Volume 71, Issue 1

THE FEDERAL LAWYER

The Magazine of the Federal Bar Association

Bankruptcy Law

Also Inside:
Spotlight on the Foundation of the FBA

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Welcome to the Inaugural All-Digital Edition of *The Federal Lawyer*

By James W. Satola

James W. Satola is the editor-in-chief of *The Federal Lawyer*. He is currently a law clerk to Senior United States District Judge Donald C. Nugent of the U.S. District Court for the Northern District of Ohio, after having earlier practiced with a worldwide law firm for close to 20 years. He is a past three-term FBA circuit vice president for the Sixth Circuit and a past president of the FBA Northern District of Ohio Chapter.

This Winter 2024 edition of *The Federal Lawyer* marks our first all-digital "primary issue" of *TFL*. Last year, we initiated an all-digital, smaller, *TFL Supp.* edition, but this year, *TFL* moves to its new all-digital format, where each of the four seasonal issues, not bound by the page limitations of printing, will be sent to the FBA membership entirely online utilizing a nimble, responsive platform that will make reading the magazine on your computer or mobile device more accessible than ever before. We're off to a great start.

This issue combines what were initially planned as two issues. The first, slated to be the opening 2024 issue, would highlight both the history and the ongoing important work of the Foundation of the Federal Bar Association, describing the great things the Foundation does throughout the FBA, through its numerous grants, scholarships, and programs. Chartered by Congress in 1954, the Foundation was reinvigorated in 2002 with the creation of the Foundation Fellows program, recognizing individuals who have demonstrated exceptional commitment to and leadership within the FBA. As of this writing, the Fellows Program counts close to 300 members. The Foundation is a key pillar of the FBA. The second, initially planned as the winter *TFL Supp.,* would be dedicated to the many facets of bankruptcy law, including a range of high-quality articles and judicial profiles of dedicated bankruptcy judges throughout the country.

With this issue, we get the best of both. For the bankruptcy portion, this issue offers eight articles and columns by leaders in the bankruptcy field, along with five judicial profiles, related to this important area of federal law. The section on the Foundation offers both a description and history of the Foundation—with a "Where We Have Been" focus—as well as feature items on "Where We Are and Where We Are Going," describing the great things the Foundation does for the FBA and the community as a whole. Included in this is a tribute marking the recent passing of Past FBA National President Robert A. McNew (the creator of the Foundation Fellows Program). As most of you know, Bob was a giant of the FBA: as a national leader of the FBA, a local leader of the Chapter he and I shared—the FBA Northern District of Ohio Chapter, and a friend and supporter to countless members of the FBA. On a personal note, it was Bob who sponsored my initiation as a Charter Lifetime Fellow of the Foundation in 2002. His love of the FBA, and his tireless support of it, was boundless. He will be missed by all.

All of us on the *TFL* Editorial Board hope you enjoy this Winter 2024 issue.

A Note About the Fall 2023 Edition

In the Fall 2023 printed edition of *TFL*, the judicial profile of U.S. Magistrate Judge William Matthewman, of the Southern District of Florida, erroneously identified him as "United States Magistrate" not by his true title of U.S. Magistrate Judge. We at *The Federal Lawyer* sincerely apologize to both Judge Matthewman and to the profile's author, Lauren Johnson, one of Judge Matthewman's former law clerks, for this error. Upon seeing the mistitling in the title of the profile, I called Judge Matthewman to apologize. He was very gracious, and we agreed that this provides us with an opportunity to "make lemonade."

The Editorial Board of *TFL* is certainly aware of the indispensable role served by U.S. magistrate judges every day throughout the country. I'd like to take a moment to highlight our May/June 2014 issue, which was dedicated to informing our FBA members about the many facets of that important service (including a feature article I wrote, "How Magistrate Judges are Selected, Appointed, and Reappointed"). This also allows us the chance to show our appreciation for, and refresh our readers on, the judicial role served by magistrate judges. It turns out that Judge Matthewman is co-chair of the Title Committee of the Federal Magistrate Judges Association, whose mission is to "provide information to the community about the proper use of the title of U.S. Magistrate Judge, including contacting the press, local bar associations, websites, and others" about the correct use of the title. We will be featuring a guest column from the FMJA on this subject in our Spring 2024 issue.

A correction has been made to the digital version of the magazine. ⊙

Every Superhero Has an Origin Story: What's Yours?

By Jonathan Hafen

Jonathan Hafen handles a wide variety of litigation, including cases in the areas of securities and investment law, employment law, regulatory enforcement defense, disputes over the ownership and control of businesses, class actions, and legal malpractice defense. Mr. Hafen also serves as legal counsel to numerous small, midsize, and multinational companies, utilizing the significant resources available at his law firm, Parr Brown Gee & Loveless, to address the broad spectrum of legal challenges routinely confronting business leaders. He serves as the FBA National President.

An effective superhero origin story explains in compelling fashion the starting point in what ultimately turns out to be a remarkable journey. That starting point could be learning that with great power comes great responsibility, discovering that there is no secret ingredient or going to law school. Our world today is filled with both fictional and factual heroes. While I do love a good Spiderman or Kung-Fu Panda movie, what has changed my life for the better has been the inspirational lives and actions of people around me. I have met many of these real-life heroes through the FBA.

Last week, I attended FBA meetings in Phoenix, Arizona, hosted by members of our wonderful Phoenix Chapter. While there, I learned the FBA origin story of Judge Alison Bachus. Following graduation from the University of Arizona College of Law, Judge Bachus clerked for then-Chief District Judge Stephen McNamee in Phoenix. Judge Bachus quickly learned that Judge McNamee was a wonderful mentor, an impressive jurist, and a committed FBA member. Judge McNamee made the Phoenix Federal Courthouse available for monthly FBA events. More importantly, he attended those events, and he brought his clerks along, even paying for them when there was a charge. Even now, when he presides over (almost all) the admission ceremonies to the district court in Phoenix, Judge McNamee makes sure he encourages new admittees to join the FBA.

It was no coincidence that Judge Bachus invited Judge McNamee to swear her in as Arizona's newest Federal Judge last year.

As Judge Bachus shared this story, with Judge McNamee at her side, she thanked him for making the FBA part of her life. Judge McNamee then shared his love for the FBA and its mission. It was a wonderful moment.

I first met Judge Bachus, pre-judge years, at a leadership training meeting in Washington, D.C. years ago. She immediately impressed me with her commitment to the FBA's mission, her desire to improve as a leader, and her friendliness and sense of humor. I felt that day that she was a true leader with a bright future, and I was right.

Senior U.S. District Judge Stephen M. McNamee speaks at U.S. Magistrate Judge Alison S. Bachus' investiture. Photo by Lauren B. Tribble.

Since that day, I have watched her serve the FBA in many positions, including Chapter President, Circuit Vice-President and Board member. Prior to her time as a judge, she was one of the FBA's most important and effective advocates in our government relations work, especially with the White House.

And throughout her FBA and professional work, she has mentored many and exemplified the values of our wonderful organization. I have watched her build connections with federal practitioners and judges throughout the country who have become her friends. They have made her life and her career better. She credits her involvement with FBA, and mentorship of FBA members such as Judge McNamee, as integral to her path to joining the federal bench.

I share this story not just because I have been a part of it, but because it is an example of how her story has become part of my story through the FBA.

As your President this year, I am emphasizing membership – both growing our membership and improving your membership experience. We are in the midst of our Countdown to Kansas City Challenge, through which we are inviting every one of our sections, divisions, professional chapters, and law student chapters to do three things: (1) grow by 10%; (2) increase our

(Left photo): Judge McNamee speaks with FBA leaders (l to r) Andy Clark, Judge Alison Bachus, and Ashley Akers; (right photo): U.S. District Judge Steven P. Logan, Senior U.S. District Judge Stephen M. McNamee, U.S. Magistrate Judge Alison S. Bachus, and Chief U.S. District Judge G. Murray Snow. Photos by Lauren B. Tribble.

retention of existing members to 80%; and (3) develop a membership plan to achieve growth and meet the needs of our FBA members.

While I was in Arizona, someone asked me what makes the FBA grow. I hadn't heard that question before. The answer to me is simple. There is no magic and no superpower involved. In fact, there is no secret ingredient.

Our membership grows best and grows fastest when one FBA member invites a colleague to an FBA event.

What is your FBA origin story? I am guessing that at some point in your life, an FBA member invited you to join us at an event. Consider how your life and your career have been impacted by that moment.

I hope your FBA experience has been positive enough that you now want to invite your friends and colleagues to join us. As you do so, you create an opportunity for that lawyer, judge, or law student to make their lives and their careers better by being part of an organization that does great things in the right way. Their stories can become part of your story and our collective FBA story.

Thank you for all you do for the FBA and our legal community!

A Framework for Federal Judicial and Legal Personnel Considering Participating in Capitol Hill Day or Other Legislative Outreach

By Cissy Jackson and Dan Renberg

Before joining Arent Fox, Cissy Jackson served as counsel and national security adviser to Sen. Doug Jones, D-Ala. Jackson also has extensive experience in the private practice of law, handling white collar, False Claims Act, grand jury investigation, and commercial property tax appeal matters. A former senior Senate staff member and presidential appointee, Dan Renberg has helped numerous clients since joining Arent Fox as a partner in 2003. Recognized as a top federal lobbyist, one of Renberg's advocacy efforts was included as one of the "Top 10 Lobbying Triumphs of 2009" by *The Hill*, and he has been listed annually since 2014 in *The Best Lawyers in America*.

Since the mission of the FBA is to advance the science of jurisprudence and to promote the welfare, interests, education, and professional development of attorneys involved in federal law, an important component of this mission is monitoring and participating in policy-making processes in Congress, the Executive Branch, and the Federal Judiciary. With the assistance of outside counsel, the FBA's Government Relations Committee leads and oversees this work, but for the Association's government relations program to be most effective, engagement from the broader membership is essential. The experiences and insights of FBA members can be highly relevant and informative for legislators; however, for FBA members who are federal judges, magistrates, nonjudicial court employees, and executive branch employees, the prospect of "lobbying" or direct advocacy to government officials can raise questions about what is and is not permitted by their governing codes of conduct. In response to several inquiries from FBA members in various such roles, we have compiled the following analytical framework which should assist in educational outreach.

After review of relevant codes of conduct, advisory opinions, and statutes, and in consultation with judges who are FBA members, the GRC believes that educational outreach activities conducted on the FBA member's own time and in an individual capacity—including participation in Capitol Hill Day and one-on-one or group meetings, calls, or correspondence with Members of Congress—regarding the following 2023 policy priorities would be permissible: Federal Judgeships and Caseloads, Article I Immigration Courts, Funding for the Federal Courts, and Judicial Security.

When speaking to Congress in an individual capacity, a judge or judicial branch employee who is opining on legislation or similar public policy matters should make clear to the audience in what role he/she is speaking—for example by stating that he/she is not providing the views of the Judicial Conference of the United States or of the circuit or court unit. Of course, this would not apply to judges or staff who have been specifically authorized to speak to Congress on a particular topic.

Analytical Framework for Federal Judges and Magistrates

- To the extent that the judge's time permits and impartiality is not compromised, judges are actively encouraged to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice, either independently or through a bar association, judicial conference, or other organization dedicated to the law.[1]
- A judge may appear before a legislative or executive body or official, at a public hearing, or in private consultation, with respect to matters concerning the law, the legal system, and the administration of justice, if it would generally be perceived that a judge's judicial experience provides special expertise in the area.[2]
    - Examples include "matters relating to court personnel, budget, equipment, housing, and procedures. These matters are all vital to the judiciary's housekeeping functions and the smooth operation of the dispensation of justice generally."[3]
    - "To qualify as an acceptable law-related activity, the activity must be directed toward the objective of improving the law, qua law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or

civic objective." The clearest examples of permissible law-related activities are those addressing the legal process. However, "activities directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group, may be permissible."[4]

    - Because of Canon 2A's provision that a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary, judges should exercise caution when considering participation in law-related activities concerning highly controversial subjects.[5]
    - Federal judges may make recommendations to public fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.[6]
- With regard to matters *not* concerning judicial administration, a judge may appear at a public hearing before or consult with an executive or legislative body or official only to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in that area.[7]
    - If a judge's participation is sought for some reason other than his or her judicial expertise, the activity is less likely to be permissible.[8] In other words, legislative appearances by a judge are generally permissible only where the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual. The subject matter should also not include legislation aimed at political issues or matters that may spawn litigation likely to come before the judge.[9]
    - Consider whether the beneficiary of the activity is the law or legal system itself. A permissible activity "serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or enhances the prestige, efficiency, or function of the legal system itself."[10]
    - Close questions should be answered by evaluating how closely related the substance of the activity is to the court's principal mission of delivering unbiased, effective justice to all.[11]
- Although judges are prohibited from engaging in any political activity, this prohibition does not prevent a judge from engaging in the above-described activities.[12] "Political activity" generally relates to actions on behalf of any party, political committee, or candidate for political office and is outside the scope of any FBA government relations activity.
    - Before deciding to engage in a law-related activity that may have political overtones, a judge should consider whether participating in such activity would compromise the judge's independence or would create an appearance of impropriety or partiality.[13]
    - Judges should restrict politically-oriented activities to those that are most directly related to the law and legal process.[14]

Framework for Nonjudicial Court Employees

The Judicial Conference has approved a Code of Conduct for Judicial Employees, which applies to all employees of the judicial branch, including interns, externs, and other volunteer court employees.[15]

Like judges, nonjudicial court employees must avoid outside activities that present a risk of conflict with their official duties or create the appearance of impropriety.[16]

As long as the outside activities do not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or employee's office, a judicial employee may participate in civic, charitable, professional, and educational activities.

If the outside activities concern the law, the legal system, or the administration of justice, the judicial employee should first consult with their appointing authority to determine whether the proposed activity is permissible.[17]

Judicial employees should refrain from inappropriate political activity, but participation in the nonpolitical activities of a civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, or recreational organization is permissible.[18]

Framework for Federal Public Defender Employees

The Code of Conduct for federal public defender employees specifically authorizes them to engage in activities to improve the law, the legal system, and the administration of justice.[19]

- A defender employee may speak, write, lecture, teach, and serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice.
- A defender employee may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal profession, and the administration of justice.
- Like nonjudicial court employees, federal defender employees should refrain from inappropriate political activity.

Framework for Executive Branch Employees

Federal employees have a statutory right, "individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof" as long as such activities take place while the employees are off duty and do not use government property or government resources.[20] Federal employees should make clear in any communications to a Member of Congress that they are acting in their individual capacities and on their own time.

While in the performance of their official duties, federal employees are prohibited from contacting any Federal agency or Federal court on behalf of others to influence Government action, unless authorized to do so as part of their official duties.[21]

Also, while in the performance of their official duties, federal employees may not assist or solicit the general public to lobby Members of Congress to support or oppose potential legislation.[22] In other words, while on the job, federal employees should not suggest in a private conversation, speech, or written correspondence that any person, group or organization call or write to a Member of Congress regarding legislative proposals.

Conclusion

Hearing from government lawyers and judges can be very impactful for Members of Congress when considering legislation relating to

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The Times They Are A-Changin': The Rise of Generative AI in the Legal Profession

By Nicole Case

Nicole Case is an associate at Moritt Hock & Hamroff, LLP. She is also a columns editor for *The Federal Lawyer*. Special thanks to Stephen Breidenbach for his excellent contributions and insights on this piece.

Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'
And you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'
Bob Dylan

The legal profession is on the brink of a technological revolution. The introduction of generative AI platforms in the legal world, while truly revolutionary, has left many attorneys with more questions than answers. Some are embracing the new tools and have already begun to integrate new systems into their daily work lives[1], while others are concerned about the accuracy of the generated information, along with other ethical issues.[2] Some judges are requiring attorneys to disclose their use of generative AI in the preparation of court filings, while others are forbidding its use all together.[3] Wherever you fall on this ever-moving spectrum, one thing remains true—generative AI not just coming, it's already here, and all evidence suggests that it's here to stay. Attorneys who understand the promises and pitfalls of generative AI platforms will undoubtedly be ahead of the curve. Bob Dylan said it best, "... admit that the waters around you have grown ... and you better start swimmin' or you'll sink like a stone."

What is AI?

Artificial intelligence (AI) refers to the simulation of human intelligence in machines.[4] One of the goals of AI is to mimic human cognitive activity.[5] AI systems leverage intelligent algorithms that classify, analyze, and make predictions from large amounts of data.[6] These algorithms are trained using large datasets so that they can identify patterns in data, make predictions, and recommend actions.[7]

AI first appeared in the 1950s, a time when scientists, mathematicians, and philosophers began to develop programs designed to mimic the problem-solving skills of a human.[8] As time went on, AI became more and more popular, being integrated into several industries such as technology, banking, marketing, and entertainment.[9] Today, AI is likely a huge part of your everyday life with examples including Siri, Alexa, email spam filters, Netflix recommendations, self-driving cars, and even a Google search.[10]

What is Generative AI?

While AI technology has already established its presence in our everyday lives, generative AI (GenAI) is a more recent phenomenon. GenAI is a form of AI that can create a wide variety of data, such as images, videos, audio, text, and 3D models.[11] It does this by learning patterns from existing data and then using this knowledge to generate new and unique outputs.[12]

Although GenAI research can trace its history back to the 1960s,[13] GenAI gained huge notoriety upon the launch of a GenAI platform known as ChatGPT in November of 2022.[14] Created by OpenAI (an AI research and deployment company established in 2015), ChatGPT can be used to organize, summarize, or write new text in response to a user's questions and/or instructions.[15] ChatGPT and other similar services are developed using: (1) information that is publicly available on the internet, (2) information that OpenAI licenses from third parties, and (3) information that OpenAI's users or human trainers provide.[16]

GenAI in the Legal Space

Virtually all law firms are already using some form of AI.[17] AI is baked into legal research platforms like Westlaw and Practical Law.[18] These tools use AI to help provide insight faster with visualization tools and data-driven charts so users can easily interpret and share information.[19] What's *new* is the use of GenAI.[20] GenAI platforms specifically designed for the legal profession include Harvey AI[21], CoCounsel[22], Lexis+ AI[23], and Westlaw Precision[24], all claiming to assist with drafting, research, and other legal tasks.

Lawyers Jumping on the GenAI Wagon

With AI on the rise, some lawyers are considering stepping up their AI game and integrating GenAI into their daily practices to automate routine tasks and streamline workflows.[25] Certain major law firms have already announced that they have created their own internal versions of ChatGPT.[26] In August of 2023, Dentons and Addleshaw Goddard announced that they are launching secure chatbots based on GPT technology.[27] Law firms Orrick, Herrington & Sutcliffe, which has about 1,150 lawyers, and Fisher Phillips, with more than 500 lawyers, are now using CoCounsel[28] while several global firms including DLA Piper and Allen & Overy are using Harvey AI.[29] Global law firm Baker McKenzie even appointed a new head of Machine Learning, a role designed to develop questions of how to combine machine learning and other types of AI with the firm's expertise to create new services.[30] A growing number of legal startups are also now applying machine-learning techniques to tasks such as document review and other litigation preparation techniques.[31]

Advantages

Time and Cost Savings:

GenAI possesses the ability to swiftly analyze vast volumes of legal documents, expedite research and due diligence, draft and manage contracts and other original content based on a user's prompt.[32] Needless to say, these systems save time and allow attorneys to focus on more intellectual endeavors. With high hourly rates for attorney services, some clients are encouraging their attorneys to use these tools to automate tedious tasks, thereby lowering their bill.

Better Decision Making

With GenAI platforms still in the works, it's possible that they can be programmed not only to pull information from legal databases like Westlaw and Lexis[33], but also from a firm's own repository of data[34], thus helping lawyers make better decisions and preventing duplicating work within a firm.

Increased Capacity:

The more time an attorney saves with GenAI systems, the more time that attorney will have to dedicate to other matters. As such, an attorney would be able to take on a heavier workload, accept more clients, and focus on business development.

Disadvantages

Hallucinated Cases:

A huge concern among lawyers is GenAI's potential to hallucinate facts and create erroneous outputs.[35] By now, we have all heard about the scandal involving New York personal injury attorney Steven Schwartz, who used ChatGPT to write a legal brief, only to realize a bit too late that the bot completely fabricated the cases.[36] The scandal left many lawyers, judges, and other legal professionals concerned about the accuracy of ChatGPT and other GenAI platforms.

Bias:

A common misconception about the use of AI is that with the removal, or reduction, of human decision making, comes a decision clean from implicit bias. On the contrary, AI algorithms (in general) can collect biased historical information, which means that the AI system may also inadvertently produce biased results.[37] When this information is used in the practice of law, it can lead to unfair outcomes and perpetuate discrimination.[38]

Ethical Concerns:

As the legal profession continues to navigate these advancements in GenAI, and lawyers consider integrating these systems in their daily practice, ethical considerations emerge as a pivotal point of discourse. AI (in general) will raise complex and challenging ethical questions that implicate a variety of ethical responsibilities including those regarding competent representation (Model Rule 1.1), client communication (Model Rule 1.4), client informed consent (Model Rule 1.6), protection of client property (data) (Model Rule 1.15), and client confidential information (Model Rule 1.6). Lawyers must also understand the risks that any form of AI can pose to client confidential data, and to inadvertently waiving attorney-client and attorney work product privileges."[39] The use of GenAI may raise the same concerns, particular the duty of competence, since it literally produces output that has historically been generated by an attorney. Needless to say, the use of GenAI as a "shortcut", especially considering the potential for GenAI to hallucinate cases as discussed above, raises serious questions about a lawyer's competence.[40]

Reduced Workforce:

With GenAI's potential to save time and resources, it begs the question: Will firms look to reduce the number of attorneys in their employ? Current research and discussions on GenAI suggest that it cannot replace the job of lawyers, since it needs human oversight to work.[41] Indeed, GenAI only works when a user inputs a prompt. Still, some attorneys and other legal professionals remain concerned that the prospect of increased efficiency and time saving will result in less humans in the office.

Disclosures

Transparency is of paramount importance in this dance between man and machine. Disclosures regarding the use of generative AI in legal processes are not just procedural niceties but ethical imperatives. Attorneys should consult with the management team of their law practice and/or partners and colleagues, inquiring into whether their workplace has established policies and procedures governing the use of GenAI platforms.

When submitting court filings, attorneys should first and foremost review their judge's rules, if any, regarding the use of GenAI. Some judges have issued protocols governing the use of GenAI in court filings, issuing either disclosure instructions or per se restrictions.[42] In May of 2023, a Texas district judge issued a requirement that lawyers in cases before him must certify that they did not use artificial intelligence to draft their filings without a human checking their accuracy.[43] In July of 2023, a New York district judge issued a similar requirement that counsel, while not prohibited from using ChatGPT or other tools, "must at all times personally confirm for themselves the accuracy of any research conducted by these means."[44]

A Look Towards a Frightening Future: Q* and Beyond

Beyond just GenAI, which has already been released in various forms, the next generation of AI platforms is also starting to take shape. OpenAI, the same company who created ChatGPT, has been working on a new kind of AI system, known internally as Q* (pronounced "Q-star").[45] While the technical makeup of this new system is not yet clear, as in what *exactly* Q* will be able to do, the research and early stages of Q* reportedly marks a major, and perhaps frightening, step towards OpenAI's goal of making systems that are *generally better than humans at doing a wide variety of tasks*.[46] Concerns surrounding this research breakthrough (within OpenAI itself) led to the temporary termination of OpenAI's CEO, Sam Altman, in September of 2023, as the board feared that Altman might charge ahead with releasing Q* before OpenAI had enough time to implement adequate safety protocols.[47] The termination of Altman arguably revealed that OpenAI may be *afraid* of its own technology's potential capabilities, a revelation that has left many concerned for what's to come.

At this stage, knowing very little about the specific details of Q*, except that its goal is to be better than humans at a variety of tasks, it's difficult to predict how it might impact the legal profession. Questions remain regarding whether systems such as Q* will ultimately be integrated into a legal professional's daily work life, and if so, what that might look like.

Conclusion

The introduction of GenAI platforms in the legal profession is akin to wielding a double-edged sword. It opens the door to the prospect of increased efficiency, better decision making, and increased capacity, while simultaneously raising ethical issues of competence and confidentiality, along with potentially biased results and reduction in workforces. As GenAI continues to permeate through the legal space, and more law practices invest resources into its integration, attorneys must ensure that they are informed on the latest GenAI news and maintain a basic understanding of how these systems work. Only then can attorneys safely and competently integrate these systems into their practice. No matter how foreign the concept of AI might seem to some legal professionals, it's more important now than ever that we "admit that the waters around [us] have grown ... for the times they are a-changin'." ⊙

Endnotes

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[2]Rabihah Butler, *Generative AI and the courts: Balancing efficiency and legal obligations*, Thomson Reuters (Aug. 28, 2023) ("According to a recent Thomson Reuters Institute survey report on gen AI use among law firms, 15% of law firm respondents said their firms have issued a warning around generative AI or ChatGPT usage at work, including 21% at large law firms and 11% at Midsize law firms.").

[3]Ryan Groff, *How can I disclose or describe my use of generative AI to a court*, casetext, https://perma.cc/2UHS-TPVH (last visited Nov. 19, 2023).

[4]Jake Frankenfield, *Artificial Intelligence: What It Is and How It Is Used*, Investopedia (Apr. 24, 2023), https://perma.cc/8RU8-2WYZ.

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[6]*What is AI and How can Law Firms Use it?*, Clio, https://perma.cc/9SAT-ZWJ9.

[7]*What is AI and How can Law Firms Use it?*, *supra* note 7.

[8]Rockwell Anyoha, *The History of Artificial Intelligence*, Harvard Blog: Special Edition on Artificial Intelligence (Aug. 20, 2017), https://perma.cc/JC66-TWRR.

[9]*Id.*

[10]Alyssa Schroer, *Artificial Intelligence. What is Artificial Intelligence (AI)? How Does AI Work?*, builtin (Jul. 27, 2023), https://perma.cc/H8UB-9B5F.

[11]*All Things Generative AI: First, What is Generative AI?*, generativeai.net, https://perma.cc/MXB6-BDUN (last visited Nov. 19, 2023).

[12]*Id.*

[13]Matt White, *A Brief History of Generative AI*, Medium (Jan. 7, 2023), https://perma.cc/FH49-425L.

[14]Suzanne McGee, *Generative AI and the Law*, LexisNexis (May 11, 2023), https://perma.cc/3ZGS-V8KD.

[15]Michael Schade, *How ChatGPT and Our Language Models Are Developed*, OpenAI, https://perma.cc/D5YA-DPC7 (last visited Nov. 19, 2023).

[16]*Id.*

[17]*How law firms can use AI to level up their business*, Reuters (Sept. 25, 2023), https://perma.cc/DG9W-UYRT.

[18]*Id.*

[19]*Id.*

[20]*Id.*

[21]Harvey AI, established in 2022, is powered by OpenAI's GPT-4 model and assists with contract analysis, due diligence, litigation, and regulatory compliance and can help generate insights, recommendations, and predictions based on data. *See Harvey AI: A Glimpse Into The Future Of Legal Technology*, LEX247 (Oct. 3, 2023), https://perma.cc/5R85-ZPYP. *See also* Kate Rattray, *Harvey AI: What We Know So Far*, Clio Blog, https://perma.cc/EGZ9-FQ89 (last visited Nov. 19, 2023).

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[24]Westlaw has developed their own version of GenAI, with AI-Assisted Research on Westlaw Precision, combining generative AI with Westlaw Precision's industry-leading legal content. *See Westlaw Precision now has generative AI*, Thomson Reuters, https://perma.cc/847E-5JPN (last visited Nov. 19, 2023).

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[26]Alex Su, *The lawyers are leaning into AI*, Off The Record (Aug. 6, 2023), https://perma.cc/TY4R-Z8W9.

[27]*Id.*; Matt Reynolds, *'The Real Game-Changer': Dentons is latest major firm to launch GPT-powered chatbot*, ABA J. (Aug. 14, 2023), https://perma.cc/6F4L-TYJQ.

[28]Sara Merken, *Legal AI race draws more investors as law firms line up*, Reuters (Apr. 26, 2023), https://perma.cc/GWB3-UQLN.

[29]*Id.*

[30]McGee, *supra* note 15.

[31]*Law firms climb aboard the AI wagon*, Economist (Jul. 12, 2018), https://perma.cc/5XL6-Q623.

[32]Sterling Miller, *Benefits of generative AI: I didn't know it could do that!*, Thomson Reuters, https://perma.cc/9XEC-FHA6 (last

visited Nov. 19, 2023); Mark Witten, *Applying generative AI to law: Opportunities and risks*, Queen's Law, https://perma.cc/Z6R2-52K5 (last visited Dec. 11, 2023).
[33]*How law firms can use AI to level up their business*, *supra* note 18.
[34]Witten, *supra* note 33.
[35]Hon. Katherine B. Forrest, *AI and the practice of law*, 4C N.Y.Prac., Com. Litig. in New York State Courts § 79:3 (4th ed.).
[36]Kyle Schnitzer and Priscilla DeGregory, *'Humiliated' NY Lawyer who used ChatGPT for 'bogus' court doc profusefly apologizes*, New York Post (June 8, 2023, updated June 9, 2023), https://perma.cc/J3AA-KUKL. See Daniel W. Linna Jr. and Wendy J. Munchman, *Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore Meets AI*, ABA (Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai/.
[37]*AI and the Law: What are the Ethical Considerations*, Clio, https://perma.cc/N5PE-9VKJ (last visited Nov. 19, 2023).
[38]*Id.*
[39]*Id.*
[40]*See* Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 1983).
[41]*Will AI take over lawyer jobs? 3 reasons to object*, Thomson Reuters (Sept. 29, 2023), https://perma.cc/VT9X-TV3T.
[42]Groff, *supra* note 4.
[43]Jacqueline Thomsen, *US judge orders lawyers to sign AI pledge, warning chatbots 'make stuff up'*, Reuters (June 3, 2023), https://perma.cc/REM3-8VY8.
[44]Groff, *supra* note 4 (Example Orders: US District Court for the Southern District of New York).
[45]Mark Sullivan, *Should we be afraid of Q*, OpenAI's mysterious AI system?*, Fast Company (Nov. 29, 2023), https://www.fastcompany.com/90989422/openai-q-mysterious-ai-system.
[47]6*Id.* (emphasis added).
[48]7*Id.*

Beltway Bulletin *continued from page 8*

the administration of justice. For this reason, the GRC invites its members who are government attorneys and judges to review these frameworks and to take any other steps necessary to satisfy themselves with regard to compliance, including consulting the appropriate ethical authority in their agencies or organizations. ⊙

Endnotes

[1]*See* Guide to Judiciary Policy, Vol. 2A. Ch. 2, Commentary to Canon 4 (Mar. 12, 2019).
[2]*See* Guide to Judiciary Policy, Vol. 2A. Ch. 2, Canon 4A(2).
[3]Guide to Judiciary Policy, Vol. 2B, Ch. 2 ("Advisory Op."), No. 50: Appearance Before a Legislative or Executive Body or Official (June 2009).
[4]*See* Advisory Op. No. 93: Extrajudicial Activities Related to the Law (June 2009).
[5]Id.
[6]*See* Guide to Judiciary Policy, Vol. 2A. Ch. 2, Canon 4A(3).
[7]*See* Guide to Judiciary Policy, Vol. 2A. Ch. 2, Canon 4A(2); Advisory Op. No. 50.
[8]*See* Advisory Op. No. 93.
[9]Id. (referencing Advisory Op. No. 50 (suggesting that a judge should not testify before a legislative committee on social legislation)).
[10]Id.
[11]Id.
[12]See Guide to Judiciary Policy, Vol. 2A. Ch. 2, Canon 5.
[13]*See* Advisory Op. No. 93.
[14]Id.
[15]The Code of Conduct for Judicial Employees does not apply to Supreme Court Justices, federal judges, or employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, or the federal public defenders' office, as each of these groups has its own codes and standards. *See* Guide to Judiciary Policy, Vol. 2A, Ch. 3, Sec. 310.10(b).
[16]Guide to Judiciary Policy, Vol. 2A, Ch. 3, Canon 4.
[17]*Id.*, Canon 4(A).
[18]Advisory Op. No. 92.
[19]Guide to Judiciary Policy, Vol. 2A, Ch. 4, Canon 4.
[20]5 U.S.C. §7211. *See also* https://www.afge.org/globalassets/documents/manuals/2021-lobbying-dos-donts.pdf
[21]*See* https://www.dol.gov/sites/dolgov/files/SOL/files/How-To-Keep-Out-Of-Trouble_2021.pdf
[22]18 U.S.C. §1913.

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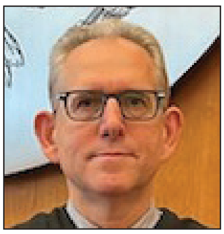
FBA Student Scholars Program Coming to a Law School Near You!

By Hon. Alan S. Trust



Hon. Alan S. Trust sits in the Eastern District of New York as chief bankruptcy judge. He is a past chair of the FBA Bankruptcy Law Section and served a two-year term as president of the Eastern District of New York Chapter of the FBA. He currently serves as chair of the Bankruptcy Judges Committee of the FBA Judiciary Division, and is the liaison from the National Conference of Bankruptcy Judges to the FBA.

Are you an attorney that wants to mentor young law students in their legal writing and researching skills? Do you work for a law school that prides itself on facilitating connections between law students and lawyers? Are you a law student that is seeking an enriching opportunity for mentorship, legal writing, and potential publication? If you answered yes to any of these questions, please consider the new Student Scholars Program being rolled out by the FBA Bankruptcy Section for launch in the Spring of 2024.

What is the Program?

The program is focused on assisting students in preparing a written paper on a bankruptcy/insolvency topic of their choice. Each participating law school is responsible for finding students who have written or are willing to write either: (1) scholarly papers of approximately 20-35 pages in length that are supported with authorities, or (2) shorter length articles which also have supporting authorities. The papers should be current (i.e., written within the last six to 12 months) and should not be active course assignments unless the specific law school chooses to allow such submissions.

Once a student is selected to participate in the program, the Bankruptcy Section would pair the student with a member of the bench or bar who has volunteered to provide guidance.

Once the paper is complete, the students will present their papers to their invited guests and members of the Section. The presentation will be held via a virtual platform or potentially in a hybrid format. Students will be allotted approximately 10-15 minutes to present their paper. The student's mentor will play the role of commentator at the presentation giving helpful, positive feedback to the student. For example, after the student presents, the mentor would ask questions like, "What inspired you to write this paper?" Final versions of the papers will then be circulated and made available to all attendees of the presentation along with the students' bios.

Does This Program Work?

The Bankruptcy Section is expanding on the great work done by the EDNY Chapter of the FBA, under the leadership of Troy Kessler. The EDNY program was open to any subject matter paper and benefitted from the help of many law school faculty members and bench bar mentors. In an upcoming law review article[1] written by Mr. Kessler, Professor Joan C. Foley of Touro Law Center, and Professor Robin Boyle-Laisure of St John's Law School, the authors describe the value students receive through engaging in scholarly writing, receiving mentorship, and making a public presentation. These authors have assembled feedback from participants in the EDNY Chapter program. Students initially expressed appreciation and felt honored that their work was being considered for the program. They viewed this as an important opportunity for building confidence as future junior lawyers. They expressed sentiments like being grateful that their law schools valued their work and trusted them to participate. Others expressed overall positivity about the mentor relationship and getting to hear about other students' papers on various issues. My own current term clerk, Mike Solimani, said the program was a fantastic opportunity for him to further his skills as a future practitioner, provided him with a potential outlet for publication, and helped him improve his research, writing, and public speaking skills.

Students were also encouraged to invite family and friends to the presentation. For some, this was the first time that their parents, siblings, and friends were able to see them present. Students also valued the connections they made with students and faculty members from their own and other schools.

How to Get With the Program

If you are a faculty member who may be interested in your law school getting involved in 2024 or 2025, or wish to volunteer to be a mentor, please email my law clerk, Mike Solimani: michael_solimani@nyeb.uscourts.gov.

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FOUNDATION of the FEDERAL BAR ASSOCIATION

Celebrating the Foundation's 70th Anniversary

By Ashley Belleau

Ashley Belleau has been a member of the FBA since 1985. She is a past national president and served as ABA delegate from 2015 to 2021. Ashley is a shareholder with Lugenbuhl in New Orleans.

As the Foundation celebrates its 70th year, having been charted by Congress in 1954, we are excited that *The Federal Lawyer* is highlighting the Foundation's past, present, and future in this winter edition. Aaron Bulloff, immediate past Foundation president and now chair of the Fellows Committee, describes how the Foundation was created and what it did in the early years. David Guerry, a current director, writes about how the Foundation was revived in 2001 by past FBA president Bob McNew with the creation of the Fellows program, which recognizes individuals who have demonstrated exceptional commitment to and leadership within both the FBA and the legal community. Several of our seasoned and new Fellows share their stories of why they became a Fellow and how becoming a Fellow has enriched their lives.

This edition also highlights the Foundation at work: the awarding of scholarships and community outreach and diversity grants. We also fund the Elaine R. "Boots" Fisher Award, Ilene and Michael Shaw Public Service Award, Ilene and Michael Shaw Younger Lawyer Public Service Grant, and Peter J. Mazza Award. The Foundation provides financial support to the annual Thurgood Marshall Memorial Moot Court Competition, sponsored by the Federal Bar Association's Younger Lawyers Division. This national program hosts law student teams from more than 35 law schools with the preliminary rounds judged by FBA member volunteers and the final round being judged by a three-person appellate panel including a sitting federal judge.

As we go forward, we have implemented our strategic plan described in my last column to maximize our impact on the federal legal community. The Foundation is focused on raising our visibility among the FBA members, and this *Federal Lawyer* winter edition is targeted to do just that. Also, we have updated our branding. The new logo of the Foundation features hands cradling the scales of justice—and our FBA members—as we are the charitable arm of the FBA. You can find us on the FBA website, www.fedbar.org/foundation/ and on:

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The Foundation has been built on the shoulders of distinguished attorneys such as Bob McNew and Winston Haythe, who are highlighted in this issue, and those who have led the Foundation over the years:

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Juanita B. Sales Lee	2019-2020
James R. Hammerschmidt	2020-2021
Hon. Pamela Mathy	2021-2022
Aaron H. Bulloff	2022-2023

The Foundation also would not be where we are today without our generous donors. Since the beginning of our fiscal year on Oct. 1, 2023, we have received 47 contributions: to the Robert A. McNew Law Student Scholarship in recognition of Bob McNew's service to the Foundation; to the Fellows program; and tribute donations in honor of our Executive Director Stacy King, past FBA presidents Matt Moschella and Hon. Michael Newman, FBA President Jonathan Hafen, national leader Hon. Alison Bachus, and yours truly. We thank the following donors[1]:

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If you would like to join our donor roll, please donate. Your donations will help us help others.

