOTES**

[1] *See for example In re Moog*, 159 B.R. 357 (Bankr. S.D. Fla. 1993); *In re Bandini*, 165 B.R. 317 (Bankr. S.D. Fla. 1994).
[2] *In re Zhuk*, 576 B.R. 273 (Bankr. S.D. Fla. 2017).
[3] *Cummings v Cummings*, 244 F.3d 1263 (11th Cir. 2001).
[4] *Harrell v. Sharp (In re Harrell)* F.2d 902(11th Cir. 1985); *Strickland v. Strickland*, 90 F.3d 444 (11th Cir. 1996).
[5] *In re Fussell*, 303 B.R 539 (S.D. Ga. 2003); *In re Benson*, 441 Fed. Appx. 650 (11th Cir. 2011).
[6] *See Strickland, supra n. 4.*
[7] *In re Lopez*, 405 B.R. 382 (Bankr. S.D. Fla. 2009).
[8] *Farghali v. Farghali*, 187 So.3d 338 (Fla. 4th DCA 2016); *Randall v. Randall*, 948 So.2d 71 (Fla. 3d DCA 2007).
[9] 11 U.S.C. § 523(a)(15).





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