I hope you enjoy reading the articles about the past, present and future of the Foundation. And a special thank you to the TFL editorial board for featuring the Foundation in this issue and to Cathy Barrie, our Foundation Manager, who spent countless hours gathering information and assisting with the production of the articles, testimonials, and photographs. ⦿

Endnotes:

[1] (Donor list as of December 15, 2023)

Bankruptcy Brief *continued from page 13*

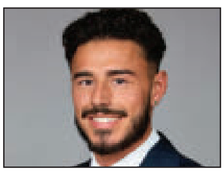
DISCLAIMER: None of the statements, facts, or opinions contained in this article constitute official policy of any judge, court, agency, or government official or quasi-governmental agency. ⦿

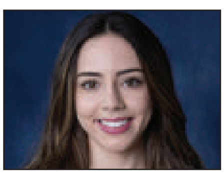
Endnotes

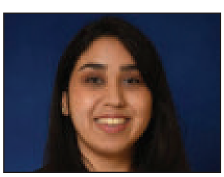
[1]Joan C. Foley, Robin Boyle-Laisure, and Troy L. Kessler, *Merging the Bench, Bar, and Law Schools: How a Student Scholars Program Achieves Professional Identity Through Scholarly Writing, Mentorship, and Presentation*, 93.1 UMKC L. Rev. __ (Aug. 2024) (publication pending) (the "Scholars Article").

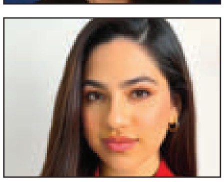
Judicial Intern Academy Returns Again: Cultivating Growth and Learning in the Lawyers of Tomorrow

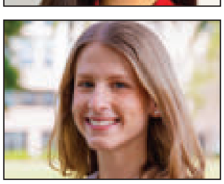
By Patricia Herrera, Dante Groppo, Kelly Cuba, Catherine Vazquez, Catarina Alvarez, Katherine Rodriguez, Sommer Sandler, and Hon. Beth Bloom











The Judicial Intern Academy's (JIA) second year comes to another successful end, sending off rising 2Ls from all around the country back to their law schools with a multitude of new experiences, expanded networks, and improved oral advocacy and legal writing skills. Acknowledging the fiercely competitive landscape of federal judicial internships, United States District Court Judge Beth Bloom established a pioneering program. With the goal of providing a gateway for a broader spectrum of students, this visionary initiative grants aspiring legal minds a unique opportunity to delve into the intricacies of the federal and state courtrooms. The objective of the program was, and is, to provide an internship for law students who are either unable to participate in a full-time, in-chambers, unpaid internship—due to either financial or personal reasons—or who applied to an in-chambers internship but were not selected. Through a well-thought-out hybrid model, participants engage in a rewarding 20-hour-per-week judicial internship. The program's design ensures that interns have the liberty to participate actively in events either in-person or remotely, fostering a culture of inclusivity and maximum engagement.

The pilot program started in the summer of 2022 with an inaugural class of 18 students from two Florida law schools (one private and one public). Now, in its second year, the JIA's Summer of 2023 class welcomed 31 rising-second year law students from the four law schools located in the Southern District of Florida: University of Miami, Nova Southeastern University, St. Thomas University, and Florida International University. This summer, several interns were able to participate in summer abroad opportunities, attend school, accept part-time jobs—20 of the interns held jobs and needed to earn money for school—and act as full-time caregivers for family members while also participating in the JIA. This second year also marks a tremendous achievement for the JIA as it has now become a national program, adopted by the Federal Bar Association, with interns from six other districts participating in the remote programming. The six participating districts include the District of Massachusetts, the Southern District of Mississippi, the Southern District of Ohio, the Northern District of California, the Eastern District of New York, and the District of Oregon.

Interns are immersed in the programming of the JIA from day one, beginning with an introduction and greeting from two members of the JIA's leadership team—Trevor Jones and Yaniv Adar, and continuing with a full-day ethics and orientation session presented by judges, law clerks, human resources personnel, law library personnel, and the U.S. Marshals Service. Day one ended with an afternoon panel comprised of judges and lawyers who spoke to the interns about mental wellness in the legal profession including the various skills and resources available to ensure mental wellness is a priority.

The eight-week JIA program is designed to run each summer and provide law students with an opportunity to immerse themselves in a diverse array of state and federal court proceedings. With a carefully curated itinerary, the program exposes participants to a wide spectrum of legal spheres, ranging from bankruptcy and family law to criminal, civil, domestic violence, probate, and duty court matters. This comprehensive approach affords students a better understanding of the legal landscape, preparing them for multifaceted challenges that await in their careers.

Participants have the privilege of observing proceedings in multiple judges' courtrooms, enabling them to explore and identify their area of interest within the legal domain. This immersive and hands-on exposure serves as a guiding light, empowering students to discern their passion and align their career paths accordingly. By facilitating access to a multitude of court proceedings, it broadens their horizons and nurtures their potential to become well-rounded legal professionals. "Federal court is viewed by many attorneys as mysterious and inaccessible, likely due to the lack of in-person interactions with the federal judiciary. The JIA provides a unique opportunity for law students to interact with a broad array of judges and professionals, interactions that most law students are unlikely to experience in their entire legal career," stated Yaniv Adar.

Interns not only observed court proceedings, but also engaged in valuable networking opportunities. They had the chance to interact with judges and attorneys, delving into their legal careers, motivations, and passions. This went beyond practical experience, as interns expanded their network and forged lasting connections with attorneys from diverse legal backgrounds, including both small and big firms, federal and state court, and members of various FBA chapters. The JIA program further enriched the interns' experience through featured series like "Learning from the Legends," where esteemed attorneys shared their insights, and "Conversations with the Court," providing interns with the opportunity to engage in discussions with accomplished judges.

Judge Bloom also recognized the importance of developing a proper writing sample and paired current interns with former federal law clerk advisors (LCAs) as mentors throughout the summer to guide interns in their writing process, with the goal of establishing a mentorship that would last long after the end of the internship. Both the interns and the mentors benefit from this pairing. LCA Russell Koonin of the SEC said: "The opportunities the program provides to law students is tremendous. But it's not a one-way street. Being offered the opportunity to be a law clerk advisor has been extremely rewarding and insightful."

The writing sample assigned to the interns addressed a current case on Judge Bloom's docket, with its main legal issue regarding deceptive and unfair trade practices against Kraft Heinz Food Co. The interns prepared a bench memorandum and were then afforded the opportunity to argue their positions before Judge Bloom in the Wilkie D. Ferguson, Jr. Courthouse. The program came full circle in the end where interns were able to watch the oral arguments live and in person by actual counsel on the case.

Yet, it is not only the carefully tailored programming which makes it unique but also the passion and commitment of the individuals who form the backbone of the JIA which make it truly special. Whether it is Trevor Jones supplying interns with sandwiches outside of the courthouse, or Yaniv Adar guiding the interns through West Palm Beach to the courthouse, or Elizabeth Gariazzo's "GOOD MORNING GOOD PEOPLE" email with the week's events, each individual on the JIA's leadership team is devoted to propping up the next generation of legal professionals. As Trevor Jones said, "One of my favorite, and most rewarding, things to do as I become a more seasoned attorney is to help those that may lack familial or societal career guidance and support."

Student Experiences

Oral Arguments

After researching the legal issues, drafting our bench memoranda on the assigned case, and practicing with our LCAs, the time has finally come for interns to present their oral arguments before Judge Bloom. Inside the federal courtroom, one by one, each intern took their turn at the lectern, papers in hand, and confidently voiced, "Good afternoon, your Honor, and may it please the court..."

With every presentation, the courtroom was filled with a symphony of articulate voices, well-reasoned points, and intellectual passion. Judge Bloom treated intern oral arguments as she would a scheduled court proceeding and posed thought-provoking questions that challenged each intern's stance. "I am grateful for the JIA program giving me this opportunity to present an oral argument before Judge Bloom. At first the nerves came in, but after each passing word, I grew steadier and more confident–it was like a switch turned on–ready to defend my client. It has given me a first-hand glimpse of what trial and oral advocacy looks like and has opened my eyes to pursue a path of becoming a litigator," stated Nova Southeastern University Shepard Broad College of Law student Katherine Rodriguez.

At the close of the oral arguments, Judge Bloom went on to offer personalized feedback to each intern, commending their strengths and encouraging them to explore further depths of the law. Interns left the courtroom with a newfound sense of purpose and inspiration. The experience had been nothing short of transformative, and the memory of presenting an oral argument in front of Judge Bloom would forever be etched in their minds.

Visiting Law Firms: Stearns Weaver and Berger Singerman

Judge Bloom and the JIA team organized visits at law firms in the South Florida area to give interns different perspectives on big vs. small law. The luncheon event at Stearns Weaver & Miller included a panel of attorneys from various law firms to provide insight on mentorship, critical law school experiences, transitions, and personal career advice. Additionally, interns visited the Law Firm of Berger Singerman, where they were hosted by Ana Kauffmann and had the opportunity to engage with young lawyers and seasoned practitioners about their paths in the legal profession and obtained a better understanding of private practice and mid-size firm life.

Learning with the Legends: H.T. Smith

Another great aspect of this program was the "Learning from the Legends" series, where respected legal voices told JIA interns the stories of their careers. For example, Professor H.T. Smith provided us with an inspiring summary of his life and stated, "storytelling is an art," which helped us realize that effective lawyers not only construct strong arguments, but also use storytelling skills to present them. We learned that the legal profession is not devoid of emotion; it requires being able to articulate how facts make people feel.

In his talk, Professor Smith asked: "What is the first thing a good moose hunter must do?" Students yelled out different responses ranging from "have confidence" to "hunting permits," but the best answer was "to go where the moose are." Being a good lawyer requires going to where the good lawyers are. Being an effective advocate for our clients involves surrounding yourself with people you aspire to be. This makes it easier to become a better person and a better lawyer.

Conversations with the Court

The "Conversations with the Court" series was designed to provide interns with the opportunity to meet other jurists. Twelve installments of the series throughout the summer allowed interns to meet multiple judges each week, learn about their personal story, and gain an inside look at how they got to the bench. The series gave students the opportunity to engage with judges not only in Florida but in other states such as New York, California, and Massachusetts.

Each judge offered their own sage advice which ultimately gifted interns with a deep pool of knowledge by the end of the summer. Judge Raag Singhal keenly reminded interns that there is "virtue in persistence" when it comes to pursuing a goal and having to reapply multiple times. Judge Mimi Tsankov, speaking in her capacity as President of the National Association of Immigration Judges, spoke on her experience working in the New York Federal Plaza Immigration Court and gave insight on how to approach a heavy caseload while keeping in tune with one's emotions. Judge Shaniek Maynard shared eight lessons on life, the law, and legal writing. She advised interns to "be willing to take risks and do work that's important to you, follow your heart." "The *Conversations with the Court* series provided us with truly limitless opportunities to get to know each judge on a personal level. This was so much more than a brief interaction or Q&A. I left every event with an even deeper appreciation for the judges we had met and an even greater perspective on the law," stated Nova Southeastern University Shepard Broad College of Law student Sommer Sandler.

The Flexibility of the Hybrid-Approach Model of the JIA Program

Moot Court

"I really enjoyed the JIA and thought it was a great experience especially in furthering my legal career and making connections. It was really easy to balance classes and trying out for moot court because I was able to work on my own schedule and attend hearings through zoom. My favorite part of the program was participating in the oral argument in front of Judge Beth Bloom. The tips Judge Bloom and my LCA gave me for the oral argument are ones I will take with me for the rest of my career and ultimately helped me try out/get into mood court!" stated Lauren Viola, of St. Thomas University's Benjamin L. Crump College of Law.

Study Abroad/Remote Experience

Another highlight of the program is the flexibility it offers students. Many of the JIA events were offered via Zoom, allowing the interns to hear inspiring talks from prominent legal voices and listen in to court proceedings from anywhere in the world. Elizabeth Gariazzo—Judge Bloom's Courtroom Deputy—was a key player in curating a courtroom environment on Zoom. She prepared the cameras and microphones for the specific speakers, allowing students to see all points of view from any location. For example, this year, three FIU Law students partook in the program whilst participating in FIU's Summer Abroad Program in Seville, Spain.

"The JIA really helped me feel immersed in the courtroom, despite being in another country," commented Kelly Cuba of FIU Law. "When I came back, I continued to participate in person, and it was like I never missed a thing."

The JIA also offered flexibility with the LCAs. Interns could meet with their advisors over Zoom and receive sage advice from experienced attorneys. As the interns wrote their memorandum, they communicated via email to receive feedback, allowing the interns to improve their writing skills despite not being in a physical courtroom. This program is using technology to help law students from different parts of the country receive the invaluable federal internship experience, which can sometimes be inaccessible to students who cannot afford to move to another part of the country.

Part-Time Work

"As a first-generation law student, it is easy to feel without direction and instruction in the pursuit of one's future career. Without guidance the path forward can often feel daunting. The 'Learning with the Legends' series not only allowed me to develop a plan forward but has also provided me with answers to questions I did not even think to ask. Participating in the program was equivalent to gaining dozens of mentors at once, with my LCA Alise Johnson, Counsel for the SEC becoming the most prominent of them all stating 'this [mentorship] does not end just because the JIA ends ... this is for life. Whatever you need you let me know.' Prior to participating in the JIA, I thought I was foreclosed from the possibility of participating in a Judicial Internship because I needed to work in order to save money for school; however, the JIA allowed me to do both and gain an invaluable wealth of knowledge in the process. I am forever grateful to Judge Bloom, the JIA leadership team and the many judges and legal practitioners who volunteered their time to speak to the interns." Patricia Herrera, second-year student at the University of Miami School of Law.

Summer Classes

"It was an amazing summer with the JIA program! I was honored to get into almost every type of court in Florida and see the hearings, duty courts, voir dire, and other events. The most exciting experience was presenting an oral argument for an actual case before Judge Beth Bloom! When it came to balancing my summer semester in school with dozens of weekly JIA events, I tried to schedule afternoon classes. I encourage every student to apply and spend their summer with the JIA!" stated Aleksandar Kutsaev, of St. Thomas University's Benjamin L. Crump College of Law.

Determining One's Legal Career

The program is an exceptional journey shaped by the interns themselves, paving the way for boundless opportunities and unparalleled value. Emphasizing the intern's active involvement, the program's worth is directly correlated to the effort invested, making it highly encouraged to seize every opportunity it presents. The chance to engage with numerous esteemed judges is an irreplaceable aspect of this unique environment, creating an experience like no other. The participants' eagerness to connect, share their profound wisdom and experiences underscores the importance of being fully present and receptive.

In this transformative setting, one must always remain mindful of the extraordinary encounters that await, for it is in these connections that inspiration truly flourishes. "As a first-generation law student, I consider myself immensely fortunate to have been bestowed with this invaluable opportunity to learn from the finest judges and attorneys. Prior to joining the program, the path ahead seemed perplexing, and I felt as though I was wandering without direction. However, the JIA ignited a spark within me––a passion for the law, a newfound drive, and a keen interest that illuminates my path. Today, I have a clearer vision of the lawyer I aspire to become, and for this profound discovery, I extend my heartfelt gratitude to Judge Bloom," stated University of Miami Law student Dante Groppo.

Judge Beth Bloom and the JIA Team's commitment to empowering the next generation of legal professionals is exemplified by the creation of this transformative program. By providing invaluable insights into the inner workings of the federal judiciary, the JIA leaves an indelible mark on the journey of aspiring legal scholars, propelling them toward excellence and success in their careers. ⦿

Hon. Beth Bloom is a U.S. District Court judge in the Southern District of Florida.

Students from each law school in the Southern District participated in this summer's Judicial Intern Academy and collectively authored this article describing their experiences during the eight-week program. Each student, described below, authored the article.

Patricia Herrera is a first generation, second-year law student at the University of Miami School of Law, with an interest in Complex and Commercial Litigation. Sher currently serves as an intern for Florida's Eleventh Judicial Circuit.

Dante Groppo is a second-year law student at the University of Miami School of Law and graduated with summa cum laude from Florida Atlantic University.

Kelly Cuba is a first-generation, second-year law student at Florida International University College of Law. She serves as the 2L representative for the Student Bar Association; secretary for the Hispanic Law Student Association; and secretary for the Sports, Entertainment, Fashion, and Art Society.

Catherine Vazquez is a second-year law student at Florida International University. She currently serves on the Student Bar Association Secretary and 2L Representative for the Cuban American Bar Association.

Catarina Alvarez is a first generation, second-year law student at Florida International University School of Law. In addition to class, she works as a research assistant at the Law Library.

As a first-generation student, Katherine Rodriguez is starting her second year at Nova Southeastern University Shepard Broad College of Law. She is pursuing the Intellectual Property Concentration and currently works part-time at a law firm specializing in collections and bankruptcy matters.

Sommer Sandler is a 2L at the Nova Southeastern University Shepard Broad College of Law. She heavily enjoyed the experience this summer as a JIA intern because it exposed her to all parts of the federal court system. She is currently a junior associate for the Journal of International Law & Comparative Studies. She is also a teaching assistant for Legal Research and Writing I & II. In the future, she hopes to pursue a career at the federal level focused on international human rights law.

Hon. Rosemary Gambardella

U.S. Bankruptcy Judge, District of New Jersey

by Hon. Elizabeth L. Gunn and Shelby Kostolni

Hon. Elizabeth L. Gunn was appointed as a bankruptcy judge for the District of Columbia on September 4, 2020. Before her appointment, Judge Gunn served as an assistant attorney general for the Commonwealth of Virginia as the bankruptcy specialist for the Division of Child Support Enforcement. In 2017, Judge Gunn was recognized by the American Bankruptcy Institute as a member of its inaugural class of 40 Under 40. Judge Gunn received her BA, cum laude, from Willamette University in Salem, Oregon and her law degree, cum laude, from Boston College Law School. Shelby Kostolni serves as Judge Gunn's 2023-24 term clerk. She is a 2023 graduate of the University of Alabama School of Law. She also received her Bachelor of Social Work in 2019 and her Master of Social Work in 2023 from the University of Alabama.

"Sometimes people see you in positions that you don't always even see yourself in," says Bankruptcy Judge Rosemary Gambardella about what inspired her to apply for the vacancy that ultimately resulted in her 1985 appointment to the bench. Although becoming a judge was not originally on her radar, after a few lawyers inquired if she was going to apply, she decided there might be some merit to it. Judge Gambardella submitted her application with just six years of practice under her belt—but practice that included a bankruptcy clerkship and working for the Office of the United States Trustee when it was still a pilot program. Now, approaching almost 40 years on the bench, it is hard to find someone who remembers the New Jersey bankruptcy court without her presence. The word count of this article is insufficient to even touch on a fraction of Judge Gambardella's successes, influential opinions, news-worthy cases, and contributions to the bankruptcy community as a whole. Instead, we focus herein on her journey to the bench and highlights of her service.

A native of New Jersey, Judge Gambardella did not leave the state she calls home. After growing up in Newark, she moved to Glen Ridge at 15, and she remained in New Jersey for both college and law school. Judge Gambardella knew she wanted to be a lawyer when she was inspired by her sociology/juvenile justice teacher Miss McAtee to pursue law school after college. At that point, in the early 1970s, there were not many female lawyers in the area and none in her family.

Judge Gambardella is a proud Rutgers (New Brunswick) alumna, entering with the first class of incoming women as part of the Class of 1976 and continuing at Rutgers for law school as part of the Class of 1979. Judge Gambardella's twin sister Frances also entered Rutgers law school in 1976, creating built-in study partners from the beginning. At that time, Rutgers was "ahead of the curve" on recognition of women in the practice of law. Just before Judge Gambardella entered law school, Ruth Bader Ginsburg ended her tenure at the school as a professor, leaving behind a legacy of women in the practice. Senator Elizabeth Warren is

another noted former professor. Although she would not characterize it as such, Judge Gambardella is another example of the history of fabulous women with connections to Rutgers law school.

After law school, Judge Gambardella sought out a clerkship for what she characterizes as "any judge." It was at this time she "fell into" bankruptcy. Because her graduating class was the first graduating law school class after the enactment of the Bankruptcy Code, Judge Gambardella was part of the first interviewing class for the former bankruptcy referees, now bankruptcy judges. Judge Gambardella credits her sister Frances with encouraging her to consider clerking for a bankruptcy judge. Both sisters obtained clerkships with bankruptcy judges out of law school, with Judge Gambardella clerking for Chief Bankruptcy Judge Vincent Commisa in Newark and Frances clerking for Bankruptcy Judge Richard Hill in Trenton. Judge Gambardella describes this time as a great time for young professionals to get involved in bankruptcy because "the playing field was being leveled" as the code had just been enacted and "everyone was an 'expert' at the same level."

Directly after her clerkship, Judge Gambardella's next adventure was to join the fledgling Office of the United States Trustee (UST) in its second year of ex-

Top photo: Judge Gambardella taking in the new Barbie movie with her sister, Frances, and friends Karen Giannelli and Geraldine Ponto, all of whom went to law school together; Bottom photo: Judge Gambardella with her sister, Frances, at a Bruce Springsteen concert at MetLife Stadium in New Jersey.

istence. Those who practice in New Jersey and Delaware today will be shocked to hear that when Judge Gambardella joined the New Jersey UST office, there was one staff attorney to cover all of New Jersey and Delaware. As a result, as a very young attorney Judge Gambardella was able to participate in cases in all chapters, including all the big cases in those jurisdictions. She remembers fondly Hugh Leonard, the United States Trustee for the Districts of New Jersey and Delaware at the time, who served as a mentor for her.

One case, Data Access Systems, started in the bankruptcy court, but the reference was withdrawn to the late District Judge Stanley Brotman. In addition to Judge Gambardella, two other attorneys in that case went on to become judges: Judge Donald Steckroth and Judge Diane Weiss Sigmund. Just imagine being a fly on the wall in that courtroom!

In reflecting on her process of appointment, Judge Gambardella reflects that life can be interesting sometimes. After being selected as a finalist for her appointment in 1985, Judge Brotman was the district judge on the Third Circuit's selection panel. In considering the circumstances of her application for employment, Judge Gambardella reflected that 1985 was a time of large turnover on the New Jersey bench as a result of the retirement of many former bankruptcy judges. One of Judge Gambardella's mentors, then-District Judge and later Third Circuit Judge Maryanne Trump Barry, gave her invaluable guidance as she navigated both the application process and in her new role as judge. So did District Judge Anne Thompson. Judge Gambardella noted that during her interview, she was asked how old she was, and she was relieved to be able to answer that she had just turned thirty. (Making Judge Gambardella one of the youngest ever bankruptcy judge appointments, still true to this day!) As a reflection of how great she was, by the time she got home to New Jersey from Philadelphia that night, Judge Gambardella had gotten a call from the Third Circuit's Chief Judge Ruggero Aldisert that she was selected for appointment.

As would surprise no one who has ever attempted to mentally spar with Judge Gambardella, her appointment came after only one application. In addition, she was the first female bankruptcy judge in the District of New Jersey. Judge Gambardella will let you know that she was not the "first" and "only" female for long, as shortly after her appointment, Judge Judith Wizmur joined her on the bench. With great colleagues, she found challenges not in her status as the first female bankruptcy judge, but instead those that come with the job. As a young judge, she says she "had to rely on her energy as much as her experience" and that what she knew then is still true now—that you have to put in the time doing the work to reap the rewards.

Over a tenure of almost four decades, Judge Gambardella has had to adapt to many changes—legal and otherwise. "Back in the day" petitions were filed on paper (in multiple copies!) in the Clerk's office, a courthouse electronics policy was a non-issue (who would try to bring their car phone into court?), and a "Mac" was a McDonald's burger. Now everything is filed via CM/ECF, courthouses have electronics policies and § 341 meetings are done by Zoom, and a "Mac" is a computer. Looking back on all the changes, Judge Gambardella wishes she had known then that technology advances are not as scary as they seem when they are new. Instead, she encourages all lawyers to continue to take advantage of technological advances that can benefit the legal practice, as well as take recommendations and adjust if they could be helpful.

Another highlight of her career is the great chambers teams that have and continue to surround her, including law clerks and interns that she has worked with and mentored over the years. Judge Gambardella gives two main pieces of advice: get involved and make good career choices. She breaks these down simply. Get involved in bar events, speaking engagements, and similar activities. These allow young lawyers to get exposure to other attorneys and the bench. Which career choice is not always straightforward, make sure to do good work because there are no shortcuts.

In one of her many leadership roles throughout her career (including a stint at Chief Judge of the Bankruptcy Court for New Jersey), Judge Gambardella had the opportunity to be the bankruptcy observer to the Judicial Conference of the United States during Chief Justice

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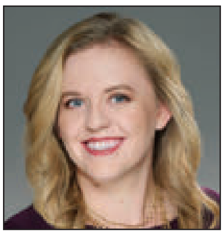
Hon. Guy R. Humphrey

U.S. Bankruptcy Judge, Southern District of Ohio

by Elizabeth A. Rogers



Elizabeth A. Rogers is a bankruptcy and financial restructuring associate at Stevens & Lee, P.C. in Wilmington, Del. She graduated from Georgetown University Law Center in 2019. Her clerkship with Judge Humphrey introduced her to the unique world of bankruptcy practice.

"For Judge Guy Humphrey, wrestling is a definitive part of life— a college sport, a father-son passion, and an approach to his role on the bench. At hearings, he often declines to set hard time limits, telling litigants to take all the time they need. As a former wrestler, he cannot be tired out. Judge Humphrey approaches the law with precision, tough questions, and a relentless determination to get things right. It is this sort of endurance that has marked his entire career.

Judge Humphrey grew up with five siblings in Burton, a tiny Ohio town with New England architecture famed for locally produced maple syrup. His roots ran deep. Judge Humphrey's great-grandfather, a carpenter, had once owned a bobsled factory in town, and his parents raised him on the same street that the family had called home for generations.

He fondly recounts stories from the array of jobs he held during his youth. From church cleaning and snow shoveling to an early morning paper route and summer work at a Christmas tree farm, he found ways to stay busy and save for his college education. During one paper route run, he was caught out in the historic 1978 blizzard that blanketed the town with four or five feet of snow in a matter of hours and closed the school for two weeks. During summer vacations, the family of seven crammed into an old station wagon and set out to Florida, the Adirondacks, and national parks, sleeping in tents at night. He recalls his giddy excitement when the family upgraded to a pop-up camper.

He became interested in a legal career during his high school years after a minor traffic infraction necessitated his appearance in state court. Judge Humphrey recalls that the state magistrate gave him a chiding lecture and slap on the wrist that he describes as firm but fair. Although it was his first experience in a courtroom, he began to picture himself within the legal profession.

Judge Humphrey graduated from Berkshire High School in 1978 as class president, despite earning the nickname "Rip" after Rip Van Winkle because of his "extraordinary ability" to sleep through class. A year later, he landed at Kent State University where he walked on to the school's NCAA Division I wrestling team. Judge Humphrey views wrestling as a highlight of his college years and the sport that built his personal character. He explains, "Wrestling is a super sport for developing character. On the mat, it's just you and the other person. There aren't ten other teammates to blame or rely on in that moment. Win or lose, it's on you." Judge Humphrey views his role as a judge in a similar light. When he takes the bench, the decisions are his to make. He prepares exhaustively for hearings with his law clerks, but in the courtroom, he makes calls alone.

Judge Humphrey also praises the camaraderie he experienced on his college team. "It was the era of disco," he says with a laugh. He and his teammates trained hard together and blew off steam at a local watering hole called "Crazy Horse," a local dive replete with a giant disco ball. He relied on these friendships during law school and has maintained them throughout his professional career.

He also views wrestling as a sort of training ground in self-control and long-term thinking that uniquely prepared him for bankruptcy practice. On the mat, competitors must learn to control their emotions and react within the rules. During his school competitions, each home team kept a box of oranges next to the bench. After each match, the home team competitor

Top left photo: Judge Humphrey at Conference; top right photo: Judge Humphrey and wife Alisa in New York; bottom photo: The Humphrey family with Olympic gold medalist, wrestler Kyle Snyder.

grabbed two oranges, offered one to his opponent, and stood next to him while they ate. This experience taught him to think about what would happen at the end of the match. Whether in litigation or sport, cordial relationships are key. An opponent in one hearing may be co-counsel in another. On the bench, Judge Humphrey is a strong proponent of civility education for attorneys.

He completed his studies at Kent State in three years. During his final summer, he interned at the Portage County Public Defender's Office. Client interview and subpoena duties sent him to the county jail and neighborhoods throughout Cleveland. This experience reinforced his interest in a legal career. He found the interactions between counsel and witnesses to be very interesting and enjoyed the intellectual nature of the work.

When he entered the Ohio State University Moritz College of Law the next year, personal computers were just beginning to hit the market. During Judge Humphrey's second year of law school, he landed a clerk position at a two-attorney civil litigation boutique firm and was later hired as the firm's first associate. He credits Steve Fitch and the late Mike Szolosi, the partners for whom he worked, as mentors and lifelong friends who launched his legal career.

After a few years at the firm, Judge Humphrey briefly moved back to Geauga County and hung his own shingle. His practice there included probate and estate work, general litigation, criminal defense, real estate, and consumer bankruptcy. He views this experience as foundational to his later work because it gave him such a broad background. He explains, "Bankruptcy touches every conceivable area of the law so having knowledge of these practice areas was invaluable to my time in practice and as a bankruptcy judge."

Several years later, Judge Humphrey returned to his former firm in Columbus just in time for the case that would propel him into corporate bankruptcy practice. In 1989, Cardinal Industries and several dozen corporate affiliates filed a Chapter 11 bankruptcy petition in the Southern District of Ohio. Cardinal also filed Chapter 11 petitions for around 1,000 of its affiliated single asset real estate ("SARE") limited partnership entities. The *Cardinal* cases were so significant that nearly every attorney in the Columbus bankruptcy bar played some role in the litigation. Humphrey represented lenders and creditors in the SARE cases, cutting his teeth in the Chapter 11 arena. After *Cardinal*, Judge Humphrey gained debtor-side experience representing a regional hotel chain in Chapter 11. His practice eventually expanded to include both debtor, creditor, and asset-purchaser representations as well as significant commercial litigation in state and federal courts. During his final years in practice, he developed a niche in representing equipment financiers and acted as outside general counsel for several regional corporations. He also sharpened his mediation skills while serving as a volunteer mediator, resolving disputes in a number of cases at the request of the bankruptcy court. He carried his career-long commitment to the value of mediation to the bench, where he helped to establish a district-wide mediation program shortly before the global COVID-19 pandemic. Judge Humphrey regularly mediates cases as a settlement conference judge and spearheaded the district's outstanding bankruptcy mediation program.

In 2007, the U.S. Court of Appeals for the Sixth Circuit appointed Judge Humphrey as a United States Bankruptcy Judge for the Southern District of Ohio seated in Dayton. Judge Humphrey served two terms on the Bankruptcy Appellate Panel for the Sixth Circuit where colleagues extolled his contributions. He quickly developed a reputation for polished opinions and careful analysis of sophisticated legal issues.

Judge Humphrey's years on the bench have been full of interesting cases and memorable litigants. He recalls that his first trial involved a witness who was nine-months pregnant and testifying on behalf of the Chapter 7 trustee in a fraudulent conveyance. In another case, a separate married couple were battling over assets. When questioned by an attorney, the husband interrupted to yell, "That lady ain't my wife!" The scene was so comedic that Judge Humphrey struggled not to lose his composure on the bench. On one occasion, a debtor explained that his tax refund was unavailable because he used it to pay off his son's drug dealer. Judge Humphrey says his jaw dropped. Now, he views this as a sobering episode that brought the reality of poverty and struggle to the courtroom.

The COVID-19 era presented its own challenges as the court shifted to online videoconference hearings. In one instance, an attorney mistakenly believed he had logged out of an ongoing omnibus hearing and began to disrobe in his office. Luckily, Judge Humphrey recalls, courtroom staff were able to remove him from the hearing before anything traumatic occurred. "It wasn't quite as good as the cat lawyer video, but it was pretty close," he recounts.

Judge Humphrey views his work with law clerks and interns as a favorite part of his time on the bench. During his investiture speech, he cited the importance of mentorship and opportunities for young lawyers. In chambers, he maintains an open-door policy. He takes a hands-on approach to legal issues and fervently enjoys debating questions until the right answer is clear. He tells new law clerks, "We take the time to get it right. That's the important thing." And this commitment to excellence is clearly reflected in the respect of his colleagues and the local bar.

Despite his erudite leanings, you won't find Judge Humphrey on the national speaker circuit or in the halls of academia. His commitment to community runs deep, and nowhere is this more evident than in his dedication to local involvement. While Judge Humphrey is a member of several national organizations and values those networks, he devotes his time to bolstering and developing local attorneys through involvement with the Dayton Chapter of the Federal Bar Association, the regional bankruptcy bar, and the local bar association. Seeking to encourage discourse between local attorneys and the judiciary, Judge Humphrey acted as the driving force behind the Southern District of Ohio's attorney-led bankruptcy bench-bar conferences. He also serves on the board of Dayton's American Bankruptcy Law Forum, an inclusive regional organization that prioritizes high-quality and affordable professional education and provides opportunities for bankruptcy attorneys to connect across generations and practice areas.

He is a fierce advocate for opportunity and practices what he preaches. During the summer of 2022, Judge Humphrey masterminded and led the pilot Diversity Externship Program for the United States Bankruptcy Court for the Southern District of Ohio. Through the program, the court hosts externs in each of its three seats – Dayton, Columbus, and Cincinnati. Each extern receives a stipend for living expenses through a collaboration between the federal courts and the Dayton Chapter of the Federal Bar Association. But even prior to the program, Judge Humphrey emphasized diversity and interest over prestige in his extern hiring. He prioritizes law students who are eager to learn and might especially benefit from their time in chambers. In his view, externship programs are an opportunity to teach writing skills and offer exposure to the federal court system. For many, the experience proves pivotal to their career, opening doors and pathways they could not have otherwise accessed.

Judge Humphrey is also fascinated with local legal history. In his spare time, he works on a history of his courthouse's historic courtroom. Copies of historical records, cemetery listings, and a local legal history tome are splayed across a table in his office. Regional attorneys and law students alike have enjoyed taking Judge Humphrey's fascinating tour of the building, a retelling of local lore replete with bizarre true stories and the occasional bit of bankruptcy practice advice.

Judge Humphrey married his childhood sweetheart, Alisa, in 1982. The couple met in kindergarten and dated throughout high school and college. He has two sons, Garrett (33) and Wade (21), whom he jokingly refers to as his "two only children" because of the twelve-year age gap between them. During his early years on the bench, Judge Humphrey maintained his commitment to strong family involvement and often spent his evenings and weekends coaching Wade's wrestling team or traveling to competitions. These days, he often can be found tackling do-it-yourself projects with son Garrett. He enjoys woodworking, spending time with his wife at their lakeside cabin in Tennessee, and connecting with friends.

Hon. Cecelia Morris

U.S. Bankruptcy Judge, Southern District of New York

by Sally McDonald Henry

Sally McDonald Henry is the John E. Krahmer Endowed Professor of Banking and Commercial Law at the Texas Tech School of Law. She is one of two 2022 recipients of the Texas Tech University Chancellor's Council Distinguished Teaching Award, the highest award given by the university for teaching. Before joining academia, she was a partner at Skadden, Arps, Slate, Meagher & Flom, LLP, where she represented a diverse group of clients, including debtors-in-possession, secured creditors, financially troubled companies, and Chapter 11 trustees. Ms. Henry received her B.A. from Duke University and her J.D. from the New York University School of Law. She is the editor of each annual edition of the *Portable Bankruptcy Code and Rules* (Business Law Section, ABA) and co-author of *Ordin on Contesting Confirmation* (Wolters Kluwer, 1998), updated semi-annually, as well as a number of law review articles and continuing education outlines.

After 23 years on the bench, Bankruptcy Judge Cecelia Morris is retiring, but she leaves her mark on the Southern District of New York Bankruptcy Court. She has served as the Chief Justice of that court, the Clerk of that court, and the innovator of wonderful programs designed to help the debtor in trouble. She has presided famous cases—*Madoff*, *Delta Airlines*, and *St. Vincent's Hospital*, for example—and innumerable individual Chapter 7 and Chapter 13 cases. To each of these cases she has brought her remarkable abilities of innovation and wisdom.

Her work ethic may have been honed in Chillicote, Texas, where she grew up on a cotton farm near the Oklahoma border. But you couldn't keep the girl on the farm, and she completed her education in Georgia, at the John Marshall School of Law. Her leadership, organizational, and budgeting skills led her to be the clerk of the Atlanta bankruptcy court. Word got out regarding how effective she was, and she soon was recruited to serve as the clerk of court of the Southern District of New York, one of the busiest bankruptcy courts in the nation.

After much cajoling, she took the position. She arrived in the late 80s to a busy office of over 100 clerks but only three computers (two PC's and one computer used solely for noticing). By the time she left to join the bench twelve years later, she had transformed the office to be a leader in electronic filing and noticing. Recognizing her special administrative skills, she was appointed by Chief Justice Rogers to serve on the Judicial Conference of the United States Committee on Information Technology.

Her courtroom has been in Poughkeepsie, New York, in the beautiful Hudson River valley. Once the capital of New York State, it is now a small, quieter city, with fewer than 40,000 inhabitants. As one might expect, her docket included many Chapter 7 and Chapter 13 individual debtor bankruptcies. What might come as a surprise is that she has also handled innumerable complex adversary proceedings involving huge corporate reorganizations or liquidations, and she has served as mediator in many complex cases.

She has made her mark judicially in both small and large cases. For example, she was the first bankruptcy judge to rule in a reported case, *In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011), that a matter initiated through a joint petition of a same-sex married couple should not be dismissed for cause under Bankruptcy Code section 707(a), concluding that the definition of marriage in the Defense of Marriage Act did not mandate dismissal. In another matter, *Togut v. Deutsche Bank AG* (*In re Anthracite Capital, Inc.*), 492 B.R. 162 (Bankr. S.D.N.Y. 2013), she protected the public's right to know by refusing to approve a "no seal, no deal" settlement that would have kept a settlement confidential.

As astute as she has been in ruling on contested matters, she has recognized the value of settlements, and spearheaded the creation of a successful loss mitigation program to encourage settlements between debtors and creditors when debtors are in danger of having their home foreclosed upon. She followed that up by establishing a student loan mitigation program. Moreover, as Chief Judge of the Bankruptcy Court for the Southern District of New York she kept operations running smoothly throughout the Covid crisis, which had hit New York early and with particular intensity.

In short, Judge Morris's intellect, commitment

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The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a judicial profile of a federal judicial officer in your jurisdiction. A judicial profile is approximately 1,500-2,000 words and is usually accompanied by a formal portrait and, when possible, personal photographs of the judge. Judicial profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a judicial profile, we would like to hear from you. Please send an email to social@fedbar.org.

to fairness, hard work and innovation will leave a lasting mark on the law and on the Bankruptcy Court for the Southern District of New York. ⊙

Left photo: Judge Morris with Former President Bill Clinton at an event for Tina's Wish Runway for Research. Judge Morris is a founding member of the organization, founded in the memory of Judge Tina Brozman, a dear friend and mentor of Judge Morris who had ovarian cancer. Bottom photo: Judge Morris at a charitable fashion event for Tina's Wish in 2023.

Gambardella *continued from page 21*

Roberts' tenure. Through this role, she was able to observe the executive meetings of the Judicial Conference and report on those to the bankruptcy community. She reflects that this role truly allowed her to be in the "room where it happened" and taught her that the most important work is done in the committees for the judiciary.

While she is a career-long bankruptcy fan, her biggest piece of advice is that when a young lawyer makes a career choice, to make a good one (even if it's not bankruptcy). She implores young lawyers to set themselves up to advance and maintain control of their own journeys. Over the years and following her own advice, Judge Gambardella has so much to be proud of, including her body of published opinions, her law clerks, and her interns. She hopes that all the writing she did as a young judge can help judges and attorneys in their practice (though we'd posit all her writing even through today qualifies in this category). She wanted to leave behind something to be proud of, and that she has. Judge Gambardella specifically notes how proud she is of her law clerks and interns that have all gone on to have great careers, in bankruptcy or otherwise. Even further, she is so proud and thankful over her years to see the diversity on the bench progress, and even though there is a way to go, she is delighted for the change that she has seen.

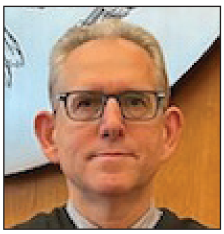
Outside of her legal career, Judge Gambardella has even more to be proud of. She has a wonderful, close-knit family that lends itself to be her support system and something she loves to boast about—her sister Frances, her brother Ben, her sister-in-law Linda, and her niece April, who is a lawyer herself. She often finds herself reminiscing on the support and love they received from her parents, Ben and Lucy. Her sister? She went on to be a bankruptcy lawyer and even serve as a chapter 13 staff attorney before her retirement.

"You have to love what you do," Judge Gambardella reminded us. Clearly Judge Gambardella loves what she does, and the bankruptcy bench and bar are better because she does. ⊙

Teach Pray Run: The Life and Code of Hon. Paul E. Singleton

U.S. Bankruptcy Judge, Northern District of Indiana

by Hon. Alan S. Trust



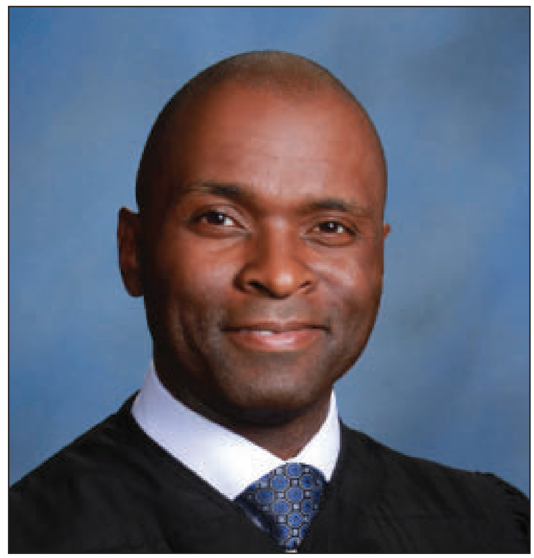
Hon. Alan S. Trust sits in the Eastern District of New York as chief bankruptcy judge. He is a past chair of the FBA Bankruptcy Law Section and served a two-year term as president of the Eastern District of New York Chapter of the FBA. He currently serves as chair of the Bankruptcy Judges Committee of the FBA Judiciary Division, and is the liaison from the National Conference of Bankruptcy Judges to the FBA.

Over the past three years I have had the distinct privilege of getting to know Paul E. Singleton, United States Bankruptcy Judge for the Northern District of Indiana. In early 2021, the Federal Judicial Center asked me if I would act as Judge Singleton's mentor. After asking what he did wrong to be assigned to me, I immediately said yes. I am certainly glad I did, and hope PES is as well.

If I had to describe Judge Singleton in a few words, I would probably choose humble, grounded, bright and dedicated. You know, a real mensch.

Judge Singleton's official court bio will detail his life of public service and his pre-judge-cred[2]: during 2003-2005, he taught social studies for Teach for America at the National Academy Foundation High School in Baltimore; in 2003 he earned his bachelor's degree with honors from Wake Forest University. He was supposed to graduate from the Sandra Day O'Connor College of Law at Arizona State University law school in 2009, but he and Stephanie (*see infra*) were expecting their first child. So, they did what any expectant couple would do (not) – he took extra credits to finish his law school requirements in December 2008, and Stephanie gave birth during the spring of their 3L year. Judge Singleton calmly now describes that year as "crazy." Natch. Stephanie nurtured their angelic child and went to class. Judge Singleton and future Judge Steele graduated law school with degrees dated 2009; both with Pro Bono Distinction. Easy peasy, law degrees-y.

Following graduation, PES provided family and landlord/tenant legal aid through Indiana Legal Services. He then joined the Family Justice Center of St. Joseph County where he handled cases involving civil protective orders. During 2011-2014, he practiced employment law at the firm now known as Faegre Drinker Biddle & Reath LLP; during 2014-2015 he served as Assistant City Attorney for the City of South Bend; and, as if juggling a career with a young family weren't hard enough, in 2014 he opened Singleton LLP as a solo practitioner. PES maintained his own



firm until he first earned the right to be called judge in 2015 as a Magistrate Judge for the St. Joseph Superior Court where he presided over criminal and civil cases. Of course, Judge Singleton picked up multiple honors and recognitions along the way.

Some more about his personal life. He has been happily married for almost 20 years to Judge Stephanie E. Steele of the Indiana Superior Court. Henceforth, Judge Singleton shall be *sub nom* The Man of Steele. They are the gushingly proud parents of two children (a teenager who has already audited a few classes at ASU and a tweenager), meaning the Singleton-Steele household is flush with fun, homework deadlines, electronic devices, dad jokes followed by random eye rolling, "are we there yet" road trips, and exceptional parental role models. When his children read this article, he expects they will say "Meh; he's alright."

Judge Singleton takes it all in stride, perhaps because he ran track for Wake Forest and maintains a disciplined running and weight training regimen. He is a work out maniac. *See* Oxford English Dictionary under "swole."[3] He has technically finished at least one

Top left photo: One of Judge Singleton's many runs; Top right photo: Judge Singleton and Judge Steele at a St. Joseph County Bar Association event; Bottom photo: the Singleton-Steele family

half ironman after training for 40 weeks.[4] He coaches summer track for his youngins, embracing such tried and true techniques as discouraging them from gobbling down multiple hot dogs minutes before a race, and not losing track of the need to be at the starting line before the starting time.

PES also has a great sense of humor. When he has time to relax, he enjoys reading and a streaming binge or two. Rumor has it he even prepares the family dinner now and then.

He is a man of deep faith and conviction. Earlier this year, we were getting ready to enjoy a meal together at an FJC workshop. I looked at my plate of food upon its arrival and, as I normally do, attacked it with adequate vigor. I looked over at PES, who was eyes closed, head bowed, saying Grace. While I thought I was a quick learner, I made the same mistake the very next morning. Of course, Judge Singleton quickly absolved me of my conduct. He did so because that's the kind of person he is. What else would you expect from a man who had just offered deeply felt thanks for the blessing of his meal?

Judge Singleton and I speak about once a month. I fear that he is just humoring me and that after each conversation he asks Stephanie Hemmert at the FJC when his mentee-sentence will be over. Every conversation is fun and light-hearted while simultaneously PES is seeking to improve himself as a bankruptcy judge and his craft. He is always interested in how to approach and solve the numerous types of real life issues we deal with every day on the front lines of economic despair and disappointment. He had no significant background in bankruptcy upon his selection but sit down with him now and you would never guess that. Or better yet, sit in his courtroom when he is presiding or in a ballroom where he is lecturing (such as on judicial ethics), and you will reach the same conclusion – this judge has BK game. More important, he is empathetic and a true believer in redemption.

I wanted to title this bio "Teach Pray Run: The Life and Code of Hon. Paul E. Singleton" because I believe that captures him. He walks the walk. He taught high school social studies, is teaching his children to live a moral life, instructs his law clerks on how the law applies to real life, and teaches lawyers in need of a refresher on substantive law and procedural rules. Prayer is an integral part of his life. And even when he isn't out for a run, he is on the run. Whether in maintaining his demanding docket, doing an early morning workout, encouraging his kids to get up to the start line and giving their best efforts to cross the finish, he is always on the move. ⊙

Endnotes

[*]DISCLAIMER: None of the statements, facts or opinions contained in this article constitutes official policy of any Judge, Court, agency or government official or quasi-governmental agency.

[2]https://www.innb.uscourts.gov/content/paul-e-singleton

[3]https://www.oed.com/dictionary/swell_v?tab=meaning_and_use#19587561

[4]PES tells it this way: "I get to 69.9 miles of 70.4, and a race official says: "There's lightening. You have to stay under this bridge. We cannot let you finish. Don't worry, you have half a mile left, you'll get credit. You won't get disqualified. We'll calculate what you would've run for that last 0.5 miles." Later on, he was tagged with "the dreaded DNF – Did Not Finish. No time." With encouragement from Judge Steele, he tossed the red flag of appeal and, upon further review, was assigned an official finish time. So, he now considers himself a 49.5% ironman – not a half – although the official record book is sans asterisk.

Hon. Kesha L. Tanabe

U.S. Bankruptcy Judge, District of Minnesota

by Hon. Charles L. Nail, Jr.

Prior to his retirement in January 2023, Hon. Charles L. Nail, Jr. was the Chief Bankruptcy Judge for the District of South Dakota and the Chief Judge of the Eighth Circuit Bankruptcy Appellate Panel. (He is also the colleague referred to in the first paragraph of this profile and an unabashed fan of Judge Tanabe.)

Appointed in January 2022 to fill the vacancy left by bankruptcy judge Kathleen H. Sanberg's retirement, Kesha L. Tanabe is best described as a force of nature. Within months of Judge Tanabe's taking the bench, a colleague told a gathering of Eighth Circuit bankruptcy judges, "Good luck keeping up with her." They thought he was kidding. He was not.

Judge Tanabe was raised in Minnesota and North Dakota. Her grandparents were originally from California, but they resettled in the Midwest after being released from the internment camp to which they were sent pursuant to President Franklin Roosevelt's infamous Executive Order 9066. Judge Tanabe has traveled extensively and has lived in several different countries, but she says something about the North Shore of Lake Superior always calls her back to Minnesota. That something may be the spectacular view from her lakefront getaway or the area's seemingly endless bike and hiking trails.

Judge Tanabe graduated *magna cum laude* from the University of St. Thomas in St. Paul, Minnesota, with a Bachelor of Arts in political science. While attending St. Thomas, she availed herself of a number of other educational opportunities, including the Higher Education Consortium for Urban Affairs' social justice and urban studies program. She also attended language immersion programs in France and Mexico and studied abroad in New Zealand and the United Kingdom.

Following her graduation from St. Thomas, Judge Tanabe attended the London School of Economics, where she received a master's degree with honors. She jokes she is technically a dropout, because she left the school's Ph.D. program to enroll at the Benjamin N. Cardozo School of Law in New York City, where she earned her Juris Doctor degree. In her third year of law school, she moved to Budapest to study at the Central European University and Open Society Institute and work at the law firm Reczicza White & Case LLP.

While in law school, Judge Tanabe interned with the solicitor general in the New York state attorney general's office, and upon graduating, she entered the

attorney general's honors program. Judge Tanabe credits the experience she gained in the honors program for her ability to employ social science to devise novel approaches to civil litigation, such as the time she used econometric modeling in a case related to school funding. Judge Tanabe remembers her days in the honors program fondly, saying she was blessed to work alongside incredibly talented and dedicated attorneys on several landmark cases, including the state of New York's efforts to enforce the 1998 master settlement agreement between it (and other states) and various tobacco companies, and *Roper v. Simmons*, in which the United States Supreme Court held it was unconstitutional to impose capital punishment on an individual for crimes committed while the individual was a minor.

Judge Tanabe returned to Minnesota to join the Minneapolis law firm Maslon LLP, where bankruptcy became the primary focus of her legal career. After making partner at Maslon, Judge Tanabe was recruited as a lateral partner, first by the Minneapolis office of the Indianapolis-based law firm Faegre Baker Daniels LLP (since combined with Drinker Biddle & Reath to become Faegre Drinker Biddle & Reath LLP), and then by ASK LLP, a New York City-based

Top photo: Judge Tanabe with law students at her alma mater, Cardozo Law; Bottom photo: Judge Tanabe and other members of the FJC faculty and advisory committee in Washington, D.C.

bankruptcy boutique. At each of these law firms, her practice primarily consisted of representing institutional investors, financial institutions, and trustees in national chapter 11 cases.

To the surprise of no one who knows her, Judge Tanabe soon developed a loyal client base. This enabled her to take the plunge and establish her own law practice. This in turn allowed her greater autonomy to work on a broader range of bankruptcy matters. While she continued to represent institutional investors, financial institutions, and trustees, she expanded her practice to include landlords, equipment lessors, distressed investors, and creditor committees.

Establishing her own practice also allowed her to give back to the community by representing local businesses *pro bono*. Among the many beneficiaries of her *pro bono* (or "low *bono*") services were minority business owners affected by the COVID pandemic and others whose businesses were damaged in the protests following the death of George Floyd.

In her "spare time," Judge Tanabe taught bankruptcy law as an adjunct professor at the University of St. Thomas School of Law. She also served as a moot court judge for the Duberstein bankruptcy moot court competition in New York City.

When Congress amended title 11 of the bankruptcy code to add a new subchapter V for qualifying businesses, Judge Tanabe was selected to serve as one of Minnesota's subchapter V trustees. In that capacity, she worked with debtors, creditors, and their attorneys to resolve their differences and develop consensual plans of reorganization, a job not entirely dissimilar to herding cats. More often than not, she succeeded.

However, Judge Tanabe was not the trustee in the first subchapter V case in the nation in which a plan of reorganization was confirmed. She could not be . . . because she represented the debtor in that case.

One of the best measures of an attorney's character, demeanor, and skill is what other attorneys say about her. Alain Baudry, one of Judge Tanabe's colleagues at Maslon LLP, worked with her on several complex bankruptcy matters and says he "came to realize that [Judge] Tanabe possessed off-the-charts intelligence and outstanding communication skills." Karl Johnson,

Left photo: Gov. Walz and Judge Tanabe at the last Minority Judges Reception in Minnesota; Right photo: Judge Tanabe at her first naturalization ceremony—one of her favorite parts of being a judge.

who knew her "as opposing counsel, as co-counsel, and as counsel representing similarly situated creditors," describes her as "always a pleasure to work with . . . [and] both an industrious and a congenial collaborator. She is also very knowledgeable about bankruptcy law and able to analyze complex situations quickly." Johnson goes on to say, "her most impressive quality, though, may be her ability to read people and communicate unpleasant truths in a way that the person can accept. . . . [Judge] Tanabe's ability to read people also makes her very skilled at evaluating credibility."

Another measure of an attorney's character, demeanor, and skill is the extent to which she is formally recognized for her work. Prior to her appointment as a bankruptcy judge, Judge Tanabe was named a Minnesota Rising Star, a Minnesota Super Lawyer, and one of Minnesota's top women attorneys by Super Lawyers, a rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement.

Finally, no profile of Judge Tanabe would be complete without at least some recognition of her efforts to promote diversity and inclusion in the legal profession. Sukanya Momsen, a past president of the Minnesota Asian Pacific American Bar Association, says Judge Tanabe is "an informal mentor to our members" and "an active member of our community who gives her time and talents to better our community at large." Lisa Beane and Jessica DuBois, former co-chairs of the Minnesota Lavender Bar Association, which represents the interests of legal professionals who are members of the LGBTQ+ community, say Judge Tanabe "has long demonstrated a deep commitment to advancing diversity in the legal profession and promoting equal access to justice."

Judge Tanabe served as the attorney co-chair for the Judicial Conference of the United States' Committee on the Administration of the Bankruptcy System's 2019 "Roadways to the Federal Bench: Who Me? A Bankruptcy Judge?" diversity event in Minneapolis. (She was also a national panelist for the event in 2022.) "Roadways" was a tremendous success, due in large part to Judge Tanabe's efforts. She devoted countless hours to identifying and personally contacting diverse attorneys to encourage them to attend. Her efforts paid off: By a show of hands, virtually every attorney in attendance at the Minneapolis event indicated they were there because of Judge Tanabe. One of those attorneys even went on to become a bankruptcy judge. That attorney was . . . Judge Tanabe.

(Ever the modest Minnesotan, Judge Tanabe hastens to point out other attorneys who attended the same event at other locations around the country have also gone on to become bankruptcy judges. However, this is her profile, not theirs.)

In only her second year on the bench, Judge Tanabe continues to be recognized and rewarded for her accomplishments. Earlier this year, Chief Justice John Roberts appointed her to the Judicial Conference of the United States' bankruptcy judge education advisory committee. She is on the faculty of the Federal Judicial Center (which provides continuing education resources for the federal judiciary). Judge Tanabe is a nationally recognized expert on bankruptcy law and continues to be a prolific public speaker. She is frequently invited to speak by organizations representing a broad range of constituencies in bankruptcy, including the American Bankruptcy Institute, the American Bar Association, the International Women's Insolvency & Restructuring Confederation, the National Conference of Bankruptcy Judges, and the National Association of Bankruptcy Trustees.

When asked why she has devoted so much time and energy to the subject of bankruptcy, Judge Tanabe says, "Bankruptcy is not a game of perfect. You're only called upon because something is broken. Restructuring is like *kintsugi*, an ancient Japanese technique for repairing broken pottery. We don't throw things away because they are imperfect. We don't just leave them broken, either. If you patiently cultivate your skills and add creativity and hard work, you can repair things. I guess that's just a fancy way of saying that in bankruptcy we try to leave things better than we found them." ⊙

The Principles of Interest

DAVID P. LEIBOWITZ

"In a bankruptcy case, interest is the tail of the dog, but it is a long tail and it wags a lot."[1] Bankruptcy addresses insolvency. Creditors seek to maximize the pennies they get back on their dollar when the debtor is insolvent. Some debtors, though, seek bankruptcy because they are illiquid, not insolvent. In these cases, unsecured creditors are entitled to post-petition interest. Over-secured creditors are always entitled to post-petition interest. This paper examines the circumstances where interest may be allowable and seeks to develop a unifying principle for the determination of interest in solvent bankruptcy estates.

The rate of interest to which creditors might be entitled is frequently in dispute. The courts interpreting the Bankruptcy Code ("Code") and related statutes have provided divergent and inconsistent results. We first address the range of decisions considering the question of interest in solvent estates. This range of decisions, however, highlights more widely applicable considerations of jurisprudence. How do courts decide difficult cases involving statutory interpretation? What are the guiding principles? How should ambiguous statutes be read? What is meant by "plain meaning"? To what extent does "historical practice" matter? To what extent does practice under English law matter? Did Congress consider any of these matters when it enacted the Code? Did enactment of the Code change past practice under the Bankruptcy Act? Can there be unifying principles? If so, on what basis? What can be learned from this exercise in considering other difficult to understand statutes?

Background

The question of interest in solvent estates may arise in many contexts. There is no unifying principle, either in the text of the Code or the cases interpreting it. Consider the basic terms, principles and statutes that inform this issue. These terms and principles have led to divergent and inconsistent results.

Unmatured Interest

Section 502(b)(2) of the Code[1] is fundamental to our analysis. A claim for unmatured interest is not allowable. However, interest is allowable, even for unsecured claims, in the event of a surplus estate in chapter 7 or a solvent estate under chapter 11 or chapter 13. Substantial litigation has arisen as to certain contractual payments, particularly so-called "make-whole" premiums on bonds, should be considered unmatured interest subject to disallowance under Section 502(b)(2).

The solvent debtor exception

The solvent debtor exception is an equitable rule that arose from English common law.[2] It was embraced by bankruptcy courts under the Bankruptcy Act and even prior to that under prior bankruptcy statutes.[3] This doctrine holds that unsecured creditors in solvent bankruptcy estates are entitled to interest on their claims. The amount of interest that is to be allowed under this doctrine is typically a matter of discretion for the bankruptcy court to determine as a matter of equity. However, courts have held that interest on such claims might be allowed at a variety of rates, including (a) the legal rate under federal law, 28 USC §1961, (b) the legal rate under the state law where the bankruptcy court is situated; or (c) the contractual rate of interest called for in any given claim.

Chapter 7 liquidation

Some chapter 7 estates have more funds than required to pay claims in full. Interest in such cases is allowed to unsecured creditors at the "at the legal rate from the date of the filing of the petition."[4] The meaning of the term "legal rate" is not defined. Litigation has given rise to divergent opinions. Does "legal rate" refer to the federal judgment rate, the judgment rate for the state where the bankruptcy court sits, the contract rate for the claim, or some other rate?

Chapter 11 reorganization

Interest in solvent chapter 11 estates can involve staggering sums. Debtors may seek to pay such creditors interest at the relatively low federal judgment rate[5]. Creditors, however, will claim that they are entitled to interest at the contract rate – otherwise, their claims are impaired. In the case of bondholders with make-whole premiums, this amount, if it is deemed to be interest, can be very high. This issue continues to be litigated in *Ultra Petroleum,*[6] recently decided in the Fifth Circuit and now on remand to the bankruptcy court. In such cases, the court must determine, as a threshold issue, whether a make-whole premium constitutes unmatured interest to be disallowed under Section 502(b)(2) of the Code. And even if it is disallowed unmatured interest, does the solvent debtor exception compel that the premium be allowed in full in solvent estates or in some lesser amount as a matter of equity?

Chapter 13 plans

No interest is payable on unsecured claims pursuant to Section 1322 of the Code. If the assets of the debtor exceed liabilities on liquidation, then is the debtor's estate considered solvent? If so, is post-petition interest due unsecured creditors to satisfy the "best interests of creditors" test.[7] If so, the court then would have to consider Section 726(a)(5) of the Code and address the ambiguity of the term "legal rate".[8] As will be seen, there is a small body of case law holding that interest is due on unsecured claims in solvent chapter 13 cases. In some instances, courts have insisted on payment of interest at the contract rate.

Over-secured claims

Over-secured creditors are entitled to interest.[9] The interest rate allowed is typically the contract rate. It need not be. Some creditors assert entitlement to a default rate of interest. Some courts will grant the contract rate but state that the contract rate is not necessarily the rate to which creditors are entitled.[10]

Chapter 7 –Code Section 726(a)(5)

Solvent chapter 7 cases offer the least complex starting point for a comprehensive analytical framework. Asset cases in chapter 7 are few and far between.[11] Asset cases that result in a surplus available to the debtor are rarer still. Typically, less than three per cent of asset cases result in funds being paid either to the debtor or third parties.[12] Since this figure incorporates payments to third parties, cases involving surplus to chapter 7 debtors are very rare.

The Handbook for Chapter 7 Trustees[13] addresses how the United States Trustee instructs chapter 7 trustees to handle surplus cases. It does so ambiguously, only instructing that payments of interest to unsecured creditors in surplus cases shall be made "at the legal rate".[14] This is exactly the instruction provided in Section 726(a)(5) of the Code. During the years the author has served as a chapter 7 trustee, the "legal rate" as provided in 28 USC §1961 has always been considered to be the prescribed rate at which interest has been paid to unsecured creditors in surplus cases. This is the position taken by the United States Trustee in *In re Hicks*[15]

The competing points of view relative to the meaning of "legal rate" in Section 726(a)(5) are set out in *In re Beguelin*[16] where the Bankruptcy Appellate Panel observed:

> We note that courts have developed two approaches to the definition of the applicable legal rate of interest under § 726(a)(5): the "state law approach" and the "federal judgment rate approach."
>
> Under the state law approach, if a contract exists between the debtor and creditor that establishes an interest rate on the outstanding balance, the contract rate is the "legal rate." *In re Schoeneberg,* 156 B.R. 963, 972 (Bankr. W.D. Tex. 1993). Alternatively, if a specific state statute exists that establishes a rate of interest for a creditor, the statutory rate is the "legal rate." *In re Shaffer Furniture Co.*, 68 B.R. 827, 831 (Bankr. E.D. Pa. 1987). Under the federal judgment rate approach, the «legal rate» is established by 28 U.S.C. § 1961. *See In re Godsey,* 134 B.R. 865, 867 (Bankr. M.D. Tenn. 1991).

Among the cases supporting the position that the "legal rate" to be paid by the Chapter 7 trustee under Section 726(a)(5) of the Code are *In re Melenyzer,* 143 B.R. 829 (Bankr. W.D. Tex 1992) and *In re Godsey,* 134 B.$. 865 (Bankr. M.D. Tenn. 1991). The court in *Melenyzer* adopted the rule that "legal rate" for purposes of Section 726(a)(5) meant the rate prescribed in 28 USC §1961. It did so for the following reasons:

- The "state law approach" would afford different creditors entitled to interest at different contractual rates with disparate recoveries, resulting in material variance from the principal of equality of distribution among creditors.
- From and after the petition date, an allowed proof of claim is tantamount to a federal judgment against estate assets, enforceable only in federal court[17]
- Interest for delay is not attributable to the debtor according to contractual rights but rather owing to the estate, a federal process. The obligation to the creditor, thus, no longer is the debtor's obligation but the estate's

Many courts that have considered this issue after *Melenyzer* and *Laymon* came to the same conclusion.[18] Perhaps the most thorough analysis concluding that Section 726(a)(5) of the Code requires the allowance of interest at the federal rate provided by 28 USC §1961 appears in *In re Dow Corning Corp.*[19] The court's reasoned that:

- Post-petition interest in a bankruptcy case is designed to compensate the creditor for delays visited by the administration of federal bankruptcy law.
- As such, the purpose of post-petition interest in bankruptcy, just as post-judgment interest in a federal case, is procedural
- Procedural matters arising in a federal court are decided by federal law
- Thus, it is settled that post-judgment in federal cases is determined by federal law.
- Congress failed to explicitly incorporate state law in Section 726(a)(5) of the Code as it did in other sections of the Bankruptcy Code[20]
- This interpretation secures prompt and effectual administration of a bankruptcy estate, particularly considering Section 704 of the Code calling for expeditious administration of the estate using a uniform, nationally recognized rate.
- Using state judgment rates might be unusually cumbersome and

would have been even more cumbersome when the Code was enacted, prior to the advent of computers[21]

For the reasons articulated in *Dow Corning,* since Section 725(a)(6) is a statute specific to Chapter 7, since interest in chapter 7 is a procedural right rather than a substantive right, and since procedural rights in federal courts are governed by federal law, one can rightfully question whether the solvent debtor exception has any applicability to Chapter 7 cases.

Recently, the bankruptcy court for the Northern District of Illinois embraced the "state law" view of Section 726(a)(5) in *In re Hicks.*[22] There, the court held that the solvent debtor exception required that either the contractually agreed upon interest rate or the applicable state judgment interest rate is the proper interest rate for postpetition interest to a creditor pursuant to Section 726(a)(5) of the Code.[23] The court's decision was based on its textual analysis of Section 726(a)(5) of the Code. It also relied on the Seventh Circuit Court of Appeals' decision in *In re Fesco Plastics Corp., Inc.*,[24] holding that the solvent debtor exception survived the adoption of the Bankruptcy Code.

- The words in the statute had an "accumulated settled meaning"
- Congress showed no intent to alter the settled meaning of the statute
- Congress incorporated the solvent debtor exception into the Bankruptcy Code
- Prior practice under the authority of *American Iron & Steel Mfg. Co. v Seaboard Air Line Ry.*[25] was to utilize the applicable state law judgment rate
- Thus "accumulated settled meaning" of "legal rate" meant the rate applicable under state law.

The bankruptcy court in *Hicks* did not explain why it concluded the "accumulated settled meaning" of "legal rate" meant the applicable rate under state law. It did not address the evolution of 28 USC §1961 which until 1982 provided for interest at the state judgment rate but since then utilized a formula based on treasury securities. It did not address how a trustee should calculate interest under state law where contractual rights called for interest at rates different than the "legal rate". For example, would holders of credit card debt be entitled to interest at the contractual rate in effect at the time of the petition, even if such rates were substantially more than the state judgment rate? In reaching its decision, the *Hicks* court examined some, but not all the cases at the circuit court of appeals level addressing this issue.

The *Hicks* court recognized that the Ninth Circuit in *Onink v. Cardelucci (In re Cardelucci),* held that the "legal rate" of interest within Section 725(a)(5) of the Code meant the interest rate provided for in 28 USC §1961.[26] The *Hicks* court then asserted that the Ninth Circuit's later decision in *Pacific Gas & Electric Co. v. Ad Hoc Comm. of Holders of Trade Claims (In re PG & E Corp.)*[27]*,* limited the *Cardelucci* case. However, considerations in Chapter 11 relating to whether creditors are impaired by a plan are different than the procedural delay creditors suffer in the administration of a chapter 7 case. The *Hicks* court considered itself bound by Seventh Circuit precedent holding that the solvent debtor exception survived enactment of the Bankruptcy Code. Of course, this is of vital importance in Chapter 11 cases. Yet, as the bankruptcy court observed in *In re Robinson*[28]*,* considerations in chapter 7 are different than and distinguishable from considerations arising in Chapter 11.

> The issues of the interest rate to be applied to a class of unsecured claims in a Chapter 11 case to determine whether (a) the class is impaired pursuant to Section 1124 and, therefore, entitled to vote on a Chapter 11 plan, or (2) the Chapter 11 plan is fair and equitable with respect to the cramdown of a class of dissenting unsecured claimants pursuant to Section 1129(b), are not present in a Chapter 7 case. Not only do they involve different issues not involved in a Chapter 7 case, but they also involve different Code sections and are subject to potentially different policy concerns.

Robinson also makes the important point that when the Bankruptcy Code was enacted, 28 USC §1961 provided that the legal rate was the judgment rate of the state where the court was sitting. Subsequently, that statute was amended twice to provide a formula based on treasury securities. *Robinson* and other courts following similar logic, focus on the use of the word "the" – a definite article – in Section 726(a)(5) of the Code to suggest Congress' intent to select one specific interest rate – the rate provided in federal law under 28 USC §1961, irrespective of how that statute may evolve from time to time.

Chapter 11 – Impaired Creditors in Solvent Estates

The issue of interest on unsecured claims in Chapter 11 arises in a different context than in Chapter 7. The determination of interest in a chapter 7 case is a procedural right, intended to compensate the creditor for delay in administration in the rare case that there are funds beyond the normal waterfall of Section 726(a) of the Code. The issue of interest on unsecured claims in Chapter 11 cases arises in solvent cases when debtors classify a claim as unimpaired but propose to pay less than the contractual rate of interest. An unimpaired creditor is deemed to have consented to a plan. However, an impaired creditor is entitled to vote on a plan.

Suppose the Debtor proposes a plan that offers to pay the creditor in full on its claim, with interest at the legal rate under 28 USC §1961. The debtor will take the position that such a creditor is not impaired and thus not entitled to vote – the argument being that the creditor is being paid as much as it would receive in liquidation. The creditor, however, may claim (a) entitlement to interest pursuant to a state judgment rate, (b) entitlement to interest at a contractual rate substantially higher than either the federal or the state judgment rate or (c) entitlement to a contractual right, such as a make-whole premium that is substantially greater than the contractual or the legal rate under either state of federal law.[29]

The Fifth Circuit Court of Appeals' decision in *In re Ultra Petroleum Corporation*[30] held that the solvent debtor exception survived the enactment of the Bankruptcy Code. As a corollary, it held that even though a make-whole premium constituted unmatured interest, otherwise not allowable under Code Section 502(b)(2), debtors of a solvent estate still must pay the contractually agreed upon make-whole premium. A vigorous dissent would have held (a) that the solvent debtor exception did not survive the enactment of the Bankruptcy Code; (b) that the make-whole premium was, indeed, unmatured interest; and (c) that in a solvent estate, the holders of unsecured claims would be limited to post-petition interest at the federal judgment rate of 28 USC §1961. The circuit court remanded the case to the bankruptcy court for further consideration.

In contrast, the bankruptcy court for the District of Delaware came to a diametrically opposite conclusion in *In re Hertz Corp.*[31] Initially, the court held that the question of whether make-whole premium constituted unmatured interest pursuant to Section 502(b)(2) of the Code was a matter of fact that depended on the circumstances of the case. For this reason, the court treated some of the creditors' claims as unmatured interest as a matter of law and some as possibly not. Having so held, following the Third Circuit precedent in *Solow v. PPI Enterprises (U.S.), Inc.*[32] the court held that it was the Code and not the debtor's plan that impaired the creditor's claim.[33] Having come to that conclusion the court then addressed the solvent debtor exception. In contrast to the holding in *Ultra Petroleum,* and consistent with the dissenting opinion in that case, the court in *Hertz Corp* held:

It is true that in the rare solvent chapter 11 debtor case, some claims may be entitled to post-petition interest under sections 1129(a)(7) and 726(a)(5). However, those sections do not reinstate the creditors' contract or state law rights to unmatured interest that has been disallowed by section 502(b)(2). Instead, as discussed below, sections 1129(a)(7) and 726(a)(5) require the treatment of claims in accordance with the mandates of those sections which courts have concluded require the payment of post-petition interest only at the federal judgment rate. 20-11218 MFW, at ***27**

The Second Circuit addressed the solvent debtor exception tangentially in *In re Latam Airlines Group, S.A.*[34], even though it held that the debtor was insolvent. There, the court acknowledged that both the Ninth Circuit and the Fifth Circuit had recognized the continued viability of the doctrine.[35] However, it was not called upon to rule on the continuing vitality of the doctrine since the debtor was found to have been insolvent in the bankruptcy court. The circuit court found no reason to disturb that finding.

Interest in Solvent Chapter 13 Cases

Interest is rarely paid on unsecured claims in chapter 13 cases[36] One case which addressed this issue thoroughly, although in dictum, is *In re Hedrick.*[37] In that case, the credit union filed an amended proof of claim asking for post-petition interest and attorneys' fees. However, the amended claim was filed after the debtor's plan calling for payment of 100% of all unsecured claims, without interest, was confirmed. The debtor's estate would have been solvent had it been liquidated.

The court sustained the debtor's objection since the confirmed plan was res judicata and binding on the credit union. However, the court observed:

> Even though the proper allowed claim is the original claim filed by the credit union, the credit union may actually be paid more than its allowed claim if the estate is a solvent estate. The court shall confirm a chapter 13 plan if all of the requirements of § 1325(a) are satisfied and, if the trustee or an unsecured creditor objects, the requirements of § 1325(b) are also satisfied. One requirement is that the distribution to unsecured creditors must be at least as much as they would have received had the case been a chapter 7 case. Bankruptcy Code § 1325(a)(4). The provision for interest on allowed claims in solvent estates is a part of this calculation. *Beguelin v. Volcano Vision, Inc. (In re Beguelin),* 220 B.R. 94, 98 (BAP 9th Cir. 1998). The interest rate, though, is the federal judgment rate, not the contract rate of the applicable state judgment rate. *Id.* at 99-101. There is no similar statutory provision for attorney›s fees, or for other reasonable fees, costs or charges provided for under the agreement under which the claim arose. *Cf.* Bankruptcy Code §§ 506(b) and 726(a)(5).

Thus, the *Hedrick* court announced that it would impose a requirement that interest be paid on unsecured claims in solvent chapter 13 cases at the federal judgment rate.

Two cases in the bankruptcy court for the Northern District of Illinois came to similar conclusions. *In re Huang*[38] held that in a chapter 13 case which was solvent on a liquidation basis, unsecured creditors must receive what they would receive in that liquidation. The court concluded that this required that the unsecured creditor receive interest at the state judgment rate, which in that case was 9%. [39]The court followed *Huang* in *In re Boehm*[40] where it allowed a proof of claim which included interest at the contract rate of 11% in a chapter 13 case where the debtor would be solvent on liquidation.

Neither *Huang* nor *Boehm* have been followed by any other bankruptcy court. Both cases were criticized by the court in *In re Dow Corning Corp*[41] which concluded that if interest were to be paid on unsecured claims, it would be paid at the federal judgment rate of 28 USC §1961. The question of interest in Chapter 13 cases rarely arises since debtors in chapter 13 are infrequently found to be solvent in liquidation.

Interest on Oversecured Claims

If the value of the collateral is greater than the claim after application of § 506(c), then interest, reasonable fees, costs, and other charges provided for under the agreement under which the claim arose are also allowed and are a part of the claim. Bankruptcy Code § 506(b).[42] Professor Pawlowic[43] ably addresses this question noting that courts typically will allow interest on over-secured claims at the contract rate. They may allow default rates of interest in some instances. But the question of interest on over-secured claims is ultimately a matter of federal law even if there is a reference to state contract law to determine rights in the first instance:

Thus, the developing rule is that the rate of interest under section 506(b) is a matter of federal bankruptcy law, but that applicable non-bankruptcy law will be adopted as the federal rule. If in a particular case this rate appears excessive, the court will determine whether another rate should apply based upon an examination of the specific facts and equities.

In re Terry Ltd. Pshp.[44] held that an over-secured creditor in bankruptcy was entitled to interest at the default rate of interest provided for in the contract.

Can the entitlement to interest be determined on a principled basis?

Why have so many able and earnest jurists come to diametrically opposite conclusions when reviewing the same statute? Readers of this journal certainly are interested in the bankruptcy aspects presented by interest issues. But fundamentally and universally, federal practitioners want to understand how statutes are interpreted, especially statutes susceptible of more than one reasonable reading. We must consider how courts are instructed to interpret statutes to discern a principled basis for understanding the relevant statutes addressed in this article. With this understanding, we might better interpret other statutes, not only in the Bankruptcy Code but in federal law generally.

Textual Analysis of Statutes

Two recent Supreme Court cases offer some insight into the Court's current thinking about statutory interpretation. The Court stated in *Bartenwerfer v. Buckley*, that it always starts with the text of the statute.[45] In *Bartenwerfer,* the Court was called upon to interpret the phrase "money obtained by fraud." The Court construed the passive voice in that phrase to focus on the element that the money had to be obtained by fraud[46] – it did not matter who committed the fraud. Since California law, the law of the state where the fraud took place, assigned liability to the spouse of the active fraudster, the non-active person who was liable under state law could not obtain a discharge with respect to that debt.

The grammar of the statute was such that the statue could most naturally be read to bar the discharge for debts for money obtained by fraud. Based on the wording of the statue, the Court held, relying on a grammar authority, that Congress' focus was on the event rather than the actor. Having decided that the text could impose non-dischargeability upon a passive person who was not the actual wrongdoer. Instead, the Court considered the relevant legal context of common law fraud holding that liability for fraud is not limited to the wrongdoer.[47] Having decided that the text of the statute supported its interpretation, the Court went on to say that, "context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute."[48] Reviewing the context in which the term "fraud" was used in the bankruptcy laws, historically, the Court concluded that the relevant legal context - the common law of fraud - has long maintained that fraud liability is not limited to the specific wrongdoer.[49]

Historical precedent under prior statute

In the late 19th century, the discharge exception for fraud precluded discharge for fraud "*created by the fraud or embezzlement of the bankrupt*"[50] . . . shall be discharged under this act." (emphasis added). The Court assumes that Congress is aware of the Court's relevant precedents.[51] So, without repeating here the precedents the Court found relevant in *Bartenwerfer,* the Court concluded that the relevant statute incorporated past precedent. Moreover, the Court held that the Bankruptcy Code incorporates common law principles of fraud.[52]

Despite this strong embrace of history, the Court looked at the past differently in *Lac du Flambeau Band of Chippewa Indians v. Coughlin*[53] in the context of interpreting the sovereign immunity provisions of the Bankruptcy Code. In *Lac du Flambeau,* the court construed the term 'governmental unit" to include American Indian tribes for purposes of abrogation of sovereign immunity under Section 106(a) of the Bankruptcy Code.[54] In so doing, the Court observed that the enactment of the Bankruptcy Code in 1978 "ushered in 'a new unprecedented era in bankruptcy practice.'[55]

In *City of Chicago v. Fulton,*[56] the Court made heavy reference to the current dictionary definitions of terms used in the pertinent provision of the Code to ascertain the heavily litigated "plain meaning" of the statute.[57]

The Supreme Court considers ancient practices as well. For example, in *N.Y State Rifle and Pistol Ass'n v. Bruen,*[58] the Court had no compunctions about considering the conditions and context existing in England at the time of the enactment of the 2nd Amendment and the 14th Amendment to the Constitution. But ultimately, text controls.

From these precedents, then, we can glean the basic tenets that the Supreme Court instructs be used in interpreting statutes in general, and the Bankruptcy Code in particular:

- Start with the text
- Consider the context
- Consider the historical antecedents including past practices under prior bankruptcy law, including, but not limited to its English antecedents
- End with the text

Reconciling Conflicting Positions on Interest

The Text

Unmatured interest is disallowed under Section 502(a)(2) of the Code. Post-petition interest is allowed on unsecured claims after all claims, even tardy claims, have been paid in full "at the legal rate" pursuant to Section 726(a)(5) of the Code. How should the courts interpret "at the legal rate" only utilizing the text. The word "at" does not add much. However, the word "the" has interpretive value.

The first two definitions of the word "the" in the Merriam-Webster dictionary are particularly instructive:

a

—used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance

put *the* cat out

b

—used as a function word to indicate that a following noun or noun equivalent is a unique or a particular member of its class

the President

the Lord

It is crystal clear that use of the word "the" in Section 725(a)(6) of the Code requires the utilization of one and only one interest rate. Textual analysis then turns to the definition of the term "legal rate." The fourth edition of Black's Law Dictionary, which was the latest edition in print as of the date of enactment of the Bankruptcy Code defined "legal rate" as:

"[a] rate fixed by statute where it is not fixed by contract, and it is unless

otherwise specifically provided the maximum rate which may be contracted for."

Black's Law Dictionary 1041 (4th ed. rev. 1968)

This definition suggests that reference should be made to a statute and that it should be fixed.

It is pertinent that there was a single unitary definition of "legal rate" in 28 USC §1961 at the time of the enactment of the Bankruptcy Code. At that time, 28 USC §1961 utilized the "rate allowed by State law". However, Public Law 97-164—Apr. 2, 1982, 96 Stat. 25 amended Section 1961 to refer to a formula based on 52-week treasury bills. All subsequent versions of Section 1961 have referred to a formula based on treasury securities. Section 726(a)(5) of the

Code makes no reference to state law. Other sections of the Bankruptcy Code do refer to state law, including Sections 109(c)(2), 522 (b)(3), 523(a)(5). The drafters of the Bankruptcy Code knew how to mention state law when they wanted to. They clearly intended to refer to a unitary rate of interest under federal law: 28 USC §1961. Congress made no change to Section 725(a)(5) when 28 USC §1961 was amended in 1982. The only inference that can be drawn is that Congress was satisfied with that provision, particularly since Congress made no changes to Section 725(a)(6) when it made comprehensive amendments to the Bankruptcy Code upon adoption of the Bankruptcy Abuse Prevention Consumer Protection Act, effective in 2006.

If there is clarity in the text, is there any need to consider previous history of the statute, the context in which the statute was adopted or anything else? Or does the analysis of the statute start and end with the text?

The same question must be asked about the solvent debtor exception. Eighteenth century jurisprudence was never codified as a part of the Bankruptcy Code. Unlike *Bartenwerfer*, which utilized pre-colonial jurisprudence to assist it in understanding the term "fraud" as it has always been used in common law, the solvent debtor exception appears to have been codified out of existence with the adoption of Sections 502(b)(2) and 725(a)(6) of the Code. Had Congress intended to incorporate this principle, it would have done so. Yet, the Supreme Court has stated that Congress is presumed to have acted with complete understanding of past precedents. Clearly, the solvent debtor exception was extant prior to the enactment of the Bankruptcy Code. There simply is no principled basis to distinguish between a pure textual interpretation of the Bankruptcy Code and a contextual interpretation of the Bankruptcy Code considering past practice. Learned opinions have been issued on both sides of this issue. Each side of the issue can be logically supported. Policy considerations should inform this analysis.

A Principled Harmonization

Administration of Chapter 7 cases

Administration of chapter 7 cases invokes a plethora of issues and considerations not present in chapter 11 cases. The trustee's duty in chapter 7 is to liquidate the debtor's assets as quickly as possible considering the interests of all parties in interest. The creditors who file a proof of claim can only have an expectation interest of receiving a pro-rata share of assets of the estate in accordance with their priorities. Upon the commencement of the bankruptcy case, their claims are no longer against the debtor individually. Rather, they are against the chapter 7 estate. Section 726 of the Code sets out the rights and priorities of the respective creditors against the estate. These are no longer the rights that existed under contract or statute under state law. These rights were fixed and determined as of the date of the filing of the petition. In the rare event that the estate derives value more than100% of all the filed claims, interest can be allowed "at the legal rate." It makes sense that the "legal rate" be the legal rate afforded to judgments under federal law since an allowed proof of claim is tantamount to a judgment entered in favor of the creditor under federal law. While the "legal rate" under 28 USC §1961 was determined by reference to state law at the time of enactment of the Bankruptcy Code, since 1982, this has not been the case. Section 726(a)(5) affords the chapter 7 trustee the opportunity to administer the estate efficiently and effectively, without the inconvenience and expense to determine interest rates under state law that might vary from creditor to creditor. For example, today, under Illinois law, judgments on consumer debt bear interest at 5% whereas judgments on commercial debt bear interest at 9%, except that judgments against units of local government bear interest at 6%.[59] Other states may have even more complex interest rate regimes. If the solvent debtor exception were deemed to exist, then Section 726(a)(5) would be written out of existence. Trustees would have to determine the contract rate of interest on all claims. Credit card and other debts could have default rates of interest. There could be satellite litigation over the rate of interest to which a particular creditor might be entitled on their claim. Unsecured creditors would no longer be obtaining equality of distribution.

In a chapter 7 case, the typical creditor with the highest interest rate by contract is a credit card creditor. By the time the debtor has filed a chapter 7 case, the credit card debt typically has been acquired by a debt purchaser for a fraction of the face value of the debt. The debt purchaser does not have an expectation of a 100% recovery on its claim, much less an expectation of recovering the contract rate of interest in the very rare case of surplus in chapter 7. Of course, the additional costs of administration of competing claims for different interest rates in chapter 7 surplus cases would have the negative effect of reducing and delaying distributions. Worse, the results would vary considerably from state to state. This cannot be what Congress envisioned for chapter 7 administration. It must have envisioned a uniform federal interest rate on unsecured claims if the chapter 7 estate generated a surplus.

Administration of Chapter 11 Cases

Chapter 11 cases call into question a different set of considerations. The better view appears to hold that Section 502(b)(2) of the Bankruptcy Code disallows unmatured interest. Such disallowance is based on the Code and not upon any plan that the debtor may provide. However, a fair argument can be made that the debtor in possession is subject to a different set of equities than the chapter 7 trustee. If the debtor in possession is solvent, then it ought to pay interest to the extent required by contract or law under the law of the state where the contract was formed, subject, however, to the restrictions of the Bankruptcy Code. *Hertz Corp.* makes the sound argument that the nature of a make whole premium as it relates to Section 502(b)(2) of the Bankruptcy Code is a question of fact for the court to determine. Once that determination is made, then the court can impose the obligation to pay interest on that claim. In distinction to chapter 7, however, a fair argument can be made that limiting the interest rate in the event of a solvent estate to the legal rate under 28 USC §1961 can give rise to an unwarranted windfall to the debtor. However, an equally fair argument can be made that the Code itself does not provide for any authority to provide for more interest than that. If Congress believes that this perceived windfall is inappropriate, it should enact a statute that says so and codify the solvent debtor exception for chapter 11 cases. Creditors have a legitimate interest in getting a return on their loan in the event of solvency. However, Congress' policy that unmatured interest is not an allowable claim must be honored. The solvent debtor exception as understood by the Fifth Circuit in *Ultra Petroleum* does violence to Section 502(b)(2). One hopes that the bankruptcy court can fashion a remedy satisfactory to the circuit court that honors Section 502(b)(2).

Chapter 13

The "best interests of creditors" test honors the legitimate interests of the creditors, even in a solvent debtor case. That is because creditors in chapter 7 can only receive 100% of their claims plus interest at the federal legal rate. Chapter 13 should be no different. However, the chapter 13 trustee or the objecting creditor would have to demonstrate that there would, indeed, be surplus in chapter 7 considering the costs of liquidation and other administrative expenses. Based on the very limited body of case law, one would expect this circumstance to be very rare. As in chapter 7, creditors in chapter 13 have no reasonable expectation of default rate of interest, or even contract rate of interest after default, especially since they will be, in most, if not all cases, purchasers of the original debt at a substantial discount.

Oversecured creditors

Over-secured creditors usually receive the contract rate of interest. Occasionally, they might receive a default rate of interest. To the extent that the creditor is over-secured, it will be entitled to reasonable attorney's fees and anything else to which it is entitled under the contract. This has been and will continue to be a matter of discretion for the court as no particular rate of interest is specified in Section 506(a) of the Code.

Conclusion

Sophisticated arguments have been made to support conflicting visions of the extent to which interest should be paid to creditors in cases where the debtor or the debtor's estate is solvent. Congress should act to clarify what it meant. To the extent that Congress fails to act, however, the courts can rely on the text of the statutes, the contexts in which the text is applied and common sense, free from preconceived notions and free from hoary and frankly antiquated century-old notions. Bankruptcy arises in the federal system. One uniform interest rate serves the legitimate interests of all parties in the bankruptcy system. However, contractual interest might be justifiable in solvent cases in the context of chapter 11. Statutory authority or an authoritative decision from the Supreme Court is necessary and desirable. ☉

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Endnotes

[1]Pawlowic, D. *Entitlement to Interest Under the Bankruptcy Code*, 12 BANKR.DEV. J. 149, 150 (1995). The reader's attention is called to this very complete exposition of interest issues in bankruptcy as of the date it was written. Then as now, the issue appears to have been controversial and unresolved.

[2]11 USC §502(b)(2).

[3]*Bromley v. Goodere* (1743) 26 Eng. Rep. 46,52, 1 Atk. 75, 80) (per Lord Chancellor Hardwicke).

[4]*Johnson v. Norris,* 190 F. 459 (5th Cir. 1911).

[5]11 USC §726(a)(5)

[6]28 USC §1961

[7]*Ultra Petroleum Corp. v. Ad Hoc Committee of Unsecured Creditors (In re Ultra Petroleum Corp).* 51 F.4th 138 (5th Cir. 2022), *cert. den. sub nom. Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors*, ____ U.S. ___ 143 S.Ct. 2495 (2023).

[8]11 USC §1325(a)(4).

[9]*In re Beguelin* **220 B.R. 94, 98 (B.A.P. 9th Cir. 1998**

[10]11 USC §506(a)

[11]*Matter of Laymon,* 958 F.2d 72, 75 (5th Cir. 1992)

[12]United States Trustee Program, "Preliminary Report on Chapter 7 Asset Cases: 1994 to 2000" at 7 (June 2001) (hereinafter referred to as the "2000 UST Study"), available at: www.justice.gov/archives/ust/file/Publicat.pdf/download ("Historically, the vast majority **(about 95-97 percent)** of chapter 7 cases yield no assets.").

[13]Preliminary Report on Chapter 7 Asset Cases 1994 to 2000 (justice.gov) Preliminary Report on Chapter 7 Asset Cases 1994 to 2000 (justice.gov) available at www.justice.gov/archives/ust/file/Publicat.pdf/download.

[14]https://www.justice.gov/ust/page/file/762521/download

[15]Handbook for Chapter 7 Trustees, Section S.1 at page 8-39.

[16]14-36072 (Bankr. N.D. Ill. Aug. 31, 2023), discussed in further depth below

[17]In re Beguelin, 220 B.R. 94 (B.A.P. 9th Cir. 1998)

[18]*In re Layman,* 117 B.R. 856, 862 (Bankr. W.D. Tex 1990) *rev'd on other grounds, Bradford v. Crozier (Iin re Laymon)* 958 F.2d 72 (5th Cir. 1992).

[19]*In re Adelphia Commc'ns Corp*., 368 B.R. 140, 257 (Bankr.S.D.N.Y.2007); *In re Best*, 365 B.R. 725, 727 (Bankr.W.D.Ky.2007); *In re Dow Corning Corp.*, 237 B.R. 380, 412 (Bankr.E.D.Mich.1999); *In re Chiapetta,* 159 B.R. 152, 161 (Bankr.E.D.Pa.1993); *In re Robinson,* 567 B.R. 644 (Bankr. N.D. Ga. 2017) (Chapter 7, reserving ruling as to future Chapter 11 cases); *In re Energy Future Holdings Corp.* 540 B.R. 109 (Bankr. D Del. 2015); *Wells Fargo Bank, N.A. v. The Hertz Corp., (In re The Hertz Corp)* (0-11218 MFW (Bankr. D. Del. Dec. 22, 2021)).

[20]237 B.R. 380 (Bankr. E.D. Mich. 1999).

[21]See §§ 109(c)(2), 522(b)(1), 523(a)(5), 362(b)(12) among others.

[22]For example, the Wisconsin legal rate is a function of the prime rate as of the date of the judgment. Wis. Stat. 804.04(4); 805.15(8).

[23]Case 14-36072 (August 31, 2023, Bankr. ND. Ill.)

[24]Other cases adopting the state law approach, not cited in *Hicks,* include I*n re Adcom, Inc.*, 89 B.R. 2 (D. Mass. 1988); *Federal Savings Loan Corp. v. Moneymaker (In re A L Properties),* 96 B.R. 287 (C.D. Cal. 1988); *In re Carter,* 220 B.R. 411 (Bankr. D.N.M. 1998); *In re Huang*, 192 B.R. 184 (Bankr. 1996) (chapter 13 best interests of creditors) ; *In re Boehm,* 202 B.R. 99, 100 (Bankr. N.D. Ill. 1996) (contractual rate of interest, Chapter 13); *In re Schoeneberg,* 156 B.R. 963 (Bankr. W.D. Tex. 1993) (chapter 11, non-default contractual rate); *In re Beck,* 128 B.R. 571 (Bankr. E.D. Okla. 1991) (Internal Revenue Code rate rather than 28 USC §1961) ; *In re Rivera,* 116 B.R. 17 (Bankr. D.P.R. 1990) (Chapter 13, Puerto Rico legal rate); *In re Boyer*, 90 B.R. 200 (Bankr. D.S.C. 1988) (State law applies, one rate for creditors with judgments, another rate for those without

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A N K R U P T

Mootness, Standing, and the Changing Landscape for Appellate Review of Bankruptcy Court Orders

NEIL BERMAN AND ELIZABETH A. ROGERS

The nature and goals of the commercial bankruptcy system often mean that litigants face heightened barriers to appellate review. A debtor's ability to effectively reorganize depends upon speed and certainty in the Chapter 11 process. This is particularly true when a restructuring plan involves a significant sale of assets outside the ordinary course of business, a strategy that is part and parcel of most corporate debtor reorganizations. After a bankruptcy sale, appellate courts are left to wrestle with questions about whether related disputes are moot and what forms of relief, if any, remain available to adversely impacted parties. The Supreme Court's decision in *MOAC Mall Holdings LLC v. Transform Holdco LLC* eliminates at least one such barrier to appellate review in this context.[1] Even if an asset sale does not meet the heightened § 363(m) standards – an appellate stay and a sale to a good faith purchaser – appellate review is not foreclosed on jurisdictional grounds. Bankruptcy court sale orders are now subject to review under equitable doctrines such as forfeiture, waiver and estoppel that apply generally to non-jurisdictional deadlines. But larger questions remain. Does MOAC represent a broader trend toward greater access to appellate review of bankruptcy court decisions? What hints should be drawn from MOAC as to the "variety of flavors" of mootness arguments that remain available to appellees facing appeals of bankruptcy court orders?[2]

The Supreme Court's 2023 *MOAC* Decision

It started with a mall.

In 2018, Sears, Roebuck, and Co., the American catalog retailer turned quintessential department store, went bankrupt. The company's failure left question marks over the future of leased retail spaces in shopping malls around the country. Sears quickly announced a plan to sell most of its assets, including many existing stores and leases, to the recently created Transform Holdco. While Transform was indeed a new legal entity, it would be headed by Sears CEO Eddie Lampert and led by other existing Sears executives. It would also share the same parent company, ESL Investments, Inc.[3]

The bankruptcy court approved the asset sale in 2019. Under the asset purchase agreement, Sears would assign designated leases to Transform as permitted by Bankruptcy Code § 365, including a 100-year lease for a custom three-story anchor space in the famed Mall of America. Transform and its affiliates planned to market the lease for sublet. And because the Mall of America lease was uniquely favorable to the tenant – among other aspects, it required Sears to pay only $10 per year in rent – Transform could sublet the space to nearly any sublessee for almost any purpose. The district court opined that "aside from a house of prostitution or other criminal enterprise, this court has had great difficulty imagining any nonindustrial use that would not be 'compatible with and not detrimental to' the multi-faceted operations at Mall of America."[4]

The Mall of America's owner, MOAC Mall Holdings LLC, objected and argued that the proposed assignment did not meet the heightened requirements for assignment of a shopping center lease in a bankruptcy case.[5] After a hearing, the bankruptcy court allowed the assignment over MOAC's objection and later denied MOAC's request for a stay of the assignment. MOAC feared that any appeal might be moot without a stay because the Bankruptcy Code constrains the ability of appellate courts to unwind asset sales to good faith purchasers when the sale order is not stayed pending appeal. Section § 363(m) states:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.[6]

During the stay hearing, Transform explicitly represented that § 363(m) did not apply to the assignment and that Transform would not raise § 363(m) on appeal. Relying in part on these representations, the bankruptcy court denied the stay.

On appeal to the district court, Transform did not initially raise any mootness arguments. Instead, Transform argued that the bankruptcy order should be affirmed on the merits because the lease assignment met the heightened requirements for assignment of a shopping center lease. Then, after the district court entered a forty-three page opinion finding in favor of MOAC, Transform filed a motion for rehearing, arguing that the court lacked subject matter jurisdiction to hear the appeal. Transform asserted that § 363(m) stripped the court of appellate jurisdiction to review the bankruptcy court's order and required the district court to dismiss the appeal on this basis. The district court reluctantly agreed with Transform and determined that it was bound by Second Circuit precedent to conclude that § 363(m) was jurisdictional, rendering the appeal statutorily moot.[7]

After the Second Circuit affirmed the decision, the Supreme Court granted certiorari to resolve the question. Writing for a unanimous court, Justice Jackson concluded that § 363(m) is not jurisdictional and articulated an appropriate analysis for statutory mootness arguments.

The Court clarified that the existence of a statutory precondition for relief does not, without more, make a rule jurisdictional.[8] Jurisdictional rules are those that "pertain to the power of the court rather than to the rights or obligations of the parties."[9] While many statutes include preconditions for relief such as filing deadlines or exhaustion of remedies, these requirements should be interpreted as jurisdictional only when the text includes a clear statement demonstrating congressional intent for a precondition to "govern[] a court's adjudicatory capacity."[10] While the clear statement need not contain a magic word or phrase, it must be supported by a reading of the statute that is more than merely plausible.[11]

The Court noted that § 365(m) does not address the court's authority and appears to contemplate appellate review and remedies. Nor does is it contain any ties to the Bankruptcy Code's clear jurisdictional provisions. Instead, the provision is best viewed as a constraint on rather than a bar to appellate remedies. Under some circumstances, a court may be unable to reverse or modify a sale authorization unless the sale was stayed pending appeal or involved a bad-faith purchaser, but the appellate court should at least undertake this analysis. Justice Jackson concluded:

> Similarly, given § 365(m)'s clear expectation that courts will exercise jurisdiction over a covered authorization, it is surely permissible to read its text as merely cloaking certain good-faith purchasers or lessees with a targeted protection of their newly acquired property interest, applicable even when an appellate court properly exercises jurisdiction.[12]

The Court also rejected Transform's argument that § 365(m) codified an existing understanding that sales of estate property fall under a bankruptcy court's in rem jurisdiction, leaving courts unable to exercise jurisdiction over validly transferred property that is no longer part of the bankruptcy estate.[13]

Transform alternatively urged the Court to determine that MOAC's appeal was equitably moot because an appellate court could not grant the relief that MOAC sought. The Court declined to resolve this question but hinted that such arguments are disfavored as barriers to appellate review.[14] A case is not moot "as long as the parties have a concrete interest, however small, in the outcome of the litigation."[15] Because MOAC merely sought typical appellate relief, the Court would not conclude that MOAC had no remaining concrete interest in the matter or "plumb[] the Code's complex depths in the first instance to assure ourselves that . . . no relief remains legally available."[16]

On remand, the Second Circuit concluded, agreeing with the district court, that Transform "has not given adequate assurance of future performance of the lease." The judgment of the district court finding it lacked jurisdiction due to § 363(m) was vacated and the case remanded.[17]

Constitutional Mootness Challenges After *MOAC*

Federal courts exercise jurisdiction only when an actual case or controversy remains live. If an action become constitutionally moot, the court must dismiss it for lack of jurisdiction. However, as *MOAC* reiterates, a case or appeal may continue as long as the parties have a concrete interest in the result, no matter how small that interest.[18] A case becomes constitutionally moot only when it becomes impossible for the appellate court to grant any form of effectual relief to the aggrieved party.[19] In such an instance, whenever it arises, the court is obligated to dismiss the appeal.

But mootness arguments do not always point to a jurisdictional issue. The use of the term "mootness" has become profligate in bankruptcy jurisprudence and has a variety of meanings. In contrast to constitutional mootness, equitable mootness is a discretionary doctrine and "does not follow from Article III standing principles."[20] The status of equitable mootness is discussed later, but for now it is sufficient to note that it does not strip courts of jurisdiction over bankruptcy appeals or mandate dismissal before reaching the merits. Instead, the doctrine permits but does not require courts to dismiss bankruptcy appeals if they conclude that effective relief is impossible based on equitable and practical concerns. Relevant considerations include whether the matter has been stayed pending appeal, whether the plan or sale has been substantially consummated, the type of relief sought, and the potential impact of that relief.[21] In essence, "equitable mootness is not concerned with the court's ability or inability to grant relief; it is concerned with protecting the good faith reliance interests created by implementation of the bankruptcy plan from being undone afterwards."[22] Constitutional mootness creates an "*inability* to alter the outcome (real mootness)" not merely an "*unwillingness* to alter the outcome ('equitable mootness')."[23] And this distinction is critical.

In *MOAC*, the Court flatly rejected Transform's arguments about the constitutional mootness of MOAC's appeal because they conflate constitutional mootness with the merits of the dispute. Transform argued that no effective remedy could be crafted for MOAC because the only method to grant the relief it sought would be to return the lease to the bankruptcy estate. But the sole mechanism provided in the Bankruptcy Code to undo the sale would require Sears, as the debtor, to avoid the post-petition transfer under § 549, and the statute of limitations for such relief had long since expired.[24] The Court explained that Transform's arguments are of a kind "disfavored" as a basis for mootness and disposed of them quickly. Statutory or practical constraints on available remedies do not foreclose appellate review. Instead of exploring whether it would be impossible to vacate the lease assignment order or offer some alternative equitable remedy to *MOAC*, the Court contented itself with concluding that *MOAC's* position was not frivolous and, therefore, the writ of certiorari was not constitutionally moot.

Similar to the Court's prior decision in *Chafin*[25], the lesson drawn is not to count on succeeding in front of the Court on a constitutional mootness argument. In *Chafin*, the Court was faced with an issue concerning the Hague Convention on the Civil Aspects of International Child Abduction. By the time the case reached the Court, the child was in Scotland with his mother, and the father sought to return the child to the United States. The mother argued that such relief was not available under the Convention or on any equitable grounds. The court rejected this argument for purposes of determining constitutional mootness, finding that the father's argument was not "so implausible" that jurisdiction did not exist. Constitutional mootness must be more straightforward for the Court to consider it as a basis to refuse to hear an appeal. Interestingly, the Fourth Circuit very recently stated that constitutional mootness is an Article III concept that does not apply to bankruptcy courts at all, although it recognized statutory mootness concepts such as § 363(m).[26]

But of course, as the late Yogi Berra explained, it ain't over until it is over. On remand, the Second Circuit was asked to re-visit the same issues the Court did not fully address. Did *MOAC* in fact have any effective remedy against Transform as the purchaser? And, relatedly, should that issue be decided on the circuit level or would a further remand back to the bankruptcy court be more appropriate? Transform told the Second Circuit, as it did the Supreme Court, that there is no effective remedy under the Bankruptcy Code for *MOAC*, including forfeiture of the leasehold interest. Finally, Transform asserted that the Court left the constitutional mootness argument for a decision upon remand. The Second Circuit rejected all of Transform's arguments and returned the matter to the District Court. First, after acknowledging the Supreme Court's determination that § 363(m) is not jurisdictional, it vacated the district court's opinion finding a lack of jurisdiction. Second, it agreed with the District Court that Transform failed to provide adequate assurance of future performance of the lease. Third, it determined that Transform's arguments about a lack of remedy did not raise Article III jurisdictional concerns and instead went to the merits of the litigation. The Second Circuit did not accept Transform's arguments that the remedy issues the Supreme Court did not want to hear should be heard by it upon remand. Instead, it left those issues for Transform to raise with the District Court. It also rejected the argument that jurisdiction was lost when the property left the estate, citing the principle from the Supreme Court's decision that bankruptcy court jurisdiction is not "purely in rem."[27]

Court Continues Its Pattern of Determining Many Federal Statutory Deadlines are not Jurisdictional.

Another fundamental takeaway from the *MOAC* decision is a continuation of an unbroken line of recent cases in which the Court has articulated a clear statement test that bears similarity to the standard for sovereign immunity abrogation.[28] Without a clear statement from Congress limiting the power of federal appellate courts to review a decision, statutes are not jurisdictional. Under this standard, even if the jurisdictional argument may be the better one, it is not sufficient for a statute to be jurisdictional if another plausible interpretation exists. The Court does not require "magic words" to find a statement jurisdictional, but the language must be unambiguous. These cases have walked back the federal courts' overbroad and imprecise usage of the term "jurisdictional." The circuit courts have followed this lead in more precisely distinguishing jurisdictional statutes from claim processing deadlines. In some ways, by looking past the Bankruptcy Code into the principles the Court has stated in recent years, the result in *MOAC* was perhaps predictable. Section 363(m) does not have the hallmark of a jurisdictional statute. For one thing, it is conditional because it only applies to good faith purchasers and requires that the sale order has not been stayed. The Court has indicated before that these types of statutes do not have the clear language required to demonstrate that Congress intended to limit appellate jurisdiction. Additionally, bankruptcy law already has a clear jurisdictional statute in 28 U.S.C. § 1334. As the Court noted, § 363(m) is not tied to that § 1334. And to bring the point home, other Bankruptcy Code sections do bear such a relationship, such as the statute addressing abstention.

MOAC also reminds practitioners that basic notions of fair play in negotiation matter. The district court, acting as an appellate reviewer of the bankruptcy court order, was "appalled" by the about-face of Transform in whether it was invoking § 363(m).[29] By determining that § 363(m) is not a jurisdictional statute, Transform's changing position on this fundamental point may allow *MOAC* to at least seek some form of redress on its appeal.

None of this is to say that equitable doctrines should give federal practitioners a false sense of security if they miss a statutory deadline or fail to seek a stay. Case law demonstrates that equitable remedies such as forfeiture, estoppel or waiver are limited and have exacting standards. Nevertheless, if a statute is non-jurisdictional, parties who may have made a procedural mistake or been unable to obtain a stay may still have access to the federal courts to seek justice.[30]

Equitable Mootness As An Alternative Argument for Reorganized Debtors to Avoid Appellate Review

The *MOAC* decision does not conclusively leave Chapter 11 debtors without other options to provide certainty at the bankruptcy court level and avoid appellate scrutiny on sale orders or plan confirmation. What does *MOAC* teach about the current state of the doctrine of equitable mootness?

Like statutory mootness, equitable mootness arguments commonly arise in the context of sales associated with business restructurings and orders confirming plans of reorganization, particularly in larger Chapter 11 cases. Chapter 11 plans often are based on compromises and contentious negotiations between various stakeholders in those cases: unsecured creditor committees, secured creditors, retirees, the United States Trustee, and others. The equitable mootness doctrine recognizes that there are certain circumstances under which a federal appellate court could exercise Article III jurisdiction but validly choose not to hear an appeal because it is too difficult to unwind all of the transactions in a sale or plan to grant a party effective relief. An appellate court might also conclude that the negative effect on third parties who relied on a bankruptcy court order weighs strongly against unwinding a transaction. Although the circuits have varied standards, there is a common theme of reluctance to revoke plan confirmation or related sales orders, which are often complicated and multi-faceted. In such cases, debtor counsel often successfully argue that unwinding such transactions would be both unwise and unworkable.

The equitable mootness doctrine can be traced to a 1981 Ninth Circuit decision, *Trone v. Roberts Farms, Inc*, which first articulated the idea that some bankruptcy appeals might be barred for prudential reasons absent a stay of the transaction order.[31] The origins of equitable mootness are less distinct than one might guess. The *Roberts Farms* court based its reasoning, at least in part, on Rule 805 of the Bankruptcy Act of 1898, the precursor to the modern § 363(m) statutory mootness issue that *MOAC* addresses. But the *Roberts Farms* case also analogized the unique implications bankruptcy order appeals to those that gave rise to the constitutional mootness doctrine, citing a Court precedent that pre-dates even Rule 805.[32] Thus, *Roberts Farms* pulled support for an equitable mootness doctrine from a historical paella of statutory, constitutional and prudential considerations. And courts have been following the recipe ever since.

Is *MOAC* merely another decision that reaffirmed established principles of statutory and constitutional mootness? Or is the *MOAC* decision grounded in a larger principle that federal courts are required to exercise jurisdiction when it is available to the parties? Does equitable mootness, at least as it is more broadly interpreted by some circuits, give appellate courts too much discretion to decline to hear genuine disputes? For example, in the Second Circuit, equitable mootness exists when a Chapter 11 plan has been "substantially consummated."[33] The Second Circuit's standard for equitable mootness makes appellate relief a particular challenge for creditors and other stakeholders because it makes an appellate stay not just a factor but a mandatory requirement. But in very large Chapter 11 cases, an appellate stay often is either impractical or nearly impossible.[34] Further, if the plan has been substantially consummated, the burden is on the appellant to demonstrate the case is not equitably moot. This requirement is more onerous than those in other circuits which rely upon a more fact-specific test and place the burden squarely on the appellee. As some commentators have noted, the test for substantial consummation is also not consistently interpreted. Finally, the Second Circuit follows an abuse of discretion standard on equitable mootness determinations, whereas some other circuits apply de novo review.

Skepticism of the equitable mootness doctrine is not new and still exists. Perhaps the most significant critique of the doctrine is found in the dissenting opinion of then-Judge Alito in the *Continental Airlines* en banc decision.[35] Alito notes that equitable mootness is oddly named in that it is not about mootness at all. "Real" mootness is the inability to rule on an issue, whereas equitable mootness is the "unwillingness" to do so. But he opines that *Roberts Farms*, even if correct on some level, has been expanded to include situations in which effective relief could be awarded but, for highly discretionary equitable reasons, should not be. Unlike *Roberts Farms*, which was moored to Rule 805 and concepts of constitutional process, equitable mootness now stands as a completely separate doctrine. Alito found this expansion of *Roberts Farms* an insufficient basis for the circuit's adoption of equitable mootness.

Alito also found the majority's other explanations for the doctrine to be less than compelling in light of the importance of appellate review. He noted that the Seventh Circuit seemed to justify equitable mootness as filling in a legal gap between statutes like § 363(m) that limit appellate review and other, similar bankruptcy situations that are not covered by a similar provision. In this respect, equitable mootness was more about creating a federal common law to support broader Chapter 11 policy goals than about the availability of remedies.[36] Alito concluded that the appeal could go forward without upsetting the plan of reorganization and should be decided on the merits.

The legacy of *Stern v. Marshall* and its progeny of cases concerning appropriate constitutional authority for Article I judges, including bankruptcy judges, also present implications for equitable mootness. Could bankruptcy judges make final determinations for traditional actions at law or was such constitutional authority limited to issues that were within the equitable jurisdiction of the bankruptcy court? This article will not delve into that well-covered and somewhat tortured legal history, but the Court ultimately determined to allow *Stern* claims, traditional claims at law at the time of the ratification of the Constitution, to be determined on a final basis by bankruptcy courts based upon the knowing and voluntary consent of the parties.[37] This constitutional "compromise" is significant to the equitable mootness debate because the constitutional authority of bankruptcy courts to determine *Stern* claims appears to have been premised, at least in part, upon ultimate Article III oversight over bankruptcy court decisions. Equitable mootness limits that review.

The Supreme Court denied a writ of certiorari to the Second Circuit out of the *Windstream Holdings* Chapter 11 case that could have resolved some of these questions in October 2023.[38] Bankruptcy rulings from the Second Circuit have outsized significance because of the multitude of large public companies that file for Chapter 11 relief in the Bankruptcy Court for the Southern District of New York. The Chapter 11 filings in that court rely on the flexible venue statute applicable to bankruptcy cases[39], allowing larger Chapter 11 debtors to have the choice to file a case in various districts. Commentary in favor and against the venue statute is not hard to find. For our purposes, we only note that, although bills in Congress periodically surface about this issue, the bankruptcy venue statute does not appear to be changing any time soon.[40] In smaller Chapter 11 cases, including those under the Small Business Reorganization Act of 2019, cases are commonly filed in the venue where a local company conducts business, and these issues are less of a concern.

However, answers may still be forthcoming. The equitable mootness issue also arose in another high-profile opioid case out of the Second Circuit, *Purdue Pharma*. The confirmed plan in that case released the non-debtor Sackler family for liability from claims against other non-debtors. When the United States Trustee sought a stay in front of the Supreme Court, it argued that the plan could be substantially consummated before the Court decided to take certiorari. Ultimately, the Court granted the stay as well as the writ of certiorari.[41]

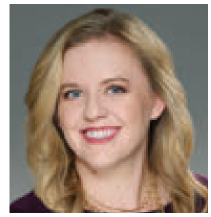
A real-world consequence of the doctrine of equitable mootness in larger Chapter 11 cases may be to incentivize debtors to take harder bargaining positions because the likelihood of an appellate remedy for a creditor or other stakeholder may be less than in other categories of federal law. This reality is arguably heightened as bankruptcy courts are being asked to resolve controversial issues in cases such as *Purdue Pharma* that foreclose victims from redress outside the bankruptcy proceedings in favor of a global solution supported by a majority of the stakeholders.[42]

Standing as Another Potential Hurdle

Standing represents a final potential concern for bankruptcy counsel. Appellate standing is different for bankruptcy courts than Article III standing jurisprudence. In most federal cases, appellate standing is established by showing an injury in fact. In bankruptcy appeals, the "aggrieved person" standard to establish appellate standing presents a higher threshold. The Sixth Circuit recently described this standard as being met as barring a party from appealing a bankruptcy court order "absent a direct financial stake in the appeal's outcome[.]"[43] The standard is justified based on the various stakeholders in bankruptcy, even those that are not named parties. The Ninth Circuit, considering recent Court precedent, has questioned why the "person aggrieved" prudential standing rule, which goes back to a statute from the repealed Bankruptcy Act of 1898, should still be applied before applying the Article III test that applies to any other federal court.[44] Still, the Ninth Circuit seems to concede that the "person aggrieved" test would still need to be met. But the Sixth Circuit decision suggested, but did not decide, that the "person aggrieved" test may no longer apply as it constitutes an impermissible prudential limitation on jurisdiction. However, the decision also suggested, without deciding, that a "zone-of-interest inquiry", which is based on "traditional tools of statutory interpretation" may be consistent with the "person aggrieved" test.[45] That test, from the Supreme Court, asks if the statute at issue intends to protect the party seeking redress.[46] Relatedly, the Supreme Court recently has taken certiorari to consider whether the broad standing principles in the bankruptcy courts under § 1109(b) is being limited by other prudential doctrines.[47] In both appellate standing and standing in the bankruptcy court under § 1109(b), the common question becomes whether these judge-made rules are consistent with Supreme Court "zone of interests" test. These developments could represent another example questioning the wisdom of separate and distinct standards for access to the bankruptcy court or an appellate court based upon the particular nature of bankruptcy law.

Conclusion

Chapter 11 bankruptcy is about collective action for the benefit of a debtor's organization but also for its creditors and other stakeholders. Stakeholders in these cases face more uncertainty about when appellate remedies may be available, but the real-world impact on practitioners remains to be seen. ⦿

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Endnotes

[1] _U.S. _, 143 S. Ct. 927 (2023).
[2] *Reynolds v. Servisfirst Bank* (*In re Stanford*), 17 F.4th 116, 121 (4th Cir. 2021).
[3] "ESL Investments Completes Acquisition of Sears Holdings' Assets," Business Wire (Feb. 11, 2019), available at https://www.businesswire.com/news/home/20190211005792/en/ESL-Investments-Completes-Acquisition-Sears-Holdings%E2%80%99-Assets (last accessed August 5, 2023).
[4] *MOAC Mall Holdings LLC v. Transform Holdco LLC* (*In re Sears Holdings Corp.*) (*Sears I*), 613 B.R. 51, 57 (S.D.N.Y. 2020) (vacated by *MOAC Mall Holdings LLC v. Transform Holdco LLC* (*In re Sears Holdings Corp.*) (*Sears II*), 616 B.R. 615, 634 (S.D.N.Y. 2020)).
[5] 11 U.S.C. § 365(b)(3) describes the elements of adequate assurance that must be met when a debtor-in-possession or trustee seeks to assign a lease in a shopping center.
[6] 11 U.S.C. § 363(m).
[7] *Sears II*, 616 B.R. at 633.
[8] *MOAC Mall Holdings*, 143 S. Ct. at 936-37.
[9] *Id.* at 936 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)).
[10] *Id.* at 936 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435-36 (2011)).
[11] *Id.* at 936.
[12] *Id.* at 937.
[13] *Id.* at 938-39.
[14] *Id.* at 934-45.
[15] *Id.* at 934 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)) (internal quotation marks omitted).
[16] *Id.* at 935 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)) (internal quotation marks omitted).
[17] *MOAC Mall Holdings LLC v. Transform Holdco LLC*, Nos. 20-1846-bk, 20-1953-bk, 2023 WL 7294833, 2023 U.S. App. LEXIS 29477 (2d Cir. Nov. 6, 2023).
[18] *Id.*
[19] *MOAC*, 143 S. Ct. at 934; see *Beem v. Ferguson* (*In re Ferguson*), 683 F. App'x 924, 926-27 (11th Cir. 2017) (comparing and contrasting constitutional and equitable mootness).
[20] *Taleb v. Miller, Canfield, Paddock & Stone, P.L.C.* (*In re Kramer*), 71 F. 4th 428, 445 (6th Cir. 2023) (quoting *Curreys of Nebraska, Inc., v. United Producers, Inc.* (*In re United Producers, Inc.*), 526 F.3d 942, 947 (6th Cir. 2008)).
[21] *Beem*, 683 F. App'x at 926; *Talub*, 71 F. 4th at 445.
[22] *Talub*, 71 F. 4th at 441 (quoting *In re City of Detroit*, 838 F.3d 792, 798 (6th Cir. 2016)).

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Appealing a Bankruptcy Court Order

HON. GUY R. HUMPHREY

While bankruptcy courts are considered a "unit" of their respective district courts[1], bankruptcy appeals are not subject to the same statutory and rule framework as appeals from the district or other federal trial courts. The concepts are essentially the same as in other federal appeals, but the timing and uniqueness of bankruptcy cases and proceedings have resulted in different paths and landmines for these appeals.[2] This article will lead you through the peculiar strictures applying to those appeals.[3]

Statutory and Rule Framework

The first step in pursuing the appeal of an order, decree, or judgment from a bankruptcy court is to familiarize yourself with the statutory and rule framework for bankruptcy appeals. This is critical to a successful journey through the appellate process.

The jurisdictional and statutory underpinning for bankruptcy appeals is 28 U.S.C. § 158. It provides for appeals to a district court, and to bankruptcy appellate panels, or for short a "BAP."

The 8000 series of the Federal Rules of Bankruptcy Procedure ("Rule") provide the timing and procedural structure for the appeal. Layered on top of the Bankruptcy Rules may be local District Court and Bankruptcy Appellate Panel Rules for your jurisdiction.

Timing

Perhaps the biggest landmine for bankruptcy appeals is the short window provided by Rule 8002(a)(1) for appealing judgments, orders, and decrees. Because of the time-sensitive nature of bankruptcy, appeals from bankruptcy court judgments, orders, and decrees must generally be filed within 14 days of their entry, rather than the 30-day time period provided by Federal Rule of Appellate Procedure 4(a)(1). This departure has tripped up many well-intentioned appellants. Other parties have 14 days from the filing of the original notice of appeal to file a cross-appeal.[4]

A number of circuits have held that the 14-day time to appeal is jurisdictional and, thus, if the notice of appeal is not filed within that timeframe, the court does not have jurisdiction to consider the appeal.[5] However, the Sixth and Eighth Circuits have held that the time to appeal is not jurisdictional but is a mandatory claims processing rule.[6]

The following timely-filed motions extend the commencement of the running of the time for filing an appeal until the order disposing of the last such motion is entered: a motion to amend a judgment or to make additional findings; a motion to alter or amend the judgment, a motion for a new trial, and a motion for relief from a judgment or order.[7]

Generally, the bankruptcy court may extend the time for filing a notice of appeal if the motion to extend the time is filed within the 14-day appeal time or within 21 days after the appeal time if excusable neglect is shown. In such cases, the courts apply the factors under *Pioneer Investment Services. Co. v. Brunswick Associates Ltd. Partnership*[8] in determining whether excusable neglect has been established.[9] However, the bankruptcy court cannot extend the time for appeal with respect to orders granting relief from the stay; authorizing the sale or use of property or authorizing the use of cash collateral under Bankruptcy Code § 363, authorizing the obtaining of credit under § 364; authorizing the assumption or assignment of executory contracts under § 365; approving disclosure statements under § 1125, or confirming Chapter 9, 11, 12, or 13 plans.[10]

Where to Appeal—Court Choices

Depending upon your circuit and your district, you may have a choice to appeal from the bankruptcy court to either the district court or to your Circuit's BAP. There is also an option for a direct appeal to the appropriate Court of Appeals. Direct appeals to the Circuit are infrequent, but are available in limited circumstances.[11]

Section 158 of Title 28 provides for appeals to either the district court or a BAP and authorizes the Circuit Courts of Appeal to establish BAPs for their circuits.[12] Five circuits—the First, Sixth, Eighth, Ninth, and Tenth Circuits—have bankruptcy appellate panels and eight circuits (including the District of Columbia and the Federal Circuits) do not. The Eastern District of Tennessee and the Eastern District of Michigan do not participate in the Sixth Circuit BAP, but all districts in the other circuits having BAPs participate in those BAPs. If your appeal comes from a bankruptcy court in which a BAP is available, you have a choice to appeal to either the BAP or the district court. If you wish to appeal to the district court and not the BAP, you must "opt in" to the district court by filing a "statement of election" which substantially complies with Official Form 417A – otherwise, your appeal will be automatically assigned to the BAP. The appellee can also "opt in" to the district court within 30 days of the notice of appeal.[13]

<u>BAP Appeals.</u> Each appeal to a BAP is heard by a panel of three bankruptcy judges who have been appointed to the BAP by the circuit. The bankruptcy judges are Article I judges appointed by their Circuit Court of Appeals. However, a BAP judge may not hear an appeal taken from their own district.[14] BAPs will generally schedule the case for oral argument; however oral argument may be waived by the parties. Oral argument is unlikely to be allowed in a case in which one of the parties is proceeding without legal counsel. The BAP will then issue an order or decision following briefing and any scheduled argument unless the BAP has already terminated the appeal for another reason.

<u>District Court Appeals.</u> If either party to the appeal elects the district court or a BAP does not exist in the circuit, the appeal is heard by a single district judge.[15] District judges are appointed by the President and confirmed by the Senate as set forth in Article III of the U.S. Constitution. Usually those appeals are decided solely on the briefs without argument; however, the judge may allow argument in the court's discretion. Appellate procedure in the district courts varies from district to district and judge to judge. The speed with which the judge will dispense with the appeal will vary depending on the nature and complexity of the case, the caseload of the judge, and the experience of the judge.

<u>Direct Appeals to the Circuit</u>. Under limited circumstances, the appropriate court of appeals may hear a direct appeal from the bankruptcy court, thus skipping the BAP and district court. These judges are also Article III judges who are appointed by the President and confirmed by the Senate.

A court of appeals has jurisdiction over appeals from the bankruptcy courts in its circuit when:

> (A) . . . . the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree [appealed from], or all of the appellants and appellees (if any) acting jointly, certify that —
>
> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.
>
> 28 U.S.C. § 158(d)(2).[16]

While § 158(d)(2) provides the jurisdiction for the direct appeal, Rule 8006 provides the procedural framework for initiating a direct appeal to the court of appeals. Rule 8006(a) provides that a certification supporting a direct appeal to the court of appeals is effective when the certification has been filed, a timely notice of appeal has been filed, and the notice of appeal has become effective under Rule 8002. Rule 8006(b) provides that the certification must be filed with the clerk of the court where the matter is pending, and for purposes of Rule 8006, "a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought." After the 30 days, the matter is considered pending in the district court or BAP. Even if the request is made to the bankruptcy court prior to the expiration of the 30-day period, the bankruptcy court must rule on the certification prior to the 30 days running or it no longer has jurisdiction to rule on the certification motion.[17]

Subsections (b) through (f) provide the procedures which parties and courts must follow to make an effective certification to the court of appeals. These provisions also provide for responses, cross-requests, and supplemental statements by the court and parties with respect to a certification made by the court or one or more of the parties. Finally, subsection (g) provides that, within 30 days after the certification becomes effective under subsection (a), a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with Federal Rule of Appellate Procedure 6(c). The matter will then be ripe for the court of appeals to make its determination as to whether it will entertain the direct appeal.

<u>Considerations in Determining Where to Appeal</u>. Once you determine to appeal, the first decision to make is the court to which you will be appealing. Considerations in making that determination may include:

- Are you in a circuit and district which participates in a BAP? If so, you should determine whether your appeal will be to the BAP or the district court.
- Do you want your appeal heard by a panel of three (Article I) bankruptcy judges or by one (Article III) district court judge? Do you believe oral argument would be helpful? If so, you may wish to appeal to the BAP as usually the district court will not conduct oral argument on bankruptcy appeals.
- Is the issue an issue more suited for the district court or the BAP

to address? Generally, the BAP will be more versed in bankruptcy-specific issues, while the district court may be more versed in other federal or state law issues.

- Timing – Is there a difference in the time with which appeals are generally decided by your BAP versus your district court?
- Do you have exceptional circumstances which warrant a direct appeal to the circuit court of appeals?

Appeals from the District Court or the BAP to the Circuit. Any further appeal from the district court or the BAP is to the court of appeals.[18] Appeals to the court of appeals are by right – that is, as long as a timely notice of appeal to the circuit court is filed, the court of appeals must accept and determine that appeal. In any such appeal, the court of appeals reviews the bankruptcy court's decision de novo rather than the BAP's or district court's decision.[19]

Appeals from the Circuit Court to the Supreme Court. Any appeals from the courts of appeal are, of course, to the United States Supreme Court. But the Court must grant certiorari. As in all other areas of the law, it is very difficult to convince the Court to accept certiorari. However, the Court generally accepts a few bankruptcy cases every term, usually if there is a split among the circuits relating to the issue on appeal.

Limits on the Ability to Appeal

Final Appealable Orders

As in other appeals, generally the order appealed from must be a final, appealable order. Perhaps the second biggest tripwire involved in bankruptcy appeals is the breadth of the concept of final appealable orders in the bankruptcy context. A final appealable order in most non-bankruptcy litigation is fairly well-defined by Federal Rule of Civil Procedure 54. Not so in bankruptcy cases. As described by the Supreme Court:

> In civil litigation generally, a court's decision ordinarily becomes "final," for purposes of appeal, only upon completion of the entire case, i.e., when the decision "terminate[s the] action" or "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." [citations omitted]. The regime in bankruptcy is different. A bankruptcy case embraces "an aggregation of individual controversies." 1 Collier on Bankruptcy ¶5.08[1][b], p. 5-43 (16th ed. 2019). Orders in bankruptcy cases qualify as "final" when they definitively dispose of discrete disputes within the overarching bankruptcy case. [citation omitted]

Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020). In *Ritzen*, the Court determined that an order granting relief from the automatic stay provided by Bankruptcy Code § 362(a) is a final, appealable order "when the bankruptcy court unreservedly grants or denies relief." *Id.* There are many other orders entered within a bankruptcy case which meet this standard of being a "discrete dispute[ ] within the overarching bankruptcy case," including the following:

Sustaining an objection to an exemption;[20]
Granting a lien avoidance;[21]
Overruling an objection to a proof of claim;[22]
Vacating an order granting an objection to a proof of claim;[23]
Determining discharge violation and contempt motions;[24]
Determining co-debtor stay under § 1301(a) is not applicable;[25]
Denying a turnover motion;[26]
Denying a motion to dismiss a case under § 109(g) of the Code;[27]
Denying a motion to dismiss a Chapter 7 case under § 707(b) of the Code;[28]
Granting sanctions;[29]
Denying a motion for extension of time to file a notice of appeal;[30]
Denying a motion to reopen a bankruptcy case;[31] and
Entering of judgment in an adversary proceeding despite pendency of motion for attorney fees.[32]

The ramification of not appealing such an order within the 14 day appeal time will likely foreclose ability to later contest that order. On the other hand, the following orders were found not to be final, appealable orders:

Denying confirmation of debtor's Chapter 13 plan with leave to file another plan;[33]

Determining creditors were entitled to post-petition interest rate for creditors prior to confirmation of a Chapter 11 plan;[34]

Denying motions to substantively consolidate two Chapter 7 bankruptcy estates (but BAP's order making that determination was a final, appealable order giving the Court of Appeals jurisdiction to review the BAP's decision);[35] and

Setting bar date for filing proofs of claim.[36]

Leave to Appeal. If your order is not a final appealable order (i.e., it is interlocutory), or if you are not sure if it is a final appealable order but nevertheless believe that it is important to promptly appeal the bankruptcy court's order, you may file a motion seeking leave to appeal the order pursuant to 28 U.S.C. § 158(a)(3) and Rule 8004. In such case, you must file a notice of appeal with the bankruptcy court clerk within the timeframe provided by Rule 8002 along with a motion for leave to appeal which provides:

(A) the facts necessary to understand the question presented;
(B) the question itself;
(C) the relief sought;
(D) the reasons why leave to appeal should be granted; and
(E) a copy of the interlocutory order or decree and any related opinion or memorandum.[37]

Standing Who May Appeal

Standing to appeal a bankruptcy court order differs from general standing in a bankruptcy case. While standing in bankruptcy proceedings is broad — extending to any "party in interest"— appellate standing has generally only been given to persons aggrieved by the bankruptcy court's order. Known as the "person aggrieved" doctrine, this doctrine limits standing to persons with a direct, pecuniary interest in the bankruptcy court's order, which has been interpreted to mean the order directly diminishes a person's property, increases their burdens, or impairs their rights. The appellate court may determine if the party is a "person aggrieved." The purpose of the general rule is to prevent peripherally involved parties from contesting immaterial issues while delaying the case and holding up the creditors and debtors from obtaining the relief to which they are entitled under the Bankruptcy Code. The structure of bankruptcy, with numerous parties, some of whom are only remotely or insignificantly involved or affected by each order of the bankruptcy court, dictates that the right of appellate review of orders be limited to those persons whose interests are directly affected by the order in issue. Thus, appellate standing under the "person aggrieved" doctrine is narrower than Article III standing or the prudential requirements of federal standing generally.[38]

The Ninth Circuit recently opined that a party appealing a bankruptcy court order must establish Article III standing before any prudential standing considerations, such as the "person aggrieved" doctrine, are applied.[39] Thus, the court held that an appellant must first establish that they: (1) suffered an "injury in fact" that is concrete, particularized, and actual or imminent, (2) the injury is "fairly traceable" to the defendant's conduct, and (3) the injury can be "redressed by a favorable decision."[40] At least in the Ninth Circuit then, standing to appeal will first be analyzed through the Article III standing standards.

The following are conclusions from the application of the person aggrieved doctrine:

- Shareholder lacked standing to appeal bankruptcy court's approval of a compromise between a Chapter 7 trustee and the debtor which allowed the debtor to retain stock in a closely held company, which resulted in the effectual abandonment of that stock, when the stock was not scheduled in the debtor's bankruptcy. Appealing shareholder's status as a disgruntled potential purchaser of the stock did not give the shareholder standing to appeal the bankruptcy court's approval of the 9019 motion.[41]
- Shareholders do not have derivative standing to appeal even if their interest in the order is as party defendants in the resulting adversary proceeding because the interest that such parties assert as defendants to an adversary proceeding is not protected by the Bankruptcy Code. Any such interest is opposed to the primary goal of the Bankruptcy Code in general, which is to minimize the injury to creditors.[42]
- Shareholders lacked standing to appeal bankruptcy court's order concerning life insurance proceeds when the shareholders could not assert a personal or direct interest in the proceeds because the corporation was the owner and beneficiary of the policy.[43]
- Debtor's manager was not a "person aggrieved" and lacked standing to appeal the dismissal of the debtor's Chapter 11 case.[44]
- Frustrated or failed bidders do not in general have standing to object to and appeal the sale of property. An exception to this general rule exists when an unsuccessful bidder challenges the structure of the sale because it is tainted by fraud, mistake, or unfairness.[45]
- The burden of defending a lawsuit does not render that person an "aggrieved" party so as to confer standing to appeal a bankruptcy court's decision because "the burden of defending a lawsuit, however onerous or unpleasant, is [not] the sort of direct and immediate harm that makes a party "aggrieved[.]"[46]
- Chapter 7 debtors are rarely a "person aggrieved" by a bankruptcy court order relating to the disposition of property of the estate. The creation of the Chapter 7 estate and the appointment of the Chapter 7 trustee divest the Chapter 7 debtor of all right, title and interest in nonexempt property of the estate at the time the case is filed. The debtor typically lacks any pecuniary interest in the Chapter 7 trustee's disposition of such property. There are two exceptions to a Chapter 7 debtor's limited standing: (1) a showing that a successful appeal would generate assets in excess of liabilities, entitling the debtor to a distribution of surplus after the payment of all creditors; or (2) when the order affects the terms of the debtor's discharge.[47] Thus, a Chapter 7 debtor lacked standing to appeal a bankruptcy court's granting relief from the automatic stay to a secured creditor involving real property because: 1) the property belonged to the estate, and only the trustee had standing to challenge such an order; 2) while the trustee indicated that the property would be abandoned, that would not happen until the case was closed; 3) the debtor did not establish that a successful appeal would lead to the distribution of a surplus since the value of the property was insufficient to pay off the debt; and 4) the stay relief did not affect the debtor's discharge.[48] In another case, the district court affirmed the bankruptcy court's substitution of the trustee for the debtor in an appeal so that the trustee could voluntarily dismiss the appeal when: a) the bankruptcy court approved the sale of the debtor's interests in radio stations and then entered an order converting the case to Chapter 7; b) the debtor failed to establish that a surplus would occur and, therefore, the debtor had no pecuniary interest in the radio stations; and c) the debtor's corporation which bid on the radio station licenses did not have appellate standing because it had no interest in the property, and no pecuniary interest in the bankruptcy case.[49]
- A Chapter 7 debtor has standing to appeal when the debt in question may be determined to be nondischargeable.[50]
- A debtor originally lacked prudential standing to assert her 42 U.S.C. § 1983 claims against the town and several officials when she filed a Chapter 7 petition, but obtained standing when the case was reopened and converted to a Chapter 13 case and she amended her schedules to include the claims on behalf of the estate and her creditors.[51]
- Chapter 7 debtors generally will have standing to appeal orders involving the disposition of property when their exemptions in that property may be implicated.[52]

Equitable Mootness

Courts hearing bankruptcy appeals have employed the doctrine of "equitable mootness" to dismiss appeals under circumstances in which they determine they cannot afford practical or effective relief. The doctrine has been primarily used in the context of an appeal of an order confirming a Chapter 11 plan of reorganization.[53] One court described it as follows:

> The doctrine of equitable mootness, one that is seemingly unique to bankruptcy proceedings ... is "rooted in the 'court's discretion in matters of remedy and judicial administration' not to determine a case on its merits." ... This is at times warranted to further "the important public policy favoring orderly reorganization and settlement of debtor estates by affording finality to the judgments of the bankruptcy court." . . . To that end, where a reorganization plan has been in place for an extended period of time after thorough vetting and approval by the bankruptcy court, there comes a point where "the

> impracticability of fashioning fair and effective judicial relief" cautions against disturbing the reorganization plan . . . . In determining whether an appeal is equitably moot we consider three factors: (1) whether the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order; (2) whether the challenged plan proceeded to a point well beyond any practicable appellate annulment; and (3) whether providing relief would harm innocent third parties.[54]

However, the doctrine of equitable mootness has recently come under criticism and has been limited in its application by appellate courts.[55] If the appellate court can find any way to give effective relief to the appellant, the court will not dismiss the appeal as being equitably moot.[56] In addition, the Sixth Circuit recently determined that the doctrine has no application to Chapter 7 cases.[57]

Statutory Mootness

Beyond equitable mootness, an appeal may also be "statutorily moot." Statutory mootness occurs in a bankruptcy case when a provision of the Bankruptcy Code renders an appeal of an order moot under specific circumstances. These are generally situations in which a party to an agreement has made a significant investment or contribution, no stay pending appeal is obtained, and the transaction cannot be easily unwound without prejudicing a party who entered into the transaction in good faith.

Thus, Code § 363(m) provides that the reversal or modification of a bankruptcy court's order approving the sale or lease of property does not affect the validity of the sale or lease to a good faith purchaser or lessee unless a stay pending appeal is obtained. If the appellant is not successful in obtaining a stay pending appeal of the order approving the sale or lease at the outset of the appeal, the appeal of that order may become "statutorily" moot.[58] This protects parties who have purchased or leased property from the bankruptcy estate in good faith.

Similarly, Code § 364(e) provides that the reversal or modification of a bankruptcy court's order approving the debtor-in-possession's or trustee's obtaining of credit or the incurring of debt to an entity that extended such credit in good faith does not affect the validity of the debt incurred if a stay pending appeal is not obtained.[59] This protects parties who have lent money or extended credit to the bankruptcy estate in good faith.

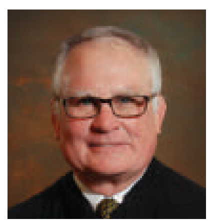
Submission of the Record and Briefing and Arguing Your Bankruptcy Appeal

Rules 8009 and 8010 address the submission and transfer of the record to the appellate court. Rule 8014 provides for the briefs, with an appellant's brief, appellee's brief, and a reply brief. Subsection (f) provides for the submission of supplemental authorities when "pertinent and significant authorities come to a party's attention after the party's brief has been filed or after oral argument, but before a decision" has been rendered.

Rule 8019 provides for oral argument on bankruptcy appeals. Subsection (b) provides a presumption in favor of oral argument being conducted unless the district court judge or all three of the BAP judges on the BAP panel—after examining the briefs and record—determine oral argument is not necessary because: a) the appeal is frivolous; b) the dispositive issue or issues have been authoritatively decided; or c) the facts and legal arguments are adequately presented in the briefs and record and "the decisional process would not be significantly aided by oral argument." When not waived, oral argument is routine before the BAPs. If one of the parties to the appeal does not have legal counsel for the appeal, the BAP may choose to not hold oral argument and determine the appeal on briefing alone. As to appeals to the district court, depending upon the district court judge, oral argument is less common, presumably because they find that the determination of the appeal would not be "significantly aided by oral argument." When in doubt, it may be wise to err on the side of requesting and participating in oral argument because the direction and result of an appeal is frequently influenced by the argument of counsel. If travel for the argument is an issue, the court may be open to conducting oral argument telephonically.

Conclusion

When deciding whether you want to appeal a bankruptcy court's order and in pursuing any such appeal, do not assume that the appeal is just like any other appeal you have filed from a state court or district court adjudication. Like the practice of bankruptcy itself, the statutes, rules, and common law governing bankruptcy appeals are unique in many ways and have their own nuances. Consult those statutes, rules, and the common law at all steps throughout the process. Consultation with counsel experienced in such appeals may also be warranted. Failure to do so could jeopardize your appeal. ⦿



Judge Humphrey has served on the United States Bankruptcy Court for the Southern District of Ohio since 2007 and served two three-year terms on the United States Bankruptcy Appellate Panel for the Sixth Circuit from 2013-2019. Prior to his time on the bench, he practiced with Chester Willcox & Saxbe LLP in Columbus, Ohio, representing debtors, creditors, and third parties in commercial debtor-creditor litigation, bankruptcies, workouts, and transactions, including in appeals from bankruptcy, state, and federal district court.

[1] *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).
[2] Credit to my longtime friend, mentor and former partner, Stephen C. Fitch, who regularly counseled new attorneys on the perils of "landmines" involved in litigation.
[3] Many thanks to the Hon. Daniel S. Opperman and Hon. Tracey N. Wise (and all of our staff (including Melanie R. Beyers (Judge Opperman), David J. Treacy (Judge Wise), and Neil M. Berman and Joni Behnken (Judge Humphrey) who helped in preparing materials for the August 20, 2021 Midwest Regional Bankruptcy Seminar for a session titled *Judicial Town Hall: The BAP Goes On* from which the author referenced and borrowed in writing this article.
[4] Fed. R. Bankr. P. 8002(a)(3).
[5] *Dorsey v. U.S. Dep't of Educ. (In re Dorsey)*, 870 F.3d 359, 362 (5th Cir. 2017); *Ozenne v. Chase Manhattan Bank (In re Ozenne)*, 841 F.3d 810, 814 (9th Cir. 2016); *Gowdy v. Mitchell* (*In re Ocean Warrior, Inc.*), 835 F.3d 1310, 1318 (11th Cir. 2016); *In re Sobczak-Slomczewski*, 826 F.3d 429, 432 (7th Cir. 2016); *Hamid v. Deutsche Bank Nat'l Trust Co.* (*In re Hamid*), 577 F. App'x. 208, 208 (4th Cir. 2014); *In re Caterbone*, 640 F.3d, 108, 111–12 (3d Cir. 2011); *Emann v. Latture* (*In re Latture*), 605 F.3d 830, 837 (10th Cir. 2010); *Statek Corp. v. Dev. Specialists, Inc.* (*In re Coudert Bros. LLP*), 673 F.3d 180,

185–86 (2d Cir. 2012); *Vázquez Laboy v. Doral Mortg. Corp.* (*In re Vázquez Laboy*), 647 F.3d 367, 371 (1st Cir. 2011).

[6]*See Tennial v. REI Nation, LLC* (*In re Tennial*), 978 F.3d 1022, 1027-28 (6th Cir. 2020) (finding that the appeal time requirement is not jurisdictional); *In re VeroBlue Farms USA, Inc*., 6 F.4th 880, 887 (8th Cir. 2021) (similar).

[7]Fed. R. Bankr. P. 8002(b).

[8]*Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*., 507 U.S. 380, 395 (1993).

[9]See *Ballinger v. Smith* (*In re Smith*), No. 20-8015, 2021 WL 3263663, 2021 Bankr. LEXIS 139 (B.A.P. 6th Cir. Jan. 21, 2021).

[10]Fed. R. Bankr. P. 8002(d).

[11]Regardless of the appellate court, the standards of review will be the same: de novo review for conclusions of law, clearly erroneous for findings of fact, and mixed questions of fact and law depend on the particular question. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 393-99 (2018).

[12]28 U.S.C. § 158(a) and (b).

[13]28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8005.

[14]28 U.S.C. § 158(b)(5).

[15]The courts are split on whether a district court may refer a bankruptcy appeal to a magistrate judge for a final judgment or a report and recommendation. Compare *S. Cent. Houston Action Council v. Oak Baptist Church* (*In re S. Cent. Houston Action Council*), 38 F.4th 471 (5th Cir. 2022) (reference not permitted) with *United States v. Continental Airlines* (*In re Continental Airlines*), 218 B.R. 324 (D. Del. 1997) (holding that bankruptcy appeals may be referred by the district court to a magistrate for a report and recommendation).

[16]*See, e.g. Davis v. Helbling* (*In re Davis*), 960 F.3d 346 (6th Cir. 2020).

[17]*Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, Nos. 08-1789, 02760, 2017 Bankr. LEXIS 2016 (Bankr. S.D.N.Y. July 19, 2017).

[18]28 U.S.C. § 158(d)(1); Fed. R. App. P. 6.

[19]*Klaas v. Shovlin* (*In re Klaas*), 858 F.3d 820, 827 (3d Cir. 2017).

[20]*Soori-Arachi v. Ferrara* (*In re Soori-Arachi*), 623 B.R. 181, 192 (B.A.P. 1st Cir. 2021).

[21]*Maria v. Kersting (In re Kersting)*, No. 19-046, 2020 Bankr. LEXIS 3329, 2020 WL 6819131 (B.A.P. 1st Cir. Nov. 19, 2020).

[22]*Nelson v. Wells Fargo Bank, N.A*., 621 B.R. 542, 553 (B.A.P. 1st Cir. 2020).

[23]*Nicolaus v. United States* (*In re Nicolaus*), 963 F.3d 839, 842 (8th Cir. 2020).

[24]*Ragone v. Stefanik & Christie, LLC* (*In re Ragone*), No. 20-8013, 2021 Bankr. LEXIS 1298, at *3, 2021 WL 1923658, at *2 (B.A.P. 6th Cir. May 13, 2021).

[25]*Conde-Vidal v. Pinto-Lugo* (*In re Velez*), 617 B.R. 158, 165 (B.A.P. 1st Cir. 2020).

[26]*Ostrander v. Brown* (*In re Brown*), 614 B.R. 416, 421 (B.A.P. 1st Cir. 2020).

[27]*Jue v. Liu* (*In re Liu*), 611 B.R. 864, 879 (B.A.P. 9th Cir. 2020).

[28]*Aspen Skiing Co. v. Cherrett* (*In re Cherrett*), 873 F.3d 1060, 1065 (9th Cir. 2017).

[29]*In re Jackson*, 554 B.R. 156, 159 (B.A.P. 6th Cir. 2016).

[30]*Ballinger v. Smith* (*In re Smith*), No. 20-8015, 2021 Bankr. LEXIS 139, at *2, 2021 WL 212361, at *1 (B.A.P. 6th Cir. Jan. 21, 2021).

[31]*In re Barksdale*, No. 20-8008, 2020 Bankr. LEXIS 2318, at *2, 2020 WL 5092877, at *1 (B.A.P. 6th Cir. Aug. 28, 2020).

[32]*PC Puerto Rico, LLC v. Empresas Martínez Valentín Corp. (In re Empresas Martínez Valentín Corp*.), 948 F.3d 448 (1st Cir. 2020).

[33]*Bullard v. Blue Hills Bank*, 575 U.S. 496, 509 (2015).

[34]*Ad Hoc Comm. of Holders of Trade Claims v. PG&E Corp*., 614 B.R. 344 (N.D. Cal. 2020).

[35]*Huntington Nat'l Bank v. Richardson* (*In re Cyberco Holdings, Inc.*), 734 F.3d 432 (6th Cir. 2013).

[36]*Century Indemnity Co. v. BSA* (*In re BSA*), No. 20-774-RGA, 2021 U.S. Dist. LEXIS 58837, at *8, 2021 WL 1174573, at *3 (D. Del. Mar. 29, 2021).

[37]Fed. R. Bankr. P. 8004(b).

[38]*Consol Energy, Inc. v. Murray Energy Holdings Co*. (*In re Murray Energy Holdings Co*.), 624 BR. 606, 611-12 (B.A.P. 6th Cir. 2021).

[39]*Clifton Cap. Group, LLC v. Sharp* (*In re East Coast Foods, Inc.*), 66 F.4th 1214, 1218-19 (9th Cir. 2023).

[40]*Clifton Cap. Grp., LLC*, 66 F.4th 1214, 1218-19 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[41]*Stark v. Moran* (*In re Moran*), 566 F.3d 676, 681-82 (6th Cir. 2009).

[42]*Sears v. Sears (In re AFY*), 733 F.3d 791 (8th Cir. 2013); *White v. Univision of Va. Inc.* (*In re Urban Broad. Corp*.), 401 F.3d 236 (4th Cir. 2005).

[43]*Harker v. Troutman* (*In Re Troutman Enters., Inc*.), 286 F.3d 359 (6th Cir. 2002).

[44]*In re Meridian Venture Partners, LLC*, No. 13-8021, 2013 Bankr. LEXIS 5216 (B.A.P. 6th Cir. Dec. 11, 2013).

[45]*Squire v. Scher* (*In re Squire*), 282 F. App'x. 413 (6th Cir. 2008); *Spitz v. Nitschke*, 528 B.R. 874 (D. Wisc. 2015); and *In re Gulf States Steel*, 285 B.R. 739 (Bankr. N.D. Ala. 2002).

[46]*Moran v. LTV Steel Co.* (*In re LTV Steel Co*.), 560 F.3d 449, 453 (6th Cir. 2009).

[47]*Stinnett v. LaPlante* (*In re Stinnett*), 465 F.3d 309 (7th Cir. 2006); *Arroyo v. Scotiabank de Puerto Rico (In re Arroyo*), 489 B.R. 486 (1st Cir. 2001); *Cook v. Wells Fargo Bank, N.A.* (*In re Cook*), 2012 Bankr. LEXIS 1764 (B.A.P. 10th Cir. Apr. 19, 2012).

[48]*In re Brown*, No. 13-8037, 2014 Bankr. LEXIS 1018 (B.A.P. 6th Cir. Mar. 17, 2014).

[49]*Squire v. Scher*, No. 1:06-cv-112, 2006 U.S. Dist. LEXIS 98222 (S.D. Ohio Sept. 12, 2006).

[50]*Mandel v. Mastrogiovanni Schorsch & Mersky* (*In re Mandel*), 641 Fed. App'x. 400 (5th Cir. 2017)

[51]*Lugano v. Town of Cicero*, No. 07 C 4822, 2012 U.S. Dist. LEXIS 141053, at *7-8, 2012 WL 4499326, at *7 (N.D. Ill. Sept. 28, 2012).

[52]*Estillore v. Manfredo* (*In re Estillore*), 2017 Bankr. LEXIS 1062 (B.A.P. 9th Cir. Apr. 12, 2017); *Law v. Siegel (In re Law*), 2014 Bankr. LEXIS 3224 (B.A.P. 9th Cir. July 29, 2019); *Shifano v. Lendmark Fin. Servs.* (*In re Shifano*), 2013 Bankr. LEXIS 68, 2013 WL 85203 (Bankr. Del. Jan. 8, 2013).

[53]*But see GLM DFW, Inc. v. Windstream Holdings, Inc.* (*In re Windstream Holdings, Inc*.), 838 F. App'x. 634 (2d Cir. 2021) (applying the doctrine in the context of an order approving payments to certain creditors which the debtor deemed were "critical vendors" when the appellant failed to seek an appellate stay).

[54]*United Sur. & Indem. Co. v. López-Muñoz* (*In re López-Muñoz*), 983 F.3d 69, 72 (1st Cir. 2020). (citations omitted).

[55]*See In re VeroBlue Farms USA, Inc.,* 6 F.4th 880 (8th Cir. 2021) (equitable mootness should only be applied in "extremely rare circumstances").

[56]*In re Old Cold, LLC*, 976 F.3d 107 (1st Cir. 2020); *Wash. Mut., Inc. v. Griffin*, 848 F. App'x. 84 (3d Cir. 2021).

[57]*Taleb v. Miller, Canfield, Paddock & Stone, P.L.C.* (*In re Kramer*), 71 F.4th 428, 451-52 (6th Cir. 2023).
[58]*See Collins v. Wolf,* 835 Fed. App'x. 905, 906 (9th Cir. 2020).
[59]*See Official Comm. of Unsecured Creditors of Verity Health Sys. of Cal. v. In re Verity Health Sys. of Cal.* (*In re Verity Health Sys. of Cal.*)*,* 814 Fed. App'x. 275 (9th Cir. 2020).

Principles *continued from page 39*

judgments. *See also In re Dvorkin Holdings, LLC,* 547 B.R. 880 (N.D. Ill. 2020) and *Ultra Petroleum Corp.* 625 B.R. 189 (Bankr. S.D. Tex. 2020), *rev'd and remanded Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors (In re Ultra Petroleum Corp.)* 51 F.4th 138 (5th Cir. 2022), *cert. den. sub nom. Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors*, 143 S.Ct. 2495 (2023).
[25]996 F.2d 152, 155–56 (7th Cir. 1993).
[26]233 U.S. 261 (1914).
[27]285 R.3d 1231 (9th Cir. 2002).
[28]46 F.4th 1047 (9th Cir. 2022), *reh'g denied*, No. 21-16043 (9th Cir. Oct. 5, 2022).
[29]*In re Robinson,* 567 B.R. 644 (Bankr. N.D. Ga. 2017).
[30]*Compare Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.),* 874 F.3d 787 (2d Cir. 2017), *with Del. Tr. Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.),* 842 F.3d 247 (3d Cir. 2016).
[31]*Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors (In re Ultra Petroleum Corp).* 51 F.4th 138 (5th Cir. 2022), *cert. den.* ____ U.S. ___ 143 S. Ct. 2495 (2023).
[32]*Wells Fargo Bank, N.A. v. Hertz Corp. (In re The Hertz Corp.)* 637 B.R. 781 (Bankr. D. Del. Dec. 22, 2021).
[33]324 F.3d 197 (3d Cir. 2003).
[34]Repeal of Section 1124(3) of the Code and *In re New Valley Corp,* 168 B.R. 73 (Bankr. D.N.J. 1994) establishes that adjustment of a claim pursuant to Section 502 or any other provision of the Code does not constitute "impairment" within the meaning of Code Section 1124.
[35]*In re LATAM Airlines Group, S.A.,* 55 F.4th 377 (2d Cir. 2022).
[36]*See In re Ultra Petroleum Corp.*, 51 F.4th 10 138, 156 (5th Cir. 2022) ("*Ultra Petroleum II*"); *In re PG&E Corp.*, 46 F.4th 11 1047, 1061 (9th Cir. 2022).
[37]The only exception to this rule pertains to certain priority claims such as domestic support obligations and tax claims. 11 USC §1332(a).
[38]343 B.R. 762 (Bankr. E.D. 2006).
[39]192 B.R. 184 (Bankr. N.D. Ill. 1996).
[40]28 USC §1961 was amended in 1982. Prior to that time, Section 1961 utilized the "rate allowed by State law". However, Public Law 97-164—Apr. 2, 1982, 96 Stat. 25 amended Section 1961 to refer to a formula based on 52-week treasury bills. All subsequent versions of Section 1961 have referred to a formula based on treasury securities.
[41]202 B.R. 99 (Bankr. N.D. Ill. 1996).
[42]fn. 27 supra.
[43]*United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365 (1988); *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235 (1989)
[44]fn. 1 at 166
[45]27 F3d 241,243 (7th Cir. 1994).
[46]598 U.S. 69, 74 (2023)
[47]11 USC §523(a)(2)
[48]*Field v. Mans,* 516 U.S. 59, 70-75 (1995) (interpreting §523(a)(2)(A) with reference to the common law of fraud).
[49]*See, e.g., Field,* 516 U.S., at 67-69
[50]*Field v. Mans*, 516 U.S. 59, 70-75 (1995) (interpreting §523(a)(2)(A) with reference to the common law of fraud).
[51]Act of Mar. 2, 1867, §33, 14 Stat. 533
[52]*Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 2022 (2022).
[53]*Husky Int'l Electronics, Inc. v. Ritz*, 578 U.S. 356, 360 (2016)
[54]No. 22-227 (U.S. Jun. 15, 2023)
[55]11 USC §106(a)
[56]*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982) (plurality opinion) (describing the Code as «a comprehensive revision of the bankruptcy laws»).
[57]___ U.S. ___, 141 S. Ct. 585 (2021).
[58]11 USC §362(a)(3).
[59]597 US.____ , 142 S. Ct. 2111 (2022).
[60]735 ILCS 5/2-1303.

What Don't You Want: Traditional Chapter 11 or Sub-V

TAYLOR KING

In the movie *Hell or High Water*, Jeff Bridges plays a Texas Ranger trying to track down two brothers that have turned to robbing banks to save their late mother's farm from foreclosure. While staking out a bank, Bridges and his partner walk into the "T-Bone Café," an empty restaurant off of Main Street in a dying West Texas town. They sit down and an old, salty waitress approaches and abruptly asks them, "What don't you want?" Confused, they point to the menu and start to order, but the old waitress cuts them off: "I've been working here 44 years. Some @#*hole from New York tried to order trout back in 1987. We don't serve no trout. You get T-bone steak and a baked potato. So either you don't want corn on the cob or you don't want green beans. So what don't you want?" Intimidated into submission, Bridges and his partner make their non-choice. After the waitress saunters off, Bridges laughs to his partner "I can tell you one thing. No one is robbing this place."

The point of this story? Don't live in West Texas. Also, if you are a debtor choosing between traditional Chapter 11 and Subchapter-V ("Sub-V"), what you don't want is traditional Chapter 11. Sub-V offers numerous advantages to debtors compared to "traditional" Chapter 11.[1]

"The supreme art of war is to subdue the enemy without fighting"[2]: Sub-V Encourages Negotiation

Creditors have numerous protections in place and tools at their disposal in a Chapter 11 case including cash collateral restrictions, conditions on assumption of unexpired leases or executory contracts, disclosure, voting, and filing a competing plan, to name a few. In many cases, the strongest tool wielded by a creditor is the absolute priority rule ("APR").

The APR requires that classes of claimants be paid according to their status. Claimants fall into tiers or tranches in a Chapter 11 plan that will dictate priority of payment. Secured creditors are paid first, then unsecured creditors, then equity holders. The APR dictates that, absent payment of unsecured creditors in full, equity holders cannot retain any equity in the reorganized debtor. The APR provides creditors with a bargaining chip to garner favorable terms or even the means to submarine a Chapter 11 case.

The Small Business Reorganization Act of 2019 ("SBRA") created Sub-V, a new breed of Chapter 11. Sub-V is uniquely different from Chapter 11. The most significant difference is the elimination of the APR in Sub-V. In addition, Sub-V eliminates the requirement that a Debtor obtain the acceptance of an impaired class to confirm a Plan. Although not typically the greatest impediment to confirmation in traditional Chapter 11, this change can be beneficial in cases with: (1) few creditors, (2) numerous unsecured creditors and no secured creditors; or (3) numerous creditors that elect not to participate and, therefore, are unlikely to vote at all.

Because of these changes, Sub-V offers greater parity in bargaining power between the debtor and creditors. In turn, this fosters settlement of reorganization cases, including cases that might otherwise be unlikely or impossible to settle.

Traditional Chapter 11 often provides an unequal playing field, particularly when one large and active creditor dominates the case. Such a creditor's conduct in a Chapter 11 may be driven by non-financial factors. Even banks are run by people that are not immune to pettiness. A debtor-creditor relationship will turn personal and contentious if subjected to years of non-bankruptcy litigation. Or a creditor may be driven by farther reaching financial factors that go beyond a single bankruptcy case, even if supporting a debtor's case might otherwise make pecuniary sense for the creditor. For instance, a franchisor may wish to make an example of a debtor to send a message to its other franchisees, even if a single franchisee's liquidation would be more costly than confirming a plan of reorganization. In another example, the creditor may be a competitor of the debtor or a vulture fund[3] that has purchased a large claim. Such a creditor would be motivated by financial goals beyond simply whether it will receive more via reorganization than liquidation. No amount of good faith or hard work from the Debtor can overcome a creditor wielding the APR and motivated by factors that extend beyond the scope of the Debtor's case. By eliminating the APR, Sub-V brings creditors to the negotiating table with the debtor, incentivizing the parties to work together to confirm a plan rather than participate in protracted and costly litigation.

"If your enemy is superior, evade him": Sub-V Eligibility

Some might argue that Sub-V tips the scales too far in the Debtor's favor and gives the Debtor disparate bargaining power. This argument holds water in some respects as a Debtor can potentially avoid the negotiating table altogether and confirm a plan without the consent of any impaired class.

What's a poor creditor to do under these circumstances? A creditor should consider whether the debtor is eligible for Sub-V and, assuming a good-faith argument can be made, object to the debtor's eligibility for Sub-V. There are a number of ways to approach this and the burden is on the debtor to prove eligibility.[4]

First, consider the debt limit to be eligible for Sub-V: $7.5 million. This cap is imposed as part of the definition of a Sub-V debtor under 11 U.S.C. § 1182. The debt limit issue has multiple layers:

1) Debts owed by the debtor to insiders or affiliates do not count against the debt limit.
2) If affiliates are also in bankruptcy, then the debt limit applies to the aggregate debt of the debtor and its affiliates. Therefore, if two affiliate Sub-V debtors each hold $3.8 million in debts, none of which are shared between the affiliates, the debtor that files second would be ineligible because the aggregate debt would equal $7.6 million. As discussed below, the debtor that files first would be eligible as the determination is made as of the date of filing the bankruptcy case (the "petition date").
3) The debt limit includes both secured and unsecured debts. Priority debts would also be included as they fall under the umbrella of unsecured debts.
4) Contingent or unliquidated debts (such as tort claims not reduced to judgment) are excluded from the calculation. Disputed debts are included in the calculation. If a debt is disputed, this does not render the debt unliquidated, regardless of the magnitude of the dispute.[5]

Second, the Debtor must be engaged in commercial or business activities and 50% or more of the debts must arise from the commercial or business activities of the debtor. Although a single asset real estate ("SARE") debtor might otherwise meet this definition, the statute expressly disqualifies SARE debtors from filing for Sub-V.

Case law is still developing as to how to interpret these prerequisites. One can certainly imagine room for debate over potential gray areas depending on the facts of a given case. Does the debtor need to be presently operating? What if the Debtor is winding down and liquidating its business? What if the Debtor operated a business, shut down, opened a different business and the majority of its debts are from the shuttered operation? Stated differently, do the debts need to stem primarily from the debtor's current business activity? What about an individual that is self-employed or a pseudo self-employed individual that receives a W-2 and also files a Schedule C? Case law answering these questions is still in its nascent stages.

Eligibility: Meaning of "engaged in"

To qualify for Sub-V, a debtor must be "engaged in" commercial or business activities.[6] Courts interpret "engaged in" to mean present, not past or future, activities.[7] The question then becomes "What amount or type of activity is sufficient for Sub-V eligibility?"

Judge Lori Vaughan answered one of these questions by determining that a debtor that has ceased operations and is in the process of liquidating its assets may still qualify for Sub-V.[8] Vertical Mac had ceased operations in October 2020, approximately eight months prior to filing Sub-V. Nevertheless, Judge Vaughan found Vertical Mac to be engaged in commercial activities based on the debtor continuing to use its bank accounts, working with insurance adjusters and insurance defense counsel to resolve pending construction claims, and preparing to sell its assets.[9]

Adopting Judge Vaughan's opinion, Judge Katharine Samson determined that a sole proprietor winding down his poultry farming business was eligible for Sub-V.[10] Robinson's only customer, Koch Foods, had terminated its contract, and Robinson had obtained new employment as a W2 employee. Robinson's commercial activities included: searching for a buyer for his poultry business, selling his farm equipment, maintaining four chicken houses, and mowing the grass around the chicken houses.[11] Judge Samson found these activities sufficient as of the petition date for Robinson to be "engaged in" commercial activities.

These cases demonstrate a propensity of courts to adopt a fairly inclusive view of what activities render a debtor eligible for Sub-V.

Eligibility: Not less than 50% of debts from the commercial or business activities

A creditor could object to eligibility based on the requirement under § 1182 that "not less than 50 percent" of the debts of the debtor must arise "from the commercial or business activities of the debtor." As discussed above, the debtor must be presently "engaged in" commercial or business activities. Therefore, one can envision differing interpretations as to whether the 50% threshold may be met by commercial debts from past commercial activities or only commercial debts from present operations. The answer may depend on how you interpret the "the" in § 1182.[12]

Some courts have determined that there must be a connection between the qualifying debts and the present operations, dubbing this connection the "Nexus Requirement."[13] In a lengthy analysis, Judge Thomas McNamara determined that the use of "engaged in" requires courts to consider the *present* status of the debtor's business activities on the petition date.[14] After determining that the debtor "engaged in" sufficient business activities as of the petition date, Judge McNamara ruled that no less than 50% of the debts "must have arisen from those *same* 'commercial or business activities.'"[15] In so ruling, Judge McNamara placed emphasis on the word "the" in § 1182(1)(A) to find that the "*the* debt must be tied to the particular type of commercial or business activities the Debtor engaged in."[16]

Reaching the opposite conclusion, Judge Benjamin Kahn held that no nexus is required between the business activities existing as of the petition date and the qualifying debts.[17] In that case, the debtor's small business had "ceased operations in May 2019."[18] As of the petition date, she worked as a W-2 employee for one company and an independent contractor for two other companies. Most of her debts stemmed from the defunct small business. Despite the disconnect between the qualifying debts and her current business activities, Judge Kahn determined that no nexus was necessary and ruled that the debtor was eligible for Sub-V. He reached this conclusion based on the broad remedial purpose of Sub-V and having acknowledged the possible import of the word "the" in § 1182(1)(A). In a recent opinion in accord with Judge Kahn's decision, Judge Joseph Meier found that § 1182 does not require an absolute nexus.[19] Under this view, a debtor may still be eligible for Sub-V even if the qualifying debts stem from business activities that are different from the "business activities the debtor was engaged in on the day the petition was filed."[20]

Eligibility: "Commercial or business activities" requirement

Mona Lisa Vito is an unemployed hairdresser. Although she may qualify as an expert witness, she likely would not qualify as a Sub-V debtor because she is not engaged in "commercial or business activities." As discussed above, if she previously operated a salon, that past activity is insufficient unless she is engaged in winding down that defunct business as of the petition date. If she owned an operational salon as of the petition date, then that operational entity would certainly qualify. Whether she qualified individually would depend on whether her ownership was passive or non-passive (i.e., the extent of her participation in management) and whether she utilized her personal credit in furtherance of the business (i.e., guaranteed business debt).[21] The use of these criteria is supported by § 1304(a), which states that a "debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business."

Non-profits and "commercial or business activities" requirement

Judge McNamara defines "commercial or business activities" as "any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income."[22] This definition would appear to exclude non-profit entities, which are not established "for the purpose of earning income." Such an exclusion may have been unintentional as Judge McNamara does not specifically address non-profits and notes that the term "commercial or business activities" is "exceptionally broad."[23]

Other courts have found that non-profits are eligible for Sub-V.[24] Finding that a non-profit community association qualified for Sub-V, Judge Karen Jennemann determined that "[n]o profit motive is required." Rather than look to the purpose behind a debtor's activities, Judge Jennemann looked to the substance of the activities to find that all non-consumer activities are "commercial or business activities" under § 1182(1)(A).[25] Similar to the analysis in *Ellingsworth*, Judge Thomas Catliota categorized "activities" as either consumer or non-consumer, thus finding that all non-consumer activities qualify as commercial or business activities.[26]

Departing even further from the "purpose of earning income" component, albeit in a footnote and with essentially no discussion, Judge Edward Coleman noted that a church or non-profit can be a small business debtor.[27] If a church can meet the definition of a "small business debtor," then it would make sense that it could be eligible for Sub-V because § 1182(1)(A) mirrors the definition of "small business debtor" contained in § 101(51D). Given this connection, pre-SBRA case law on § 101(51D) would potentially provide courts with guidance on Sub-V eligibility under § 1182(1)(A). However, unlike the numerous strategic advantages for debtors in Sub-V, meeting the definition of "small business debtor" under traditional Chapter 11 offers no such advantages. Therefore, creditors had no incentive to litigate this issue before Sub-V and no pre-SBRA case law exists that would provide meaningful parallels between interpretations of § 101(51D) and § 1182(1)(A).

W-2 Employment and "commercial or business activities" requirement

In the author's opinion, an individual should not be eligible for Sub-V solely based on their W-2 employee for an unaffiliated third party. Absent some other qualifying criteria, such W-2 employment alone does not meet the "commercial or business activities" requirement. Judge Thomas Agresti agrees that such a "garden variety employee-employer relationship" is not synonymous with small business and should not equate to Sub-V eligibility.[28] Likewise, Judge Edward Morris agrees with this characterization that W-2 employees do not qualify for Sub-V merely by virtue of their employment, even if such employment involves a heightened role as an officer.[29] Case law is still developing and these two cases constitute the "majority" on this issue. Technically, Judge Kahn in *In re Blue* does mention the debtor's W-2 employment, however, he deemed the debtor eligible based on other activities, unrelated to the debtor's W-2 employment. Implicitly, Judge Kahn seemed to find the W-2 employment a non-factor when considering the extent of the "commercial or business activities." Thus, while *In re Blue* might arguably be considered part of the "majority" on this issue, it more conservatively should be considered nominally relevant to this particular issue.[30]

In the sole remaining case that addresses this issue, *In re Ikalowych*, Judge McNamara takes the opposing viewpoint by finding "that virtually all private sector wage earners may be considered as 'engaged in commercial or business activities.'"[31] Respectfully, this ruling, which would make a person eligible for Sub-V based on their part-time employment at Starbucks, is an overly broad interpretation of Sub-V eligibility.

Eligibility: Affiliate Debts

Many small business debts are guaranteed by an individual or corporate affiliates. If the corporation[32] files Sub-V, then the guarantor may also need to file Sub-V to address its guaranties. If the corporation has $6 million in total debt, standing alone and assuming all other prerequisites are met, that company qualifies for Sub-V. However, if the guarantor files and holds more than $1.5 million in separate debts, not counting the guaranties, then the guarantor would not qualify for Sub-V because the debt limit includes *aggregate* affiliate debt.[33] The guarantor could still file for traditional Chapter 11 or possibly wait to file until after the corporate debtor has exited Sub-V.

In this scenario, it matters which affiliate files first. Whether the business or the guarantor, the debtor that files first would qualify and the second would not qualify. This is because the debt limit determination is made as of the petition date.[34]

Judge Christopher Lopez discussed this issue in *In re Free Speech Systems*. In that case, Free Speech Systems filed Sub-V and was under the debt limit. Subsequently, Alex Jones, the owner of Free Speech Systems, filed Chapter 11. Mr. Jones was subject to a $1.5 billion judgment for defamation and clearly ineligible for Sub-V. Judge Lopez determined that Mr. Jones' Chapter 11 filing did not render Free Speech Systems ineligible for Sub-V because the relevant date for determining eligibility is the petition date.[35]

Relying on *Free Speech Systems*, Judge Rebecca Connelly also found that a debtor who is eligible for Sub-V on the petition date cannot be made ineligible by post-petition events, including the filing of an affiliate.[36] A contrary result would "mean that debtors could float in and out of Subchapter V at any time."[37]

Eligibility: Individual Guarantors and "commercial or business activities"

As mentioned above, whether an individual meets the "commercial or business activities" prerequisite to qualify for Sub-V may depend on whether: (1) their ownership is passive or non-passive; and (2) they extended their personal credit to obtain a loan for the business entity.[38] Without expressly adopting these factors outlined in *In re Ikalowych*, Judge Robert Littlefield considered facts pertinent to these criteria.[39] Judge Littlefield analyzed the debtor's business interests, conduct incidental to those interests, and the debtor's personal guaranty. *Id.* at *1-4. Ultimately, he adopted an inclusive approach and found the debtor was eligible for Sub-V. Specifically, Judge Littlefield found that the debtor's guaranty related to a closed business and the defense of a lawsuit related to that guaranty were sufficient "business activities" for purposes of Sub-V eligibility. This inclusive view would encompass practically any individual that has the need to file a Sub-V, a guarantor that is subject to legal action on account of a guaranty. Such guarantors would more likely than not clear the other major eligibility hurdle by having commercial debt that outweighed their consumer debt.

Eligibility: Individual Guarantors and 50% Commercial Debt Requirement

What if the commercial guaranty is not in default? Would that debt be considered when calculating whether more than 50% of the debts are commercial? The Sub-V $7.5 million debt limit clearly does not include contingent debts.[40] However, a closer look is needed to determine the impact of contingent debts on the 50% requirement. Section 1182(1)(A) references "aggregate *noncontingent* liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50% *of which* arose from the commercial or business activities of the debtor."[41] The prepositional phrase "of which" offers further detail regarding the $7.5 million debt limit. That further detail provides that the debts included in the debt limit calculation must be more than 50% commercial debts. Furthermore, only debts used in the debt limit calculation are applicable to the 50% determination. Therefore, a debtor with a large amount of contingent or unliquidated debs would be under the debt limit, but potentially would not qualify based on the 50% requirement.[42] Various cases discuss the unliquidated or contingent nature of debts in the context of the $7.5 million debt limit.[43] However, no cases discuss these issues as they relate to the 50% requirement.

Eligibility: Express Exclusions

Lastly, creditors may want to keep in mind the certain types of debtors that are expressly excluded from Sub-V eligibility, even if they otherwise qualify based on the criteria discussed above. One such exclusion is a SARE debtor.

Another exclusion is a publicly traded company or an affiliate of a publicly traded company. It is hard to imagine that a publicly traded company could have debts less than $7.5 million; however, an affiliate of a publicly traded company falling below the debt limit seems in the realm of possibility.

"In all history, there is no instance of a nation having benefitted from prolonged warfare": Sub-V Expediency

Congress recognized the need to give small business debtors access to a more expedient, and thereby less costly, method of reorganization. To fill this void, "Congress enacted Subchapter V . . . to streamline reorganizations for small business debtors."[44] This purpose is expressed in the report issued by the House Committee on the Judiciary.[45] Nevertheless, one should not be overly reliant on Congressional intent. "Every legislat*or* has intent . . . and the legisla*ture* is a collective body that does not have a mind; it 'intends' only that the text be adopted, and statutory texts are usually compromises that match no one's first preference."[46] Even if the intent stated in the committee report is accurate, whether Congress accomplished its goal is best determined by reviewing the relevant provisions of the enacted legislation.

The first such provision mandates that the court hold a status conference within 60 days of the petition date.[47] No later than 14 days before the status conference, the debtor must file a report detailing its efforts to obtain confirmation of a consensual plan.[48] This contrasts with traditional Chapter 11, in which solicitation of votes is prohibited prior to approval of the disclosure statement.[49] Eliminating this prohibition makes sense given that, absent a court order, no disclosure statement is required in Sub-V.[50] Removing the requirement to file a disclosure statement also aids in the debtor's ability to expeditiously file a plan.

In a traditional Chapter 11 small business case, there is a strict 300-day deadline to file a plan.[51] This deadline may be extended by court order if the debtor proves that it is more likely than not to confirm a plan within a reasonable time.[52] This is not an onerous burden, however, a debtor that has failed to file a plan within 300 days of the petition date has likely experienced some impediment to proposing a confirmable plan. If such a debtor needs additional time beyond 300 days to file a plan, it likely has not been able to remove that impediment. In a non-small business Chapter 11, there is no deadline to file a plan, and the only plan deadline relates to exclusivity. This exclusivity period, which provides the debtor with the exclusive right to file a plan, is 120 days in a non-small business Chapter 11 and 180 days in a small business Chapter 11.[53] Although the Code provides no deadline for filing a plan in a non-small business Chapter 11, some courts enter a form Order Authorizing Debtor-in-Possession to Operate Business, which may include a mandate that the debtor file a plan within the 120-day exclusivity period.

In a traditional small business Chapter 11, once a plan is filed, the debtor must confirm a plan within 45 days or obtain an extension of time from the court by proving that confirmation is relatively imminent. 11 U.S.C. § 1129(e). These traditional small business deadlines are burdensome to small business debtors and only aid creditors or the United States Trustee by more expeditiously exposing non-viable cases that might otherwise linger indefinitely. The Sub-V plan deadline is even shorter, 90 days from the petition date,[54] and would be even more burdensome and reduce the odds of a successful reorganization in many cases were it not for the elimination of the APR. The 90-day plan deadline presents challenges; however, these challenges are manageable in the absence of several traditional confirmation hurdles: satisfying the APR, filing and obtaining approval of a disclosure statement, and obtaining the acceptance of an impaired class. Even without these hurdles, given the immovability of the 90-day deadline, debtor's counsel would be prudent to devote substantial time prepetition to formulating a strategy for the case and possibly drafting a plan of reorganization before the case is filed. This is of course true in any case, although not always possible if the debtor only contacts counsel on the eve of entry of a judgment, repossession, foreclosure, eviction, franchise termination, or some other significant event that warrants filing a case on an emergency basis.

He will win who knows when to fight and when not to fight: § 523(a) applicability to corporate entities

In addition to being mindful of the old adage "know your judge," it is important to know your jurisdiction, particularly when it comes to considering whether to file a § 523(a) adversary proceeding against a corporate Sub-V debtor.

Prior to the SBRA, in most instances, § 523(a) discharge exceptions applied only to individual debtors.[55] Corporate Chapter 11 debtors clearly are not subject to a § 523(a) adversary proceeding based on the plain language of § 1141. A corporate discharge under § 1141(d) is subject to very limited exceptions.[56] Corporations do not receive a discharge under Chapter 7, and they are ineligible for Chapter 13. Thus, there is no need to question whether § 523(a) applies to corporations in Chapter 7 or Chapter 13. Corporations are eligible for Chapter 12 and receive a discharge under § 1228. Chapter 12 cases are few and far between relative to other chapters,[57] which results in less developed case law. This should be taken into consideration when weighing the import of Chapter 12 case law.

Despite the significant passage of time since the enactment of § 1228(a)(2) in 1986,[58] only two courts have addressed whether § 523(a) exceptions apply to corporations receiving a Chapter 12 discharge.[59] Both opinions determined that § 523(a) discharge exceptions do apply to corporations in Chapter 12.

Based on similarities between § 1192(2) and § 1228(a)(2), the Fourth Circuit relied on these two decisions when it found that § 523(a) exceptions are applicable to corporations in Sub-V. The Fourth Circuit aptly noted that Sub-V shares many similarities with Chapter 12. As additional support for its ruling, the Fourth Circuit dove deeply into the murky waters of Congressional intent. The Fourth Circuit cautioned that it did not come to its decision easily calling the question "a close one."

The Fourth Circuit's decision has three flaws. First, gleaning legislative intent is a suspect endeavor prone to manipulation that aligns with a court's predetermined leanings. Second, the Fourth Circuit's decision relies too heavily on the two Chapter 12 cases, which are both from bankruptcy courts and contain fairly limited discussion of the issue. This overreliance also ignores the reality of how infrequently Chapter 12 cases are filed. This infrequency is why only two cases exist on this issue after 37 years since the enactment of § 1228. Third, the Fourth Circuit overlooks two important rules of statutory construction: the rule against surplusage and the plain-meaning doctrine.

Every other court to address this issue, which includes seven bankruptcy courts and the Ninth Circuit Bankruptcy Appellate Panel, has disagreed with the Fourth Circuit's conclusion.[60] These courts have relied on rules of statutory construction. First, when Congress enacted the SBRA, Congress amended § 523(a) to add a reference to § 1192. As § 523(a) unambiguously applies only to individual debtors, to apply § 523(a) exceptions to corporations in Sub-V would render this SBRA amendment superfluous. Thus, the rule against surplusage supports a conclusion that § 523(a) exceptions do not apply to Sub-V corporate debtors. Furthermore, given that § 523(a) explicitly limits its application to "individual debtor[s]," the plain meaning doctrine supports the same conclusion. Finally, although legislative intent should not be wielded haphazardly, Congress likely would have acted more clearly if it had intended to depart from longstanding practice that § 523(a) exceptions apply only to individuals.[61]

Given the circuit split on this issue, practitioners should know their jurisdiction when pursuing or defending a § 523(a) adversary proceeding in a Sub-V case. Creditors can have confidence they will survive a motion to dismiss on this issue if they are in the Fourth Circuit. Creditors in the Ninth Circuit would be wise to avoid bringing such an adversary proceeding. Creditors in other jurisdictions may wish to test the waters, particularly if they are prepared to appeal, and should keep an eye out for further decisions from the remaining circuit courts of appeal or from the Supreme Court.

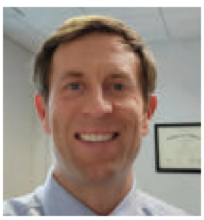
Begin by seizing something which your opponent holds dear; then he will be amenable to your will: Disposable Income and Officer Salary

As discussed above, Sub-V significantly shifts the power dynamic compared to traditional Chapter 11 cases. While creditors in Sub-V lack the typical leverage-enhancing tools, such as the APR, they may still take advantage of the Sub-V requirement that a debtor commit all its disposable income during the three-to-five-year plan period.[62]

Small businesses owners often wear multiple hats by performing the dual roles of management and equity. Other than perhaps budgeting for a cash reserve, which at a certain level seems an appropriate measure, no other mechanism seems as prone to artificially deplete disposable income than inflating officer salary. For the debtor, this serves the twin purposes of decreasing payments to unsecured creditors and increasing payments to its decisionmakers. One can envision creative arguments that these payments are "necessary for the continuation, preservation, or operation of the business of the debtor."[63] The argument goes that the management/owner's work for the debtor is necessary and absent such work the debtor's business would cease. The argument does have some validity and active management should be compensated fairly, subject to the standard restrictions. However, a clear incentive exists for unchecked debtors to minimize "*projected* disposable income," while maximizing their own return. Prudent creditors should be mindful of this issue, not only once a plan is filed, but also at the outset of the case when the court typically will set interim officer salary that lasts from the petition date to confirmation. By focusing on an issue near and dear to the hearts of the debtor's decision-makers (their paycheck), creditors may be able to enhance payments or increase their bargaining power to foster a favorable settlement.

Conclusion

After perusing a lengthy article, my mind often searches for a small, useful nugget that I can extract and retain for future use. As stated by Dwight K. Schrute, "K.I.S.S. – Keep it simple, stupid. Great advice, hurts my feelings every time." In that vein, I would impress two simple points upon you. First, the elimination of the APR is the most impactful change in the SBRA. Second, because of this change, the most important battle between a debtor and creditor in a Sub-V case will often be whether the debtor is indeed eligible for Sub-V. This may be an uphill battle for creditors given the proclivity of courts to be generous and inclusive when ruling on Sub-V eligibility. ⊙



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Endnotes

[1]*NetJets Aviation, Inc. v. RS Air, LLC* (In re RS Air, LLC), 638 B.R. 403, 414 (9th Cir. B.A.P. 2022).
[2]Sun Tzu, The Art of War.
[3]Judge Catherine Peek McEwen prefers the term "asset troll."
[4]*In re Phenomenon Mktg. & Ent, LLC*, 2022 WL 3042141, at *1 (Bankr. C.D. Cal. Aug. 1, 2022).
[5]*U.S. v. Verdunn*, 89 F.3d 799 (11th Cir. 1996).
[6]11 U.S.C. § 1182(1)(A).
[7]*See, e.g., NetJets Aviation, Inc. v. RS Air, LLC* (*In re RS Air, LLC*), 638 B.R. 403 (B.A.P. 9th Cir. 2022); *In re Thurmon*, 625 B.R. 417 (Bankr. W.D. Mo. 2020).
[8]*In re Vertical Mac Construction, LLC*, 2021 WL 3668037 (Bankr. M.D. Fla. July 23, 2021).
[9]*Id.* at 4.
[10]*In re Robinson*, 2023 WL 2975630 (Bankr. S.D. Miss. Apr. 17, 2023).
[11]One could argue that mowing around the chicken houses was ancillary to maintaining the debtor's personal residence as the Debtor's residence rested on 88 acres of land that included his manufactured home and the chicken houses.
[12]Depends on what your definition of "is" is.
[13]*In re Hillman*, 2023 Bankr. LEXIS 1448 (Bankr. N.D.N.Y. June 2, 2023) (discussing *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021)).
[14]*In re Ikalowych*, 629 B.R. at 280.
[15]*Id.* at 275-76.
[16]*Id.* at 287.
[17]*In re Blue*, 630 B.R. 179 (Bankr. M.D.N.C. 2021).
[18]*Id.* at 183.
[19]*In re Reis*, 2023 WL 3215833, at *5 (Bankr. D. Idaho May 2, 2023).
[20]*Id.*
[21]*See In re Ikalowych*, 629 B.R. at 283, 288.
[22]*Id.* at 276.
[23]*Id.*
[24]*In re Ellingsworth Residential Cmty. Ass'n.*, 619 B.R. 519, 521 (Bankr. M.D. Fla. 2021).
[25]*Id.*
[26]*Lyons v. Fam. Friendly Contracting LLC (In re Family Friendly Contracting LLC),* 2021 Bankr. LEXIS 2945 (Bankr. D. Md. Oct. 26, 2021).
[27]*In re Abundant Life Worship Ctr. Of Hinesville, GA, Inc.*, 2020 Bankr. LEXIS 3517, at * 26 n.23 (Bankr. S.D. Ga. Dec. 16, 2020) (citing *Ellingsworth Cmty. Ass'n,* 619 B.R. at 521-22).
[28]*Nat'l Loan Invs., L.P. v. Rickerson (In re Rickerson)*, 636 B.R. 416, 426 (Bankr. W.D. Pa. 2021).
[29]*In re Johnson*, 2021 Bankr. LEXIS 471, at *20-22 (Bankr. N.D. Tex. Mar. 1, 2021).
[30]*In re Blue*, 630 B.R. at 183, 188-90.
[31]*Ikalowych*, 629 B.R. at 287-88.
[32]For brevity, references to "corporation" include limited liability companies. The Bankruptcy Code's definition of "corporation" includes limited liability companies. *Cleary Packaging, LLC*, 36 F.4th 509, 512 n.1 (4th Cir. 2022).
[33]*See* 11 U.S.C. § 1182(1)(B).
[34]*See* 11 U.S.C. § 1182(1)(A); *see also In re Free Speech Systems*, LLC, 649 B.R. 729 (Bankr. S.D. Tex. Mar. 31, 2023).
[35]*In re Free Speech Systems, LLC*, 649 B.R. 729 (Bankr. S.D. Tex. Mar. 31, 2023).
[36]*In re Dobson*, 2023 Bankr. LEXIS 1311, at *10-11 (Bankr. W.D. Va. May 17, 2023).
[37]*Id.* at *11 (quoting *Free Speech Systems*, 649 B.R. at 734).
[38]*See supra* p. 7 (citing *In re Ikalowych*, 629 B.R. 261 (Bankr. D. Colo. 2021)).
[39]*In re Hillman*, 2023 WL 3804195 (Bankr. N.D.N.Y. June 2, 2023).
[40]11 U.S.C. § 1182(1)(A).
[41]*Id.* (emphasis added).
[42]An individual guarantor will likely have consumer debts including a mortgage loan, a car loan, and credit card debts. For the individual guarantor to qualify for Sub-V, these consumer debts cannot outnumber the business debt guaranties.
[43]*See, e.g., In re Macedon Consulting, Inc.*, 2023 Bankr. LEXIS 1551 (Bankr. E.D. Va. June 14, 2023); *In re Hall*, 650 B.R. 595 (Bankr. M.D. Fla. May 5, 2023).
[44]*Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packing, LLC)*, 36 F.4th 509, 514 (4th Cir. 2022).
[45]H.R. Rep. No. 116-171 at 1 (2019).
[46]Chief Judge Frank H. Easterbrook, *Foreword to* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxii (2012).
[47]11 U.S.C. § 1188(a).
[48]11 U.S.C. § 1188(c).
[49]11 U.S.C. § 1125(b).
[50]11 U.S.C. § 1181(b).
[51]11 U.S.C. § 1121e(2).
[52]11 U.S.C. § 1129(e)(3).

[53]11 U.S.C. § 1129(b), (e)(1).
[54]11 U.S.C. § 1189(b).
[55]Corporations do not receive a discharge in Chapter 7, thus there is no reason for exceptions in these cases. Corporate entities are not eligible for Chapter 13. There is room for debate whether corporate Chapter 12 debtors are subject to § 523(a) exceptions.
[56]*In re Hall*, 651 B.R. 62, 69 (Bankr. M.D. Fla. Apr. 13, 2023) (discussing exceptions to discharge specified in § 1141(d)(6)).
[57]*See, e.g., Bankruptcy Statistics*, American Bankruptcy Institute, https://www.abi.org/newsroom/bankruptcy-statistics (Chapter 12 filings comprised less than 0.06% of the total cases filed for the week of August 28 – September 3, 2023).
[58]100 Stat. 3112., 99th Cong., Act of October 27, 1986.
[59]*Southwest Georgia Farm Credit, ACA v. Breezy Ridge Farms, Inc. (In re Breezy Ridge Farms, Inc.)*, 2009 Bankr. LEXIS 1396, 2009 WL 1514671 (Bankr. M.D. Ga. May 29, 2009); *New Venture P'ship v. JRB Consol., Inc.*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995).
[60]*In re Off-Spec Sols., LLC*, 651 B.R. 862, 865 (B.A.P. 9th Cir. 2023); *BenShot, LLC v. 2 Monkey Trading, LLC (In re 2 Monkey Trading, LLC)*, 650 B.R. 521 (Bankr. M.D. Fla. 2023); *Nutrien Ag Sols., Inc. v. Hall (In re Hall)*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *Avion Funding, LLC v. GFS Indus. (In re GFS Indus.)*, 647 B.R. 337 (Bankr. W.D. Tex. 2022); *Jennings v. Lapeer Aviation, Inc. (In re Lapeer Aviation, Inc.)*, Case No. 21-31500-jda, 2022 WL 1110072 (Bankr. E.D. Mich. Apr. 13, 2022); *In re Rtech Fabrications, LLC*, 635 B.R. 559 (Bankr. D. Idaho 2021); *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 630 B.R. 466 (Bankr. D. Md. 2021), *rev'd*, 36 F.4th 509 (4th Cir. 2022); *Gaske v. Satellite Rests. Inc. (In re Satellite Rests. Inc.)*, 626 B.R. 871 (Bankr. D. Md. 2021).
[61]8 Collier on Bankruptcy 1192.03 (16th ed. 2023).
[62]11 § 1191(c)(2)(A).
[63]11 U.S.C. 1191(d)(2).

Mootness *continued from page 45*

[23]*In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994).
[24]*See* 11 U.S.C. § 546(a) (providing the statute of limitation for a post-petition transfer and other avoidance actions).
[25]*Chafin v. Chafin*, 568 U.S. 165 (2013).
[26]*Kiviti v. Bhatt*, 80 F. 4th 520, (4th Cir. 2023).
[27]*MOAC Mall Holdings LLC*, 2023 WL 7294833, 2023 U.S. App. LEXIS.
[28]*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 386-88 (2023) (discussing the clear statement rule applicable to sovereign immunity abrogation).
[29]*MOAC Mall Holdings LLC v. Transform Holdco LLC*, 616 B.R. 615, 625 (S.D.N.Y. 2020).
[30]*In re Santos-Zacharia v. Garland*, 143 S. Ct. 1103 (2023) (finding provision of the Immigration and Nationality Act requiring administrative exhaustion before judicial review of final order of removal is non-jurisdictional).
[31]652 F.2d 793 (9th Cir. 1981).
[32]*Mills v. Green*, 159 U.S. 651 (1895) (cited in *Trone v. Roberts Farms, Inc.* (*In re Roberts Farms, Inc.*), 652 F.2d 793, 797-98 (9th Cir. 1981).
[33]11 U.S.C. § 1101(2).
[34]Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Affects*, 93 Am. Bankr. L.J. 377, 386 (Fall 2019) (discussing the difficulty of obtaining a stay, "especially in large, complex reorganizations.").
[35]*In re Continental Airlines*, 91 F.3d 553, 567-73 (3d Cir. 1996).
[36]*Id.* (quoting *In re UNR Indus.*, Inc., 20 F.3d 766, 769 (7th Cir. 1994).
[37]*Wellness Int'l Network, LTD v. Sharif*, 575 U.S. 665 (2015).
[38]*U.S. Bank N.A. v. Windstream Holdings, Inc.* (*In re Windstream Holdings, Inc.*), 2022 WL 14199458, 2022 U.S. App. LEXIS 29630 (2d Cir. Oct. 25, 2022), *cert. denied*, No. 22-926, 2023 WL 6366801, 2023 U.S. LEXIS 3125 (Oct. 2, 2023).
[39]28 U.S.C. § 1408.
[40]*See, e.g.* Bankruptcy Venue Reform Act, H.R. 1017, 118th Cong. (2023).
[41]*Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023).
[42]Equitable mootness generally has little application in Chapter 7 cases. For a discussion of this issue, see *In re Kramer*, 71 F.4th 428, 441-44 (6th Cir. 2023).
[43]*Litton Loan Servicing v. Schubert* (*In re Schubert*), Nos. 21-3969/3983, 2023 U.S. App. LEXIS 7432, at *5, 2023 WL 26633257, at *2 (6th Cir. Mar. 28, 2023).
[44]*Clifton Cap. Grp., LLC v. Sharp* (*In re East Coast Foods, Inc.*), 80 F.4th 901, 906 (9th Cir. 2023). *But see Dugaboy Inv. Trust v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), No. 22-10960, 2023 WL 4861770, at *2-3, 2023 U.S. App. LEXIS 19671, at *4-5 (5th Cir. July 21, 2023) (reaffirming the circuit's standard for bankruptcy standing).
[45]*Schubert*, 2023 U.S. App. LEXIS, at *7, 2023 WL 26633257, at *3.
[46]*See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (finding that a statutory cause of action extends to plaintiffs falling "within the zone of interests by the law invoked").
[47]*Truck Ins. Exch. v. Kaiser Gypsum Corp.*, 60 F.4th 73, *cert. granted* 144 S. Ct. 325 (2023).

In Rem Stay Relief Motions Under 11 U.S.C. Section 362(d)(4)

ANDREW O'KEEFE

Individual bankruptcies have increased for 13 consecutive months compared to year-over-year bankruptcy filing averages.[1] With local pandemic rent moratoriums expiring, student loan payments resuming, and broader macroeconomic pessimism, it is safe to assume individual consumer bankruptcy filings will continue to increase for the foreseeable future. As a result, many elusive debtors will file bankruptcy to protect their homes and avoid paying their creditors. This article seeks to educate non-bankruptcy attorneys about the mechanics of an often underutilized tool secured creditors have at their disposal: *in rem* stay relief motions under 11 U.S.C. § 362(d)(4).[2] Furthermore, this Article attempts to give practical tips to bankruptcy attorneys when considering pursuit of *in rem* stay relief.

Mechanics of the Automatic Stay and *In Rem* Stay Relief

First, it is necessary to understand one of the most important features of the Bankruptcy Code: the automatic stay. The automatic stay is recognized as a cornerstone of bankruptcy law.[3] In fact, it is often the *raison d'etre* of many consumer bankruptcy filings. The automatic stay provision, found in § 362, principally prevents a creditor from continuing collection efforts against a debtor. The stay is automatically in place once a debtor files bankruptcy. The purpose of the automatic stay is to give a debtor a "breathing spell" while the debtor attempts to reorganize or discharge their debts.

But like many Bankruptcy Code provisions designed to protect debtors, there is an inherent risk of abuse. To combat such abuse, Congress enacted § 362(d)(4) with the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") amendments to the Bankruptcy Code.[4] Section 362(d)(4) states that a secured creditor[5] may be granted *in rem* stay relief "if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property." This was a notable enactment because prior to 2005, *in rem* relief was rarely granted.[6] And when it was, bankruptcy courts relied upon their catch-all powers under § 105(a).[7]

Further, § 362(b)(20) works in tandem with § 362(d)(4). Subsection (b) of § 362 lists exceptions to the automatic stay, and § 362(b)(20) excepts from the automatic stay "any act to enforce any lien against or security interest in real property following the entry" of an *in rem* stay relief order. This subparagraph also lists two notable tests that allow a debtor to move for relief from an *in rem* order in a future bankruptcy case. Namely, if a debtor files bankruptcy to protect their interest in real property that is subject to an *in rem* order, that debtor can move for relief from such order "based upon changed circumstances or for other good cause shown."[8]

Typically, in a stay relief motion, a secured creditor will move under §§ 362(d)(1) or (d)(2). Stay relief under these Bankruptcy Code provisions, however, is only *in personam* stay relief. That is, it only lifts the stay with respect to an individual debtor. So after a court grants *in personam* stay relief against a debtor, a secured creditor may then continue pursuing its state court remedies against the debtor, such as an eviction action. On the other hand, *in rem* stay relief lifts the stay with respect to the subject real property. Thus, the creditor protection exists "against not only the debtor, but also every non-debtor, co-owner, and subsequent owner of the property."[9]

If a secured creditor is successful in prosecuting its *in rem* stay relief motion under § 362(d)(4), the secured creditor must then record the order for relief, similar to a mortgage or judgment lien, in compliance with "applicable State laws governing notices of interests or liens in real property."[10] Section 362(d)(4) explicitly states that any federal, state, or local government unit that accepts notices of interests or liens must accept notices of *in rem* stay relief orders. Once the *in rem* stay relief order is properly recorded, the order is binding in any subsequently filed bankruptcy case for two years after the date of the entry of the order.

Another notable enactment came through Congress's passage of the Bankruptcy Technical Corrections Act of 2010. Prior to 2010, § 362(d)(4) required a debtor's conduct to be part of a "scheme to delay, hinder *and* defraud creditors" to be accorded *in rem* stay relief. Thus, the burden of proving a debtor's scheme was intended to do all three acts was difficult to meet. The Bankruptcy Technical Corrections Act of 2010 eased that burden by replacing "and" with "or," so a secured creditor need only prove a scheme was intended to either delay, hinder, *or* defraud creditors. Accordingly, it is important to note, when analyzing the case law surrounding § 362(d)(4), that practitioners are wary of pre-2010 cases that require a scheme to meet all three elements.

Finally, when considering the automatic stay and *in rem* stay relief, and how the Bankruptcy Code provisions work together, it is important to mention § 362(c)(3). This subparagraph states that, if a debtor had a chapter 7, 11, or 13 case pending within the preceding 1-year period of the filing of the new bankruptcy case, then the automatic stay terminates after 30 days. This termination occurs because such cases are presumptively not filed in good faith. A debtor may rebut this presumption by showing, with clear and convincing evidence, that this second case was filed in good faith. This subparagraph is essentially another anti-abuse provision that shifts the burden on debtors to prove why they should enjoy the benefits of the automatic stay.

What is a scheme and when does it rise to a level of delaying, hindering, or defrauding a secured creditor?

Bankruptcy Courts interpreting § 362(d)(4) define a scheme as a "systemic plan or artful plot that evidences a debtor's wrongful motive or intent."[11] In *In re Greenstein*, the court found it is not necessary that the debtor be part of the scheme, rather the property need only be part of the scheme.[12] The existence of multiple bankruptcy filings is not *per se* sufficient to be a scheme to delay, hinder, or defraud creditors.[13] So the question becomes: when does a scheme sufficiently delay, hinder, or defraud a secured creditor such that prospective *in rem* relief is warranted? This question is difficult because, by the very nature of filing a bankruptcy petition, a debtor is delaying and hindering a creditor's effort to collect from a debtor.

Courts vary on what debtor conduct rises to a level sufficient to infer a scheme that is intended to hinder, delay, or defraud creditors.[14] This is a fact-specific inquiry that will depend upon the judge and the district of the Bankruptcy Court. For example, in the Second Circuit, when analyzing *in rem* stay relief motions in the context of multiple filings, *In re Merlo* noted that Bankruptcy Courts in the Second Circuit focus on (1) "the timing and sequence of filings" and (2) "the good faith prosecution of the cases."[15] In *In re Yellowman*, another Bankruptcy Court in the District of New Mexico, however, listed the following seven factors used to determine when a debtor has engaged in a scheme intended to delay, hinder, or defraud creditors:

> (1) serial filings to stop a foreclosure; (2) the timing of the bankruptcy filings relative to each other, to proceedings in the foreclosure action, and to scheduled foreclosure sales; (3) lack of changed circumstances between filings; (4) failure to prosecute bankruptcy cases or to honor the obligations of a debtor in the bankruptcy cases, or other bad faith conduct in connection with the bankruptcy cases; (5) the inability to fund a plan; (6) multiple bankruptcy filings by multiple parties to protect common property; and (7) failure to make any mortgage payments for a long time.[16]

These factors look somewhat similar to factors that Bankruptcy Courts consider when analyzing whether a bankruptcy case is filed in good faith, which is an implicit requirement that many Bankruptcy Courts read into the Code.

Another court, in *In re Danley*, stated that whether the debtor's serial bankruptcy filings was a scheme intended to delay, hinder, or defraud creditors must be determined based on the totality of the facts and circumstances.[17] The Court considered the amount of the debt and arrearage, the length of the delinquency, and the feasibility of reorganization to be the focus of its inquiry. The debtors in *In re Danley* had two loans from a bank, one with a principal balance that had grown to nearly $475,000 and another with a principal balance that had grown to $363,000. The arrears on the loans were $96,000 and $173,000, respectively. The debtors had not made a payment on either loan in about three to four years. The Court found this to be "very strong, if not conclusive, evidence of a scheme to hinder or delay" the secured creditor.[18]

It is quite common for a bankruptcy petition to be filed on the eve of foreclosure. So a debtor who has multiple bankruptcy filings in the past few years, but only one of which is on the eve of foreclosure, likely does not reach a level that would constitute a scheme to delay, hinder, or defraud. Synthesizing the case law surrounding § 362(d)(4), if a debtor, or another individual that appears to be acting in concert with a debtor, has filed multiple (typically three or more) bankruptcy cases on the eve of foreclosure to save real property, that is strong evidence that will likely lead a Bankruptcy Court to grant *in rem* stay relief.

Another factor listed in the *Yellowman* case that other Bankruptcy Courts have considered is whether there has been a change in circumstances since the previous filings that would allow a court to find that the present bankruptcy case is proper. This factor is likely linked to an exception to the exception regarding *in rem* stay relief found in § 362(d)(4)(B). Buried within the language of this subparagraph about properly recording an *in rem* stay relief order, the Bankruptcy Code states that a debtor may seek relief from an *in rem* order "based upon changed circumstances or good cause shown." A secured creditor should look to whether a debtor can now confirm a plan under the new bankruptcy case, whether a debtor has greater or additional income since the previous case, or whether a debtor has attempted to cure the default. If a debtor can prove one of the following, a Bankruptcy Court will be much less inclined to grant the *in rem* request.

In sum, if the same debtor or multiple debtors have filed multiple bankruptcy cases to save the same real property on the eve of foreclosure, and the prosecution of those bankruptcy cases has been suspect, a secured creditor should strongly consider whether it should seek the extraordinary remedy of *in rem* relief provided for in § 362(d)(4). Some debtors are able to evade their secured creditors for years and sometimes decades. It would be prudent for a secured creditor that finds itself in this position to proactively exercise all of its available remedies sooner rather than later.

Issues with Timing

Another issue that arises with *in rem* stay relief orders is timing. Under § 521(i), a bankruptcy case is automatically dismissed if not all the information required under subsection (a)(1) of § 521 (such as a list of creditors, schedules of assets and liabilities, statements of financial affairs) is not filed within 45 days of the petition date. Because many of the bankruptcy petitions in these scenarios are filed on the eve of foreclosure, the bankruptcy petitions are often "skeleton" filings. A "skeleton" filing means that a debtor will simply file a bankruptcy petition to quickly prevent the foreclosure, but fail to file all the required documents under § 521(i). These bankruptcy cases will be dismissed automatically on the 46th day.

Secured creditors must act quickly in pursuing their *in rem* stay relief rights or risk further delay. There are three options a secured creditor may pursue to navigate this timing issue. First, a secured creditor may file an emergency motion to set an accelerated hearing on the matter to have a hearing on the *in rem* stay relief order prior to the expiration of the 45-day period. Second, if the 45-day period lapses, a secured creditor may consider filing a motion to reopen the case and request the bankruptcy court hear the *in rem* stay relief motion. Third, there are examples of Bankruptcy Courts exercising their jurisdiction over estate property in a case that was dismissed.[19] Interestingly, *In re Buczek* held that, unlike §§ 362(d)(1) and (2), paragraph (4) addresses property rights subsequent to dismissal because paragraph (4) deals with all current and prospective interests in real property.[20] The Bankruptcy Court in *Buczek* granted the secured creditor's *in rem* stay relief request based on this rationale. So even if a debtor's bankruptcy case is dismissed for failure to file all the required documents of § 521(i), a secured creditor should still consider filing an *in rem* stay relief motion.

Who is Entitled to Notice?

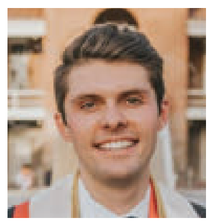
Another issue to consider when seeking the extraordinary relief provided by § 362(d)(4) is who is entitled to notice before a Bankruptcy Court may grant an *in rem* stay relief motion. Because *in rem* relief may affect interested parties other than the debtor, simply sending notice to the debtor is often insufficient. The Bankruptcy Court in *Buczek* recognized this problem and stated that when a secured creditor requests *in rem* relief, "appropriate notice should generally include not only the debtor, but also the record owner of the property."[21] Failure to give notice to the record owner of the property may result in a denial of an *in rem* stay relief request, so secured creditors must do their due diligence when serving their *in rem* stay relief motion.

Is an Adversary Proceeding Required?

Finally, some creditors request a 180-day ban on filing a bankruptcy petition when dealing with abusive debtors. When such requests are made pursuant to the court's § 105 powers, rather than § 109(g),[22] a court may find an adversary proceeding is required because the request is in the nature of an injunction. When filing an *in rem* stay relief motion, however, an adversary proceeding is not required.[23] Motions for relief from the automatic stay are contested matters governed by the Federal Rules of Bankruptcy Procedure Rule 9014.[24] Whereas any request for injunctive, declaratory, or other equitable relief, such as requesting a 180-day ban prohibiting a debtor from filing bankruptcy under § 105, requires the filing of an adversary proceeding. This is another advantage to requesting *in rem* stay relief under § 362(d)(4), it is more time and cost-efficient than alternative remedies.

Conclusion

As consumer bankruptcy filings rise and crafty debtors seek to avoid foreclosure, § 362(d)(4) can be an excellent, but often overlooked, tool to avoid years of litigation in multiple courts. So long as a secured creditor acts quickly, the facts are sufficient to support a finding of a scheme intended to hinder, delay, or defraud, proper notice is given to the record owner of the property, and the *in rem* order is properly recorded, a secured creditor has a good probability of preventing the automatic stay from frustrating a secured creditor's attempts to exercise its state court remedies. ⦿



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Endnotes

[1]Epiq News, *August Commercial Chapter 11 Filings Increase 54 Percent Over Last Year*, (Sept. 5, 2023).

[2]Unless otherwise specified, all statutory references herein are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq.

[3]*See Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494 (1986).

[4]7 Norton Bankr. L. & Prac. 3d § 143:12.

[5]Section 362(d)(4) explicitly says "secured" creditor. Thus, unsecured creditors and equity holders may not move under this section.

[6]*See, e.g., In re Amey*, 314 B.R. 864 (Bankr. N.D. Ga. 2004).

[7]*Id.* ("Section 105(a) of the Bankruptcy Code authorizes a bankruptcy court to grant in re relief in connection with granting relief form the stay under § 362(d) in extraordinary circumstances were an ordinary relief from stay order will not be effective to protect a secured lender's rights, as demonstrated by the prior history of the parties and the property.").

[8]11 U.S.C. § 362(b)(20).

[9]*Alakozai v. Citizens Equity First Credit Union (In re Alakozai)*, 499 B.R. 698 (9th Cir. B.A.P. 2013) (citing *First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First Yorkshire Holdings, Inc.)*, 470 B.R. 864, 871 (9th Cir. B.A.P. 2012).

[10]11 U.S.C. § 362(d)(4).

[11]*In re Yellowman*, 2023 WL 5658795, at *5 (Bankr. D.N.M. Aug. 31, 2023) (internal quotations omitted).

[12]*In re Greenstein*, 589 B.R. 854 (C.D. Cal. 2018), *aff'd*, 788 Fed. Appx. 497 (9th Cir. 2019).

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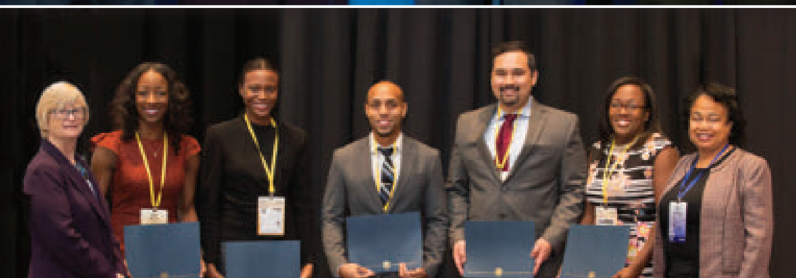


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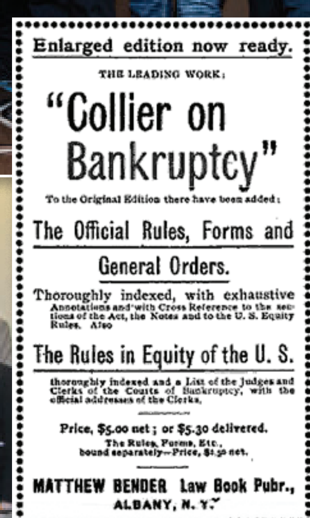
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The National Conference of Bankruptcy Judges: Its Not Just For Bankruptcy Judges

HON. ROBERT JACOBVITZ AND HON. DANIEL COLLINS

Many federal practitioners have heard of the National Conference of Bankruptcy Judges (NCBJ), an association of active and retired U.S. bankruptcy judges. Many know us because every year we host the largest bankruptcy conference in the United States. But NCBJ is not just for bankruptcy judges and insolvency lawyers. At our most recent conference in Austin, Texas, we hosted over 1,400 judges, academics, lawyers, financial advisors, accountants, investors, and media. Programs were presented by numerous of our professional partners in furtherance of our mission to present best-in-class CLEs and facilitate exchanges of ideas and collegiality among bankruptcy professionals. NCBJ also provides input into important legislative matters, promotes diversity, and publishes a peer reviewed journal on bankruptcy law and a newsletter. We also utilize our expertise to improve the administration of the bankruptcy system, advance civic engagement, and so much more. We are also proud of our growing alliance with the FBA.

This article will provide a bit of background on the structure of NCBJ, delve into some of NCBJ's nearly 100 years of history, and describe its annual conference and the work of its 20-plus committees.

NCBJ's Structure

There are 345 authorized bankruptcy judgeships in the United States, 299 active-duty, full-time bankruptcy judges, and 26 bankruptcy judges on recall status. A high percentage of the active bankruptcy judges are members of the NCBJ, in addition to many retired bankruptcy judges. NCBJ's Board of Governors consists of the four officers of the NCBJ, four at-large governors, and 11 circuit governors. Board members take their positions on the newly constituted Board at the annual Conference of the NCBJ. The Executive Committee of the Board is made up of the president, the president-elect, the secretary, the treasurer, and the immediate past president. The Executive Committee and Board meet monthly.

In addition to the work of the Executive Committee, much of NCBJ's work is done by its more than twenty standing, special, and ad hoc committees and publications. These committees and publications are discussed in section four below.

NCBJ's History and Some Comparisons with the Present

NCBJ has a long and interesting history. The first permanent bankruptcy law in the United States was the Bankruptcy Act of 1898. Before then, there were periods when there were no bankruptcy laws in the United States. The first, second, and third bankruptcy laws were in effect from 1800 to 1803, 1841 to 1843, and 1867 to 1878, respectively.

The first attempt at a national organization of bankruptcy judges, then called "referees in bankruptcy" or "bankruptcy referees," was made by a group of thirty referees in 1899. The organization disbanded five years later.

By 1920 there were more than 500 bankruptcy referees nationwide who were mostly isolated and spread across 84 judicial districts. Referees, most of whom held part-time positions, were appointed by district courts for two-year renewable terms and were removable at will. Decisions of bankruptcy referees were not reported. There were no uniform bankruptcy practices. Referees were criticized as being inefficient, having conflicts of interest, and disproportionately using bankruptcy estate assets to pay costs of administering the estates. Ex parte communications between referees and parties were common. Prominent law firms did not practice in the bankruptcy arena, which was dominated by small cliques of attorneys and other professionals. There was some concern that Congress would repeal the Bankruptcy Act of 1898.

It was in this climate that the National Association of Referees in Bankruptcy (NARB or Association), NCBJ's predecessor organization, was born. On July 9 and 10, 1926, 82 referees from 26 states and the District of Columbia gathered in Detroit to form NARB. A motion to form a permanent organization "unanimously carried even though the Referees would not necessarily be permanently in office."

At the 1926 organizational meeting, the Association adopted a constitution, elected officers and directors (one from each of the circuits, except the U.S Court of Appeals for the Tenth Circuit that had been established only four months earlier), formed four committees (Ethics, Legislation, Resolutions, and Uniformity of Practice), and launched the Journal of the National Association of Referees in Bankruptcy. The initial subscription price for the journal was $5.00 per year, "payable in advance."

NARB's purposes, as stated in its constitution, was "to promote better acquaintance and co-operation among the Referees in Bankruptcy of the United States Courts, to secure a greater degree of uniformity in the administration of estates in Bankruptcy, to encourage expedition in the liquidation of estates and economy in the administration thereof, and generally to improve the practice in bankruptcy cases."

NARB quickly developed a relationship with the American Bar Association's (ABA) newly formed bankruptcy committee and the Commercial Law League of America and over time formed relationships with other organizations in the bankruptcy community.

At the second annual meeting, held in Buffalo, New York on August 29 and 30, 1927, NARB adopted a Code of Ethics for Referees published in its journal. The code of ethics included a declaration to the public of the things for which referees stand, a statement of principles, and a guide of conduct for referees. The statement of principles states that the public trust in the office of referee "demands the highest degree of honor, skill and efficiency, and condemns dishonesty in any form, inefficiency, waste and delay." The code of ethics described its force and effect as, "The adoption of this Code of Ethics by the National Association of Referees in Bankruptcy places an obligation on each of its members to a sincere and faithful observance of the rules of conduct therein set forth." By the end of 1927, 203 referees had become members of the new Association. By 1933, its referee membership had increased to 241.

The Association's journal served the important functions of reporting the Association's affairs, fostering an exchange of ideas and debate among referees, and reporting on other matters affecting the administration of the bankruptcy system. The journal included reports on NARB's annual conferences and its activities and those of affiliate organizations; NARB committee reports; discussions of legislation and referee practices and procedures in different districts; and of legal issues of interest. It also included information about appointments and retirements of referees; reviews of bankruptcy related books; and memorials.

Over time, the journal evolved to include and focus more on scholarly articles about bankruptcy issues, to report notable decisions by referees, and to review or discuss bankruptcy legislation in prospect or as enacted. Reporting referee decisions served a particularly important purpose prior to the launch of the Bankruptcy Reporter in 1979.

NARB's Committee on Uniformity of Practice was charged with formulating proposed rules of bankruptcy procedure. The committee was comprised of referees, receivers, trustees, attorneys, and other bankruptcy professionals. In the October 1930 edition of the journal, NARB published 100 uniform bankruptcy rules proposed for adoption by district courts. NARB also adopted a comprehensive set of proposed amendments to the Bankruptcy Act, published in the October 1932 edition of the journal.

NARB played an important role in the drafting of the Chandler Act of 1938, named after the then Chair of the U.S House of Representatives Judiciary Subcommittee, Walter Chandler. Referee Paul H. King, NARB's first president, chaired the National Bankruptcy Conference that drafted the statute. The Chandler Act, which amended the 1898 Act, together with the original 1898 Act and the Bankruptcy Reform Act of 1978, are the most significant bankruptcy laws adopted in the United States.

A bill was introduced in the House on January 2, 1943, drafted largely by the National Bankruptcy Conference, to reform the referee system. At that time, referees were appointed for two-year terms by district judges, were removable at will, were paid per case fees and commissions, and mostly held part-time positions. The bill, which was enacted as the Referee Salary Act of 1946, increased the term of referees to six years, gave them fixed salaries and federal judicial benefits, provided for removal only for incompetence, misconduct, or neglect of duty, and fostered a policy of full-time referees. By receiving a fixed salary, some referees would earn a lot more but some, primarily those who presided over the larger cases, would earn substantially less. With more full-time referees, many part-time referees would lose their positions. The Judicial Conference of the United States (JCUS) supported the bill. Although NARB's journal contained detailed summaries of the bill, NARB was conspicuously silent in not taking a position, presumably because doing so would be too divisive within NARB's referee membership. After passage of the bill, over half of the referees lost their jobs.

Many years later, NCBJ's approach addressing how NARB dealt with the bill that became the Referee Salary Act of 1946 is reminiscent of how NCBJ addressed possible bankruptcy venue reform. Bankruptcy venue reform would spread mega bankruptcy cases across the country instead of concentrating them in a few judicial districts. Instead of taking a position on the issue, NCBJ issued a white paper addressing pros and cons. Venue reform has not yet gained overwhelming traction.

The World War II years were a very difficult time for NARB and for referees. Several NARB meetings were cancelled, and both NARB and many referees experienced financial difficulties. For the six-year period from 1937 to 1942, the number of new bankruptcy cases filed in the United States was more than 50,000 annually. In 1943, the number of new cases dropped to 34,711 and the next year to 19,535, an overall decline in the two-year period of approximately 62.5%. At NARB's 1944 annual conference, there was great uncertainty regarding whether the decline in bankruptcy case filings had touched bottom. Some thought it had, but in 1945 the number of new cases dropped to about 12,000 and in 1946 to 10,196, the lowest number of cases filed in any year since enactment of the Bankruptcy Act of 1898.

In 1940, there were 453 referees in the United States. Many joined the military during World War II. The next year, the number declined to 378, and by 1946 to 334. Although the number of referees declined by about 25% between 1941 and 1945, the number of new case filings during the same period declined by about 75%. Although the increase in filings could not be predicted at the time, by 1954 filings had increased fivefold from the bottom in 1946 to 53,136, and by 1970 to about 200,000.

The statistics regarding bankruptcy case filing levels during and after World War II and the uncertainty about future filing levels after the war presents an interesting comparison to the present. There were 1,618,907 bankruptcy cases filed in 2004. Case filings spiked the next year to 1,782,643 with bankruptcy legislation looming that would decidedly tip the scales in consumer bankruptcy cases in favor of creditors. In 2006, after passage of the 2005 legislation, case filings dropped the next year to 1,112,542. Following a recession in 2008 and 2009, in 2010 bankruptcy case filings peaked again at 1,596,355. Gradually declining over the next decade during years of relative prosperity, before the Covid pandemic in the United States, bankruptcy cases leveled off in 2016 to 2019 at around 780,000 per year. As a consequence of the Covid pandemic, total case filings decreased by about half to 383,810 by 2022. For the 12-month period ending September 30, 2023, filings increased to 433,658. Like filing levels in the years following World War II, future bankruptcy case filing levels in the years following the Covid pandemic are uncertain. This uncertainty poses significant challenges for NCBJ and bankruptcy courts with respect to the division of scarce funding resources within the federal judiciary.

At its 1965 annual meeting NARB revised its constitution to change its name to the National Conference of Referees in Bankruptcy (NCRB). NCRB also revised its statement of purpose to read: "The purpose of the Conference shall be to promote better acquaintance and co-operation among the referees in bankruptcy of the United States Courts, to secure a greater degree of uniformity in the administration of estates in bankruptcy, to encourage expedition in the liquidation of estates and economy in the administration thereof, and generally to improve the practice in bankruptcy proceedings."

New bankruptcy rules were adopted, effective October 1, 1973, that identified referees in bankruptcy as bankruptcy judges for the first time. The NCRB wasted no time in changing its name again, in 1973, to the National Conference of Bankruptcy Judges (NCBJ). Yet the Bankruptcy Act of 1898, then in effect, still used the designation "referee in bankruptcy," not "judge." Between October 1, 1973, and the effective date of the Bankruptcy Act of 1978, many district judges refused to refer to bankruptcy referees/judges as judges.

The Winter and Summer 2004 issues of the *NCBJ Conference News* contained a lengthy two-part interview of Professor Lawrence King. Professor King was a renowned professor of bankruptcy law and secured transactions at New York University and was editor in chief of *Collier on Bankruptcy* for many years. Professor King was asked about how a bankruptcy trustee administering an estate under the Bankruptcy Act of 1898 had to be a business expert as well as a good bankruptcy lawyer. Professor King responded with this humorous story:

> The really good trustees made a lot of the business decisions themselves and they had an acumen for that. Bill Rochelle had – I think it was either a circus or a zoo [in the bankruptcy estate]. I don't remember, and he sold an elephant. He had sold it to somebody in Atlanta for $5,000. And I said 'Bill, isn't that awfully cheap for an elephant?' He said 'Very cheap for an elephant and I was highly criticized for a while.' I said 'What happened after a while?' He said 'Well we also had this dog. I sold the dog for $30,000.' I said "An elephant for $5,000 and a dog for $30,000? How?' He said, 'You don't understand. Elephants have buddies, and if they don't have their buddies near them all the time they don't eat, they don't sleep, they don't behave. I sold the elephant without his buddy and his buddy was this dog. These people found they had to buy the dog.'

Some things never change. Today's best bankruptcy trustees must be business experts and good lawyers. And buyers do not always perform adequate due diligence. By the way, the Bill Rochelle in the story is the father of the Bill Rochelle who writes the American Bankruptcy Institute's Rochelle's Daily Wire read religiously each day by a large number of bankruptcy judges and lawyers and other bankruptcy professionals. Bill's father was among the great bankruptcy lawyers in the nation.

In 1970 and 1971, the academic and news aspects of the Journal of the National Conference of Bankruptcy Referees were separated into two publications, the American Bankruptcy Law Journal (ABLJ) and an NCRB newsletter. Judge Conrad K. Cyr was the editor in chief of the last issue of the Journal of the National Conference of Bankruptcy Referees and the first ABLJ editor in chief. Judge Cyr was a referee/judge from 1961 to 1981, president of the NCBJ from 1976 to 1977, a district judge from 1981 to 1989 in the U.S. District Court for the District of Maine, and a judge on the U.S Court of Appeals for the First Circuit from 1989 to 2007. The first ABLJ edition featured a lead article by Harvard law professor Vern C. Countryman, a particularly renowned expert in bankruptcy and commercial law.

The span from 1980 to 1990 was a tumultuous time for the bankruptcy system and for bankruptcy judges in the United States. In 1978, Congress enacted the Bankruptcy Reform Act of 1978 which became effective October 1, 1979 (1978 Act). It established bankruptcy courts in each judicial district and vested bankruptcy jurisdiction in bankruptcy courts. It also provided that after a transition period, bankruptcy judges would be appointed by the President and confirmed by the Senate for 14-year terms, and two bankruptcy judges would serve on the JCUS. On June 28, 1982, less than three years later, the U.S. Supreme Court issued *Northan Pipeline Co. v. Marathon Pipeline Co*., 459 U.S. 813 (1982), holding that the jurisdictional grant to bankruptcy judges was unconstitutional because bankruptcy judges were not Article III judges. The Supreme Court delayed the effective date of its decision to give Congress time to fix the problem.

The primary source of controversy surrounding how to fix the constitutional infirmity of the 1978 Act was whether to make bankruptcy judges Article III judges. Two bills were introduced in the House, the Rodino-Fish bill would make bankruptcy judges

Article III judges, and the other (H.R. 3257) would vest bankruptcy jurisdiction in the district courts and allow district courts to refer the exercise of their jurisdiction to bankruptcy judges with certain limitations. Then president of the NCBJ, Judge Hal J. Bonney, and other members of the NCBJ, worked tirelessly in support of the Rodino-Fish bill. The JCUS, Administrative Office of the Courts (AO), and then Chief Justice Warren Burger personally, all lobbied Congress not to grant bankruptcy judges Article III status.

Although bankruptcy judges were not granted Article III status under the bankruptcy amendment and Federal Judgeship Act of 1984 (BAFJA), the court of appeals, not district courts, appoint bankruptcy judges to fill vacancies; the Circuit Judicial Council may remove a bankruptcy judge during the judge's renewable 14-year term only for incompetence, misconduct, neglect of duty, or physical or mental disability; each bankruptcy judge has the right to appoint a law clerk and a secretary and other staff as the AO determines to be necessary; upon certification by the circuit judicial council that the number of cases and proceedings so warrants, bankruptcy judges in a district may appoint a clerk of court; and the clerk of court may appoint and remove necessary deputies, with the approval of the bankruptcy judges in the district, in such number as the AO approves.

In 1985, only one year after passage of BAFJA, the Judicial Conference urged consolidation of district court and bankruptcy court clerks' offices to save costs where feasible. NCBJ President Judge Ralph H. Kelley and others played a prominent role in an effort that resulted in enactment of 28 U.S.C. §156(d) in 1986, which provides: "No office of the bankruptcy clerk of court may be consolidated with the district clerk of court office without the prior approval of the Judicial Conference and the Congress."

In 1987 and 1998, NCBJ, through its legislative committee, was instrumental in efforts resulting in an amendment to 28 U.S.C. §153(a), which substantially increased the salaries of bankruptcy judges, and in passage of the Retirement and Survivor's Annuities for Bankruptcy Judges and Magistrates Act of 1988, which established the retirement packages for bankruptcy judges and magistrate judges in effect today.

Over the years NCBJ and its predecessors, NARB and NCRB, have addressed many constitutional, budgetary, legislative, and bankruptcy practice challenges. For example, certain cost containment initiatives under consideration today by the JCUS present serious challenges to bankruptcy courts and the NCBJ given current budgetary pressures on the judiciary, lower bankruptcy cases filings nationwide, and the balance of power. Greater budgetary pressures on the judiciary creates greater pressure on prioritizing the allocation of scarce resources. Lower bankruptcy case filings after the Covid pandemic have reduced bankruptcy court fees as a source of revenue for the judiciary. Future bankruptcy case filing levels are inherently unpredictable.

NCBJ's Annual Conference

NCBJ's premier event is its conference held annually in the fall in different cities throughout the United States. It is quite a production. A remarkable diversity of organizations in the bankruptcy and insolvency field participate. It is a great place to learn, network and meet colleagues and for insolvency professionals to meet bankruptcy judges.

As noted above, the 2023 NCBJ Annual Conference was held in October in Austin, Texas, where it hosted over 1,400 attendees, including more than 200 sitting and retired bankruptcy judges, as well as attorneys, law professors, economists, accountants, appraisers, investors, and many others. The five-day conference included 30 educational programs, 47 meetings, 24 meals and receptions, and over a dozen organized social events.

At the 2023 conference, in addition to NCBJ, a who's who of insolvency organizations presented educational programs and awards, hosted receptions, held meetings, sponsored breakfasts, lunches or dinners, or otherwise participated in the 2023 conference, including the American Bankruptcy Institute, ABA, American College of Bankruptcy, American Inns of Court, Association of Restructuring and Insolvency Advisors, Commercial Law League of America, International Women's Insolvency & Restructuring Confederation, and National Association of Bankruptcy Trustees. Can you now name this alphabet soup of organizations: AIC, CLLA, NCBJ, AIRA, ABI, IWIRC, ABA, NABT, and ACB?

NCBJ holds its annual members and board of governors meeting at the annual conference as well as an organizational meeting to install the new board for the next year. The annual meeting features reports from the executive director of the AO, chairs of NCBJ's various committees and publications, the chair of the JCUS's Committee on the Administration of Bankruptcy (CABS), an economist, and many others. Next year's conference will be held at the beautiful Seattle Hyatt Regency from Sept. 17 through 20, 2024. The NCBJ conference is so large that NCBJ must contract with host hotels many years in advance. Future conferences will be held in Chicago (2025), San Diego (2026), Boston (2027), New Orleans (2028), and Denver (2029).

NCBJ's Committees and Publications

In addition to NCBJ's annual conference, NCBJ's various committees work year round on a wide array of missions. Here is a list of some of the many standing, special, and ad hoc committees and their missions. This partial list gives one some insight into the breadth of NCBJ's activities and the good work it accomplishes:

- <u>Academic Recognition Committee</u>. Provides grants and awards to academics, jurists, and empirical researchers to promote the development of a just, fair, exemplary, and impartial bankruptcy system in the United States.
- <u>Behind the Bench</u>. Develops four to eight consumer and commercial webinars each year for dissemination to bankruptcy professionals across the globe.
- <u>Blackshear Committee</u>. Provides a stipend for up to five minority attorneys to attend NCBJ's annual conference. This Committee is named after the highly esteemed Judge Cornelius Blackshear.
- <u>Conference News Committee</u>. Produces and publishes the *NCBJ Conference News*, the quarterly judges-only official newsletter of the NCBJ.
- <u>Diversity, Equity & Inclusion Committee</u>. Promotes diversity, equity, and inclusion within the bankruptcy profession and on the bankruptcy bench.
- <u>Education Committee</u>. Provides timely, challenging education on bankruptcy and other related topics to all registrants at each annual NCBJ conference.
- <u>Ethics Committee</u>. Assists the officers and members of NCBJ on ethics issues in connection with their NCBJ activities.
- <u>Federal Rules Advisory Committee</u>. Studies and prepares com-

ments on proposed amendments to the Federal Rules of Civil Procedure, Bankruptcy Procedure, and Evidence.

- International Judicial Relations Committee. Serves as a resource for NCBJ on international matters, including judicial exchange, educational programs, and organizational collaboration.
- Liaison Committees. Maintains and fosters ongoing relationships, cooperation, exchanges of ideas between NCBJ and other organizations, including the ABA, ABI, ABJA, CLLA, HNBA, NABT, NACTT, NBA, NCBC, TMA, UST, and the FBA.
- Legislative Committee. Offers NCBJ's perspective and educates members of Congress on issues important to the bankruptcy court system. NCBJ works with the FBA in this regard as well as with its sister organizations the Federal Judges Association (FJA-Article III Judges) and the Federal Magistrate Judges Association (FMJA-Magistrate Judges).
- Membership Committee. Welcomes new judges to the bench, seeks to engage them in the work of NCBJ and helps orient them on the many elements of NCBJ's annual conference. This committee also orders awards and produces memorials for deceased colleagues.
- NextGen Committee. Selects and hosts up to 50 up-and-coming bankruptcy practitioners from all areas of the country. Applicants must have three to ten years of experience with bankruptcy law comprising 50% of their practice.
- Public Outreach Committee. Develops programs and activities that educate and inform the public and the non-bankruptcy judiciary about bankruptcy law. At the annual NCBJ conference, this committee pairs up with a local charity and often raises several thousands of dollars in cash, supplies and/or services delivered to that charity. In its effort, NCBJ usually partners with the local bar and other insolvency communities to promote the local charity to make a greater impact. NCBJ always aims to be a grateful guest in our host cities.
- Retired Judges Committee. Serves the needs of retired bankruptcy judges.
- Schwartz Roundtable Committee. Fosters collegiality among bankruptcy judges by guiding roundtable discussions at NCBJ's annual conference on important legal topics and issues.

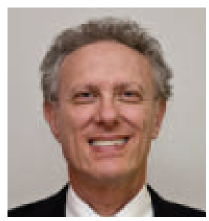
After separation of the ABLJ and NCRB newsletter into two publications, the first incarnation of the newsletter was the irreverent *The Silver Whistle*, published a few times in 1970 and 1971. Its logo included a photo of a referee in a black and white vertically striped shirt blowing a silver whistle. In 1976, NCBJ decided to publish a more professional newsletter and launched the *NCBJ Conference News*.

Both the ABLJ and *NCBJ Conference News* have flourished as separate publications. The *Conference News* is published quarterly. ABLJ is now published three times/year. The ABLJ is a peer-reviewed law review journal that publishes scholarly articles focusing on bankruptcy law and related subjects to promote the exchange of ideas and a deeper understanding of bankruptcy issues, particularly among its core audience. ABLJ's core audience includes judges, bankruptcy professionals, academics, legislators, other policymakers, and early career professionals in the insolvency community. Its editorial staff consists of an editor in chief and four associate editors, all of whom are bankruptcy judges. ABLJ is published exclusively in digital format and may be accessed free of charge at: https://ablj.org/.

The *NCBJ Conference News* currently has an 11-member staff, consisting of an editor in chief, managing editor, layout editor, and issue editors (two of whom are *Conference News* photographers). The quarterly publication is a lifeline between NCBJ and its membership and is the primary source of information for most bankruptcy judges about NCBJ's activities and activities of fellow judges. Each issue runs about 30 pages.

Conclusion

As you can see, NCBJ is much more than a "union" of bankruptcy judges who host a "see and be seen" conference for insolvency professionals. True to its mission, NCBJ leads the insolvency profession with best-in-class CLEs, input into important legislative matters addressed on Capitol Hill, thoughtful leadership through its law review journal, civic engagement though its Blackshear, NextGen, Diversity and Public Outreach Committees, and so much more. NCBJ is proud of its rich history and its engagement with the many insolvency-related professional organizations, including the FBA. Come join us! ⊙




Judge Robert H. Jacobvitz was appointed to the U.S. Bankruptcy Court for the District of New Mexico effective August 10, 2009, has served as Chief Bankruptcy Judge for the District of New Mexico since August 12, 2012, and has been a member of the Tenth Circuit Bankruptcy Appellate Panel since November 8, 2012. He is a Fellow in the American College of Bankruptcy. While in private practice, Judge Jacobvitz received an Outstanding Bankruptcy Lawyer Award for New Mexico. Judge Jacobvitz is a former president of the New Mexico Jazz Workshop and is an avid nature photographer. Judge Daniel P. Collins was appointed to the U.S. Bankruptcy Court, District of Arizona effective as of January 18, 2013. Judge Collins was the 2023 President of the National Conference of Bankruptcy Judges, is a Fellow in the American College of Bankruptcy, is on the 9th Circuit's Trial Improvement Committee, is on the JCUS's Bankruptcy Judges Advisory Group, and was on the national Board of the American Bankruptcy Institute.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Risky Business: Merchant Cash Advances

TARA TREVORROW

Every so often someone figures out how to spin revenue seemingly out of thin air and a new product hits the financial market. In the early 2000s, traders bundled mortgages into blocks and sold fractional interests in the packaged unit. By the end of the decade, the housing market imploded, making much of the security worthless and leading to the great recession. That meltdown quickly ended the Commercial Mortgage-Backed Security market's hyperactive, high-achieving phase. Fast-forward a few years, and there is new darling in the financial world: merchant cash advances, or MCAs.

As the name implies, an MCA is akin to a payday loan for a business. A casual observer would guess, based upon the name, that MCAs carry substantial risk and are governed by existing lending laws. But they would be wrong. MCAs often carry no risk at all, which begs the question of what exactly they are. They skirt the edges of established lending law by classifying themselves as "sales" rather than loans.

MCAs are touted as sales of future receivables, and early case law from state courts shows that for a time, at least, that designation was accepted as true. The MCA market continues to mature without governmental regulation, and MCAs are now making their way into federal court, with dealmakers often landing in bankruptcy court alongside their small business clients. The results are fascinating.

This article explores the world of MCAs and points out issues that bankruptcy courts must evaluate in the broader context of a chapter 11[1] restructuring case. Although the current trend seems to favor settlement prior to trial, some cases are making their way through to the bitter end, with federal courts issuing opinions that call things as they are.

To describe what is happening and why, this article covers the nature of MCAs, their role within the U.S. economy, and spotlights a recent case tackling complex issues of contract interpretation and New York state law.

What is an MCA?

For the uninitiated, the concept of an MCA is counterintuitive because the terminology does not match the deal structure. The first thing to understand is that the titles of MCA agreements and terms used in describing them are deliberately one step off of reality. Although most MCAs look and function exactly like a loan, MCA providers classify them as "sales".

Marketed as a "purchase" of future receivables, MCAs hail from the line of accounts receivable financing more familiarly known as factoring. Factoring is a form of financing where a business entity sells its interest in invoiced-but-as-yet-uncollected amounts due to the business ("accounts receivable") at a discount to an outside source of financing. The financier ("buyer") offers immediate cash to the business entity ("seller") and receives in return the right to collect on the unpaid invoices as well as an additional sum ("factor rate") to compensate for the potential risk of uncollectible invoices. To mitigate the risk of non-payment on the "sold" invoices, the financier/buyer usually restricts their "purchase" to the most recent and credit-worthy accounts receivable.

MCAs are similar to traditional factoring arrangements in most respects but differ in that they cover only receivables linked to credit card (or debit card) transactions. This is an intentional distinction.

Limiting an MCA provider's "purchase" to credit/debit card sales transactions offers a certain amount of predictability regarding payment. Although chargebacks are possible, the credit card issuer essentially guarantees timely (and full) payment of the subject invoices pursuant to the terms of its own agreement with the cardholder. In contrast to payment via check, business to business credit, or some other trade arrangement, payment via credit card settlement is a relatively sure win.

As another condition of their "purchase," MCA providers also frequently require businesses to segregate credit card receivables into a designated merchant account. The reasons for this isolation are twofold: first, it gives MCA providers certainty as to which receivables are "theirs", so to speak, and second, it enables MCA providers to do a clean sweep of the merchant account, plucking off its daily or weekly ration of the small business's income.

A bit more explanation of the key components may help. Three concepts are important at this stage: merchant accounts, holdbacks, and sweeps.

Merchant accounts

A merchant account is a separate bank account designed to function as a clearinghouse for credit card and debit card payments. Depending upon the type of credit card processor a small business uses, the business's receivables may be commingled with receipts from other businesses, or held entirely separate in an account linked to only that business. MCA providers may prefer the latter arrangement because it makes it simpler to earmark the receivables that the MCA provider has "purchased."

The requirement of a specialized bank account for credit card transactions derives from the nature of credit card processing itself, not MCAs. Without going into extensive detail regarding the mechanics, the process involves multiple steps. There is an initial validation, or credit check, at the time of sale (usually happening seconds after a credit card is inserted into a point of sale (POS) machine). A day or two later, a settlement phase occurs after a verification and authorization process. The end result is a transfer of funds to the waiting merchant, either into a special merchant account for that small business, or perhaps an operating account (after a stopover into a merchant account held by a third party processor).

Requiring a small business to place credit card receivables into a designated merchant account makes collection a simple process for an MCA provider. The funds are ready and waiting as soon as the settlement process finalizes, and there is no concern that a sweep of the account will result in an inadvertent transfer of "unsold" funds earmarked for operational costs.

So why does this matter?

There are a number of reasons, with the most significant being that segregation of potential MCA repayment funds alleviates the risk of nonpayment. If a credit card receivable comes in, the MCA provider knows and has immediate access to it. This makes sense if you accept the characterization of the MCA arrangement as a "sale". It makes less sense when you look at the transaction from a 10,000 foot level, peeling back the layers to reveal the heart of the deal. From a higher vantage point, the segregation strongly resembles a risk mitigation device.

In order to understand the full picture, a bit more explanation of the mechanics of MCA transactional requirements may help. The next concepts to grasp are sweeps and holdbacks, as both functionally ensure prompt (and full) payment of the "sold" receivables to the MCA provider.

Holdbacks and Sweeps

Unlike traditional loans, most MCAs require payment of a fixed amount on a daily or weekly basis. That payment amount incorporates a baked-in factor rate that functions similar to an interest rate in practice, if not in theory. (Remember, MCA providers contend that the transaction is a "sale," not a loan.)

The way that the MCA provider collects the "purchased" receivables (plus the factor rate) is nothing if not efficient: they take the money directly from the merchant account. This is possible because it's precisely what most MCA agreements provide.

MCA agreements generally contemplate a transfer of control over a small business's finances in two ways: the ability to pull funds from ("sweep") a designated account, and the amount that must remain in the account (ready for a sweep) at all times. The amount that a merchant must hold available on a daily or weekly basis is called a holdback.

The ability to simply grab funds when needed is, of course, a creditor's dream. There's no risk of ending up thirsty when you have access to the well. By requiring a minimum amount of funds to be ready and waiting at all times (a holdback), and then executing regular sweeps of the merchant account, MCA providers ensure that they have constant access to the assets they have "bought."

Sale versus Loan

The million-dollar question is whether MCAs may rightfully be called sales (as MCA providers argue) rather than loans (as bankrupt businesses have begun to argue). The answer currently depends in large part upon the terms of the subject agreements, which federal courts are now inspecting closely. Their terms typically include significant risk mitigation devices, and courts are taking notice.

In addition to the concepts already described in this article (segregated funds, holdbacks, and sweeps), MCA agreements may contain other terms that effectively shift the burden of risk to the small business. The spectrum varies from silent attacks (like terms that make a small business "seller" instantly in default) to nuclear warfare in the form of guaranties ensuring a business owner's personal liability even if the company becomes insolvent.

MCA providers contend that these terms (including the ability to execute on a personal guaranty) are not onerous because they simply ensure that MCA providers receive the benefit of their agreed-upon bargain. That type of thinking leads to the all-important question of what exactly is that bargain? Is it a loan or a sale?

For all practical intents and purposes, if no risk of nonpayment exists, then existing law provides that the transfer of funds is a secured loan.[2] Changing the name to "sale" on the governing documents doesn't magically transform the transaction into something that it is not.[3] And, recently, federal courts have begun to focus on exactly that: the truth behind the nature of the deal.[4]

The next step in understanding the world of MCAs is appreciating why these business arrangements exist.

Why Do Business Owners Agree to MCAs?

With the risk squarely (or seemingly so) on the shoulders of the small business owner, it's easy to wonder why anyone would ever agree to an MCA. MCA providers offer the anodyne platitude that doing so makes sense whenever the business owner has the ability to generate revenue in excess of the cost of capital. They aren't wrong—that is the textbook answer for why any business should take on debt—but the circumstances giving rise to an MCA deal frequently have little to do with seizing a unicorn business opportunity.

First, the daily pressures of running a business are intense. Margins are often slim, and payroll must be met. Quick cash with minimal (or no) credit check is appealing when it looks like revenue is falling short of expectations.

Second, the pervasive marketing of MCAs is relentless. Small business owners receive unsolicited texts and phone calls seeking a "purchase" of receivables on a frequent basis. Anecdotal stories of boiler room sales tactics have begun to surface.

Third, the slick convenience and relative ease of MCA deals are hard to ignore. Small business owners can sign up online 24 hours a day. It only takes a few minutes and a handful of clicks for a small business owner to sign away their business income.

Finally, and most importantly for many small businesses, there is no other option for outside financing. Traditional small business financing requires at least two years' worth of financial statements. What is a small business to do within the first two years of operation if a needed piece of machinery breaks down, or there is an unexpected shortage of key supplies? How can a business survive the all-important first two years, if not by accessing the only cash available to it?

The answer is, unfortunately, that the business will likely not endure either way, absent a phenomenal surge in revenue. The reason for that dire prediction is none other than the "cost of capital", as MCA providers obliquely refer to financing terms that flaunt civil and criminal usury standards.

Cost of Capital

The cost of entering into an MCA is steep from the small business's perspective. Tapping into future revenue at today's prices means something has to give. That something is future income, and lots of it.

MCA providers impose a factor rate upon the use of their funds, or to put it in terms that they prefer, MCA providers include an extra amount (relative to the total amount of accounts receivable "sold") that they will extract from future receivables as part of their "purchase." (Again, remember that the deal is referred to as a sale rather a loan, so the factor rate is intentionally not described as interest even though it serves precisely the same purpose.)

Factor rates are fixed rates that form part of the initial calculation of the cost of capital. Unlike interest rates, which often refer to a percentage over the London Interbank Offered Rate (LIBOR) or Secured Overnight Financing Rate (SOFR), factor rates are not linked to external variables. This additional amount of income that an MCA provider requires as part of its "purchase" of receivables is disclosed up front and must be paid regardless of subsequent business pressures or changes in market forces.

Factor rates are expressed as a decimal rather than a percentage. That distinction masks the financial impact of seemingly small numbers.[5] Factor rates currently range from 1.2 to 1.5.[6] Assuming a modest "sale" of $10,000 of accounts receivable, a factor rate of 1.2 (the lowest end of the spectrum), and daily payments of $200, the total payback amount would be $12,000 spread over 60 days. Translating that payment plan into more familiar market terms, this type of transaction would result in the equivalent of an effective APR of over 225%. Keeping all variables the same and increasing the factor rate to 1.5 results in the equivalent of an effective APR of over 421%.

Those eye-watering rates are perfectly legal. Or are they?

Public Policy Issues and Bankruptcy Courts

Bankruptcy courts in particular have a strong public policy incentive to examine all relevant evidence regarding the nature of a disputed MCA transaction because this form of financing impacts an essential part of the broader U.S. economy. Based on the Small Business Administration definition of a small business as an establishment with fewer than 500 employees, there were 7,977,623 small businesses as of 2020.[7] Within the past ten years, data indicates that those same small businesses employ over half of the nation's private sector workforce.[8] The ability of a vital sector of the broader U.S. economy to reorganize in bankruptcy court (and thereby keep workers gainfully employed) is no small matter.

Although federal courts cannot and should not attempt to regulate an entire swath of the financial industry, looking at all aspects of an MCA transaction connected to a bankruptcy debtor makes sense in the larger scheme of evaluating confirmability of a plan or priority of distribution in a liquidation. In some instances, fraudulent marketing may underlie the business's entry into an MCA or explain the existence of an onerous personal guaranty.[9] In other instances, the reasons might be less clear. Whatever the circumstance, bankruptcy courts must assess the validity, priority, and extent of any potential liens or other claims to estate assets.

Business debtors are starting to direct the bankruptcy court's attention to the full deal structure of burdensome MCAs, including the circumstances surrounding execution. Sometimes they are not alone in this endeavor.

Business Debtors Fight Back

In the bankruptcy arena, small businesses are beginning to fight back against the impact of MCAs on their reorganization prospects. Well-established small business debtors with traditional loans who take out prepetition MCAs may find themselves with unlikely bedfellows: an institutional lender holding a security interest in cash collateral, or other creditors left holding the bag after an MCA provider claims a security interest (via an allegedly questionable UCC filing) against all postpetition income.[10]

Circumstances vary as widely as the types of businesses filing bankruptcy and their deal partners, so drawing hard and fast legal conclusions at this stage of the game is difficult. That being said, there is some commonality in the causes of action and arguments asserted by business debtors and, to a lesser degree, their unexpected allies (secured lenders and trade creditors). Complaint allegations often include Racketeer Influenced and Corrupt Organizations Act (RICO)[11] claims (collection of an unlawful debt), furtherance of a Ponzi scheme, tortious interference with business relationships, violation of the automatic stay, and lack of compliance with applicable lending laws.

Causes of action regarding lending laws typically focus on the laws of one state, New York. The reason follows a simple logical path. MCA agreements typically refer to New York state law as the governing law. The motivator for that designation is almost certainly New York's confession of judgment process.

Up until 2019, New York's confession of judgment statute (New York Civil Practice Law and Rules § 3218)[12] allowed MCA providers to enforce personal guaranties against small business and their owners even if the owners resided out of state. Recent changes to § 3218 have slightly throttled use of the confession of judgment process. In addition to continuing the existing requirement that confessions of judgment be filed within three years of execution, a 2019 amendment to the statute limits enforcements to confessions of judgment accompanied by an affidavit signed by a party attesting to New York residency at the time of signing. [13]

With those observations in mind, two collateral points come into focus. First, most MCA agreements require collection of receivables over a maximum of three years. The continuity of timing compared to § 3218 (also three years) does not appear to be accidental. Second, the geographic limitations imposed by § 3218 affect only natural persons. "Non-natural persons" (i.e. businesses) reside in any county in which they conduct business. This rather broad exception opens the door to enforcement mechanisms against the company itself, even though the newer version of the statute offers some protection to the business owner personally.

Current Case Law

Bankruptcy and district courts are wading into the morass formed by contract interpretation of MCA agreements, evidence regarding the course of dealing between parties, New York state law (including banking law), and common sense. Juggling a diverse pool of litigants and multiple versions of "cash advance" or "revenue purchase" agreements with slightly varying terms (sometimes in the same case), courts are shifting their focus to economic reality rather than window dressing.

Fleetwood Services v. RAM Capital Funding, LLC is a prime example of what happens when a federal court dives into the substance of an MCA transaction.[14] In a lengthy and detailed analysis, the *Fleetwood* court observed that that "hallmark" of a loan under New York law is whether the principal sum is absolutely repayable.[15] This simple principle evokes a refreshing pragmatism that is likely to infuse future opinions from other courts. If the MCA provider as buyer assumes significant risk of nonpayment of purchased receivables, then the transaction seems more like a sale (i.e. caveat emptor). If the MCA provider has some other form of recourse against nonpayment—for instance, the ability to pursue a personal guaranty—the transaction looks an awful lot like a loan, no matter what the title of the agreement may say.

Opinions like *Fleetwood* dutifully recite and apply existing standards, including a 3-factor test addressing the loan versus sale question for MCAs under New York law. The factors are "(1) whether there is a reconciliation provision in the agreement, (2) whether the agreement has a finite term, and (3) whether there is any recourse should the merchant declare bankruptcy."[16] Even after applying this test, however, courts are free to look at the broader picture and determine for themselves whether the transaction looks like a duck, walks like a duck, and quacks like a duck.[17]

Ultimately, the challenge in analyzing MCA agreements for any court is not simply acknowledging and applying the existing tests, but having the time and resources to deeply examine agreements and facts that intentionally defy obvious categorization. With so much effort placed into structuring a financing deal as a sale rather than a loan, the obvious question becomes, why? Why indeed. The answer, of course, is money, or more specifically, the ability to make (plenty of) money without (ostensibly) violating usury law.

Usury

With a little creative license, MCAs can be viewed as the lending market equivalent of microloans. They are designed to stay in the lower range of financial markets and tied to a relatively small revenue stream. For this reason, if designated as loans, they would fall under New York state law regarding civil and criminal usury. The civil usury rate (currently 16%) allows a borrower to plead usury as an affirmative defense in a collection action. The bigger issue for MCA providers, however, is the criminal usury rate (currently 25%). If an MCA is a loan, and the factor rate places it well above the criminal usury rate, then a bankruptcy debtor's RICO claim might have very big teeth.[18]

Given the usual set of parameters regarding payment term and amount, even the lowest commonly available factor rate (1.2) exceeds the criminal usury rate. That classification fuels a strong incentive for MCA providers to dress up the deal in a non-loan costume.

Whether an MCA must be viewed as a loan ultimately becomes a key question in the context of a reorganization plan. Should the MCA provider be able to siphon off accounts receivable vastly in excess of whatever amount the small business originally accepted in cash? Is the MCA a disguised criminally usurious loan? Or is it a bona fide sale?

Complicating a bankruptcy court's analysis are two competing concerns. First, even if one accepts the premise that an MCA is, in substance, a sale, the deal terms are almost always punishing. It's difficult to imagine a scenario where a struggling business accepts quick cash by forfeiting its future income stream and yet isn't somehow negatively affected. Those instances must exist, but logic dictates that they are probably the exception rather than the rule.

Second, the right to contract is a long-held tenet of common and constitutional law. It is not the court's job to rewrite a bad deal. But, in the bankruptcy context, it is perfectly acceptable to approve a rejection, assuming that the contract is executory and not papering a disguised secured transaction. That particular rabbit hole has yet to be explored in the bankruptcy world as it applies to MCAs, but it's probably only a matter of time.

Predicting The Future

MCA law appears to be in its infancy, yet the parallels to the "sale versus lease" debate of yesteryear are obvious. It seems likely that courts will ignore the current game of make-believe perpetuated by the financial industry and instead put MCAs into their proper taxonomic rank. In the interim, small businesses will continue to weigh the pros and cons of quick cash at a steep cost.

The bigger issue to consider from a public policy perspective is the vacuum in the existing finance market for small businesses. If MCAs represent the only possible source of outside financing, what is the alternative for most new businesses, other than immediate failure and dissolution? Should the MCA sector of the financial market be regulated to improve the strength and resilience of the broader economy? Or is it appropriate to let small businesses fuel a growing sector of private investment at the risk of undermining their own existence? What represents the greater good for the balance of the nation?

These are difficult questions, far beyond the scope of what a federal court will determine. But there's no question that the MCA bankruptcy battles are just beginning, and the outcome will change the market. ☉

Tara Trevorrow is a Judicial Law Clerk for the United States Bankruptcy Court, Southern District of Florida (Honorable Mindy A. Mora, West Palm Beach). Prior to joining the Court, Ms. Trevorrow worked as business bankruptcy attorney for twelve years in international and Florida law firms. Ms. Trevorrow is

committed to giving back to her community. She currently serves as the Vice Chair of the Pro Bono Committee (Business Law Section of the Florida Bar), Vice Chair of the Financial Literacy Task Force (Business Law Section of the Florida Bar), and Chair of the Financial Literacy Committee (Bankruptcy Bar Association of the Southern District of Florida). Ms. Trevorrow is a Fellow in The Florida Bar Williams Reece Smith, Jr. Leadership Academy Class XI (2023-2024). Before starting her legal career, Ms. Trevorrow was a professional ballet dancer in the United States and France.

Endnotes

[1]11 U.S.C. § 1101 *et. seq.* (2023).

[2]*See, e.g., Fleetwood Servs. v. RAM Cap. Funding, LLC*, Case No. 20-cv-5120, 2022 WL 1997207, at *27 (S.D.N.Y. June 6, 2022) (citing *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 122 N.Y.S.3d 309, 312 (N.Y. App. Div. 2020)).

[3]*Fleetwood Servs.*, 2022 WL 1997207, at *27.

[4]*Id.*

[5]For math-phobes, the easiest way to see through the smoke and mirrors and approximate the deal terms is to multiply the factor rate by 100, i.e. 1.2 becomes 120%. (So using the example in the rest of the above paragraph, $10,000 x 120% = $12,000.) That is the amount that must be repaid, with the equivalent interest rate potentially several orders of magnitude higher due to the time frame by which the MCA provider must collect their "purchased" receivables.

[6]*See* Olivia Chen, *Merchant Cash Advance Calculator: Find the True Cost of an MCA*, Nerdwallet (Sep 8, 2023), https://www.nerdwallet.com/article/small-business/merchant-cash-advance-mca-calculator.

[7]*See* Adam Grundy, *U.S. Census Bureau Resources, Data Tools, New Website for Small Businesses,* U.S. Census Bureau (May 4, 2022), https://www.census.gov/library/stories/2022/05/how-small-businesses-impact-economy.html. Research indicates that 2020 is the most recent year for which reliable data is available.

[8]*See* Jared Hecht, *Are Small Businesses Really the Backbone of the Economy?*, Inc. (Dec. 17, 2014), https://www.inc.com/jared-hecht/are-small-businesses-really-the-backbone-of-the-economy.html.

[9]*See* Press Release, *Broward County Resident Sentenced to 110 Months in Prison for Conspiracy in MJ Capital Funding, LLC Ponzi Scheme*, U.S. Dep't of Justice (Sep 20, 2023), https://www.justice.gov/usao-sdfl/pr/broward-county-resident-sentenced-110-months-prison-conspiracy-mj-capital-funding-llc.

[10]See, e.g., Motion for Summary Judgment at ¶¶ 6-12, Adv. Proc. No. 2301022, ECF No. 27 (Bankr. S.D. Fla.).

[11]18 U.S.C. § 1961 *et. seq.* (2023).

[12]N.Y. C.P.L.R. § 3218 (Consol. 2023).

[13]*Id.*

[14]Case No. 20-cv-5120, 2022 WL 1997207 (S.D.N.Y. June 6, 2022).

[15]*Id.*

[16]*LG Funding, LLC v. United Senior Props. Of Olathe, LLC*, 122 N.Y.S.3d 309, 312 (N.Y. App. Div. 2020); *Fleetwood Servs.*, 2022 WL 1997207, at *27 (citing same).

[17]For instance, the presence of a reconciliation provision is a red herring if it does not allow for a meaningful, real-time true-up of income verses expenses, and most do not. Many MCAs require daily or weekly sweeps set against a once-a-month reconciliation clause, which means that the effectiveness of this type of clause as an escape hatch for a struggling business entity is entirely debatable.

[18]Civil RICO provisions may apply to amounts that are double (or more) than the enforceable rate. *Fleetwood Servs.*, 2022 WL 1997207, at *19.

In Rem *continued from page 65*

[13]However, some courts have found that the existence of serial filings alone is sufficient to infer an intent to hinder, delay, or defraud creditors. *See, e.g., JP Morgan Chase Bank, NA v. Caires (In re Caires*), 611 B.R. 1 (Bankr. D. Conn. 2020).

[14]*See, e.g., In re Montalvo*, 416 B.R. 381 (Bankr. E.D.N.Y. 2009).

[15]*In re Merlo*, 646 B.R. 389, 395 (Bankr. E.D.N.Y. 2022)(quoting *In re Montalvo*, 416 B.R. 381 387 (Bankr. E.D.N.Y. 2009).

[16]*In re Yellowman*, 2023 WL 5658795, at *5 (Bankr. D.N.M. Aug. 31, 2023).

[17]*In re Danley*, 540 B.R. 468, 476 (Bankr. M.D. Ala. 2015).

[18]*Id.* at 480.

[19]*See, e.g., Johnson v. TRE Holdings, LLC (In re Johnson)*, 346 B.R. 190 (9th Cir. B.A.P. 2006).

[20]*In re Buczek*, 2023 WL 5770130, at *3 (Bankr. W.D.N.Y. Aug. 24, 2023).

[21]*Id.*

[22]Section 109(g) renders a debtor ineligible to file bankruptcy if (1) "the case was dismissed for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case" or (2) "the debtor requested and obtained the voluntary dismissal of the case following the filing of a request [for stay relief]." This is a useful tool, however, if neither of these two conditions are met, a secured creditor can make a 180-day ban request pursuant to the court's inherent powers under § 105.

[23]*See In re Vazquez*, 580 B.R. 526, 535 n.2 (Bankr. C.D. Cal. 2017).

[24]F.R.B.P. 4001(a)(1).

FOUNDATION of the FEDERAL BAR ASSOCIATION

The Foundation's Purpose, as stated in U.S.C. Title 36, Section 70502 (2) of the Foundation Charter:

Public Law 662 CHAPTER 911

AN ACT

To incorporate the Foundation of the Federal Bar Association.

August 24, 1954 [H. R. 9862]

The Foundation of the Federal Bar Association. Incorporation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following-named persons, Justin Miller, California; William L. Ellis, Michigan; Bettin Stalling, Illinois; William S. Tyson, North Carolina; Kennedy C. Watkins, District of Columbia; Martin C. Epstein, New York; Laurence H. Axman, District of Columbia; Julian R. Eagle, Pennsylvania; William F. Farrell, Texas; Barratt O'Hara, Junior, Illinois; Joseph F. Brodie, California; Spurgeon E. Paul, Colorado; J. Edward Hauk, Maryland; Ida I. Kloze, Maryland; William R. Vallance, New York; Clyde Baggarly, Virginia; Charles W. Freeman, California; William A. Roberts, District of Columbia; Ralph G. Cornell, Maryland; Horace Russell, Illinois;

Robert E. Freer, Ohio; Frank J. Delany, Illinois; William N. Merell, Minnesota; Heber H. Rice, Maryland; William E. Reese, Virginia; Robert N. Anderson, Virginia; Marguerite Rawalt, Texas; Robert H. Shields, Maryland; Harold Lee, New York; James E. Palmer, Junior, Virginia; John A. McIntire, Maryland; Major General E. M. Brannon, District of Columbia; Maxwell H. Elliott, New York; Edwin L. Fisher, Maryland; Edward E. Odom, California; Rear Admiral Ira H. Nunn, Arkansas; Herman Phleger, California; Arthur J. Klayman, Illinois; F. Joseph Donohue, District of Columbia; Frank J. Parker, New York; Ernest Votaw, Pennsylvania; T. Wade Harrison, Florida; Admiral O. S. Colclough, Pennsylvania; J. Lee Rankin, Nebraska; Stanley N. Barnes, California; Newell Blair, Virginia;

To apply its income, and if the corporation so decides, all or any part of its principal, exclusively to the following educational, charitable, scientific, or literary purposes, or any of them: (a) To advance the science of jurisprudence; (b) To uphold high standards for the Federal judiciary and for attorneys representing the Government of the United States; (c) To promote and improve the administration of justice, including the study of means for the improved handling of the legal business of the several Federal departments and establishments; (d) To facilitate the cultivation and diffusion of knowledge and understanding of the law and the promotion of the study of the law and the science of jurisprudence and research therein, through the maintenance of a law library, the establishment of seminars, lectures, and studies devoted to the law, and the publications of addresses, essays, treatises, reports and other literary works by students, practitioners, and teachers of the law.

The Foundation of the Federal Bar Association

Who we are and what we do

AARON BULLOFF

Did you know the Foundation of the Federal Bar Association was chartered by Congress as a 501(c)(3) organization in 1954? We turn 70 this year, but it's the last 22 that have seen the Foundation grow and become the active supporter of federal law that it is today.

The Foundation's purpose is to procure funds that advance objectives exclusive to the following educational, charitable, scientific, or literary purposes:

Promote and support legal research and education;
Advance the science of jurisprudence;
Facilitate the administration of justice; and
Foster improvements in the practice of Federal law.

Early efforts sought to advance various parts of the Foundation's mission and purpose. On Sept. 24, 1959, Chief Justice Earl Warren challenged the FBA at its annual meeting "to launch a virile program for the improvement of judicial and administrative processes." Taking up the challenge, the Foundation launched a research project titled "Delays in Justice in the Federal Courts: Their Causes, Effects, and Related Social Phenomena." In September of 1965, the Foundation published *Equal Justice Under Law: The Supreme Court in American Life*. The book provided summaries of landmark cases, profiles of Justices, and other stories about the history and influence of the Court. In the next six years the Foundation sold almost 200,000 copies of the book.

In the 1990s, the FBA devoted substantial effort to advocating for the increase of federal judges' salaries. In 2001 and 2003 the FBA collaborated with the American Bar Association in the publication of two white papers on federal judicial compensation that helped secure increased salaries.[1] These reports were presented to Chief Justice William Rehnquist at the Supreme Court. The cost of the White Papers was underwritten in substantial part by the Foundation.

In later years, however, the Foundation experienced difficulties advancing its mission. It simply did not have assets to do so. At the time, it did not have an investment corpus from which to draw and depended upon contributions to pay for its specific efforts. The assets that the Foundation did hold primarily consisted of old law books and plaster busts of eminent jurists. But then, at a watershed time, 2000-2001 National FBA President Robert A. McNew—with substantial assistance from FBA members David Guerry, Dennis Clark, past national presidents Russel del Toro, Adrienne Berry, Joyce Kitchens, Bob Mueller, and others—began a campaign to raise funds for the Foundation that would sustain programming on an annual basis. After approximately 15 years, their persistent, relentless, arm-twisting efforts culminated in the successful realization of a corpus goal of $1 million.

"The purpose of the Fellows of the Foundation of the Federal Bar Association ("Fellows") shall be to assist in the realization of the objectives of the Foundation by encouraging adequate financial endowment of the Foundation by means of gifts, devises and bequests and by recommending to the Board of Directors projects and programs which, if undertaken by the Foundation, would in the judgment of the Fellows promote legal and other research of importance to federal jurisprudence, the improvement of the administration of justice and the maintenance of the honor and dignity of the legal profession."

An additional important aspect of this fundraising effort was the creation of the Fellows of the Foundation program in 2002. Original bylaws created for the Fellows program were incorporated into the Foundation bylaws in 2017, which were amended to add Article VIII:

> "The purpose of the Fellows of the Foundation of the Federal Bar Association ("Fellows") shall be to assist in the realization of the objectives of the Foundation by encouraging adequate

financial endowment of the Foundation by means of gifts, devises and bequests and by recommending to the Board of Directors projects and programs which, if undertaken by the Foundation, would in the judgment of the Fellows promote legal and other research of importance to federal jurisprudence, the improvement of the administration of justice and the maintenance of the honor and dignity of the legal profession."

(Top photo) On March 15, 2002, the first class of Fellows were inducted at a luncheon ceremony in Washington, D.C. Created to bolster support for the Foundation, the Fellows program recognizes individuals who have demonstrated exceptional leadership within the FBA and the federal legal community. Honorary Life Fellows eventually will include Supreme Court Associate Justices Stephen Breyer (2007), Sandra Day O'Connor and Antonin Scalia (both 2008), Sonia Sotomayor and Ruth Bader Ginsburg (both 2009), Elena Kagan (2011), Clarence Thomas (2012), and Neil Gorsuch (2018). (Bottom photo) On May 23, 2003, Chief Justice Rehnquist (left) with ABA President Alfred Carlton, FBA President Kent Hofmeister, and Associate Justices Breyer, Souter, and Kennedy at the presentation of *Federal Judicial Pay: An Update on the Urgent Need for Action.*

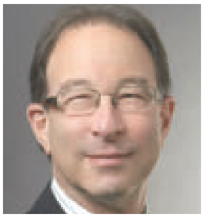
Candidates nominated for the Fellows program must have five years membership in the FBA and have demonstrated exceptional leadership within the FBA and the federal legal community. Fellows support the Foundation through a $1,500 contribution as well as by their service in support of Foundation programing. On March 15, 2002, the first class of Fellows, comprised of 24 Charter Life Fellows (those who completed their pledge in full) and 50 Charter Fellows, was inducted. The Fellows program is now comprised of 279 members, including eight Supreme Court Justices who are honorary members.

The continued growth of the Foundation's investment corpus was aided in the last several years by three additional factors: a favorable investment climate in the several years prior to the Covid pandemic; the professional management of the Foundation's investment corpus by Truist Financial Corp.; and substantial donations made by the Federal Bar Building Corp. in 2021 and 2022. Truist's management continues to the present day and has, with few exceptions, met market benchmarks. These three factors allowed the Foundation's investment corpus to more than double the initial $1 million goal set by FBA President McNew.

Like most investors, however, the Foundation incurred investment losses in 2022 due to the pandemic's impact on the economy. Throughout fiscal year 2023, the Foundation's investment corpus hovered in the $1.6 million to $1.75 million range, depending upon market fluctuations. The Board of the Foundation, in conjunction with advice from the Foundation's investment managers, determined that programming should continue to be budgeted for and funded at a dollar amount not exceeding 5 percent of the investment corpus, plus any contributions received during a fiscal year. This ensures that the corpus will maintain a sustainable amount for future years.

Following that 5 percent budget guideline, the Foundation continues to endow scholarships, grants, awards, and sponsorships and has even increased the funds for some. The Foundation has awarded nearly $750,000 in total to middle, high school, university, and law school students as well as FBA members, chapters, sections, and divisions. This demonstrates its significant impact in the legal community at large.

In connection with the increased Foundation corpus, the Foundation Board has boosted the amount of funds available for grants and scholarships. Selection committees for each program make award recommendations to the FFBA Board of Directors which, after discussion, approves the final grant and scholarship funding. Starting in 2022, we doubled the budget for Diversity Grants as well as the number of scholarships awarded (from one of each to two) each year. ⊙



Aaron Bulloff is past president of the Foundation and current chair of the Fellows Committee.

Endnotes

[1] *Federal Judicial Pay Erosion; A Report on the Need for Reform,* presented on February 13, 2001, to Chief Justice Rehnquist; *Federal Judicial Pay: An Update on the Urgent Need for Action,* presented on May 23, 2003, to Rehnquist.

Foundation Grants, Scholarships, and Awards as of Sept. 30, 2023:

Robert A. McNew Law Student Scholarship
Scholarship amount: $5,000
No. of scholarships awarded since 2015: 10
Total amount of awards: $50,000

Kintner Public Service Scholarship
Scholarship amount: $5,000
No. of scholarships awarded since 2004: 21
Total amount of awards: $90,000

Dr. J. Clay Smith Jr. Diversity in the Legal Profession Scholarship
Scholarship amount: $15,000
No. of scholarships awarded since 2021: 5
Total amount of awards: $75,000

Chapter Community Outreach Grants
No. of Chapter Outreach Grants awarded since 2011: 86
Total amount of awards: $127,000

Diversity Grants
No. of Diversity Grants awarded since 2017: 51
Total amount of awards: $147,000

Ilene and Michael Shaw Public Service Awards Fund
$20,000 annually
Total amount of awards since 1986: $240,000+

Elaine R. "Boots" Fisher Award
$1,000 annually
Total amount of awards since 1990: $10,000+

Peter J. Mazza Outstanding Federal Lawyer Award
$500 annually
Total amount of awards since 2001: $1,500

Total amount of grants, awards, and scholarships given in FY2023:
$112,737

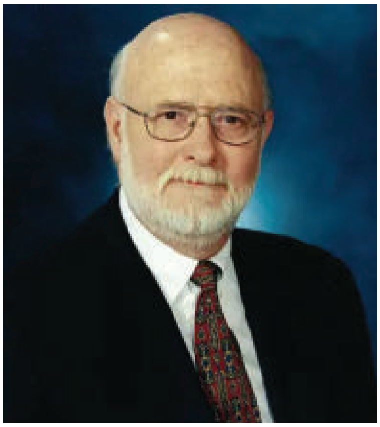
The Foundation's thoughtful approach to programing and its funding has also allowed it to fund special programs, such as the September 1, 2017, Hurricane Disaster Fund, created to provide financial assistance for FBA members and their families who were victims of Hurricane Harvey, and later Hurricanes Irma, Jose, and Maria. Further, the contributions of more than 70 Foundation Fellows and four Fellows' law firms helped underwrite the 2020 publication of Centennial, Celebration 100 Years of the Bar and Bench, 1920-2020, a high-quality, photo-filled book covering the history of the FBA.

As the Foundation approaches its 70th birthday, it now looks to its role in the future of the FBA legal community and of the legal community at large. To that end, in 2022-2023 it undertook a year-long engagement led by a professional strategic planner to help chart its course going forward. The effort anticipated and considered the late 2023 receipt of roughly $2.6 million in donated funds from the dissolution of the Federal Bar Building Corp. (the result of the sale of the office condo owned by the FBBC and the FBA Board of Directors' decision to rent its headquarters space going forward). The Foundation's investment corpus now exceeds $4 million, which allows for new thinking guided by the strategic planning effort.

The Foundation's next chapter awaits. Even before the dawn of the new fiscal year on October 1, the Foundation Board of Directors started putting the goals of the three-year strategic plan to action. With the help of more than 35 Fellows volunteers, the Board and FBA staff will collaborate during the next three years to achieve the plan goals: raise the visibility of the Foundation; deepen the pride, prestige, and engagement of Foundation Fellows; engage in programming that deepens and broadens the Foundation's impact; and engage in best practices in governance and financial stewardship.

Keep an eye on us. You'll like what you're going to see.

Robert A. McNew: His Foundation Legacy Endures



More than 20 years ago, Past FBA President and Foundation Fellows Chair Bob McNew revitalized the Foundation with the Fellows program and increased contributions.

In 2001, Bob McNew, after completing his year as President of the FBA, spearheaded an effort to revive the moribund Foundation and modernize its purpose to reflect modern times and needs, including ongoing funding, education, and more opportunities for fellowship and networking.

A natural corollary of this effort was the creation of the Fellows. Initially and primarily aided in this effort by former FBA presidents Adrienne Berry and Joyce Kitchens, Bob used his nationwide contacts to secure initial donations—essentially seed money—to put together the larger group that would work through revitalizing the Foundation and broadening its purpose and vision. As the effort grew and became more popular, scholarships were funded, programs started, and Fellows gatherings began.

A strong second wave of support came from many stalwart supporters including active volunteers Col. Winston Haythe, Dennis Clark, Russel del Toro, Hon. Gustavo Gelpi, Aaron Bulloff, and David Guerry. Chapters which provided early and ongoing support included Northern Virginia, Puerto Rico, New Orleans, and many others. Over time, the funds grew, and the development of programs and scholarships followed. In 2014, as Bob finally rotated off the Foundation Board of Directors and hosted his last dinner as chair of the Fellows, a concerted effort to raise pledges was made which culminated in the Foundation reaching its first million-dollar corpus. None of this would have happened without the vision and never-ending efforts of Bob McNew.

Sadly, our colleague passed away on November 14, 2023, after a long illness. Before Bob's death, his family requested that family and friends make donations in memory of Bob's vision for the Foundation.

Winston Haythe writes about Bob:

"By sheer coincidence, I became a 50-year member of the Federal Bar Association in the same month that our beloved friend and former FBA President Robert Alton McNew passed on to his heavenly reward. I shall forever be grateful to Bob who, along with former presidents Adrienne Berry and Joyce Kitchens, initially reached out to me to become a Fellow of the Foundation. My decision to do so immediately was an easy choice, especially when three close friends had issued the call. As a result, I later had the privilege of hosting the first two Fellows Dinners at my private social club on Embassy Row in Washington, D.C., as well as a third dinner much more recently.

In 2014, as Bob finally rotated off the Foundation Board of Directors and hosted his last dinner as chair of the Fellows, a concerted effort to raise pledges was made which culminated in the Foundation reaching its first million-dollar corpus. None of this would have happened without the vision and never-ending efforts of Bob McNew.

"When Bob McNew became chair of the Fellows program, following his presidency of both the FBA and thereafter the Foundation, he breathed renewed vigor into the organization. Because of his devotion and tireless leadership, the corpus of the Foundation grew to exceed a million dollars for the first time, thanks to those Fellows who 'stepped up to the plate' in honor of Bob to push the Foundation over the seven-figure threshold.

"Today the Robert A. McNew Law Student Scholarship is a tangible, living monument to Bob's generosity of spirit and effective leadership. His accomplishments and dedication will live on in the hearts and minds of generations of worthy law students to come."

Under the leadership of the current Fellows Committee Chair Aaron Bulloff, Foundation Fellows continue the tradition that Bob started of providing financial and service support to the Foundation. Bob's legacy will remain in the hallowed halls of the Foundation and the Federal Bar Association for many years to come. ⊙

Meet Col. Winston McDonald Haythe

AARON BULLOFF

Longtime FBA member Winston Haythe is a man of miens—distinguished in appearance, genteel in attitude, polite almost to a fault in conversation, but steely nerved in confrontation—in short, a most valuable member of the Foundation Board of Directors for the last 12 years until he reached his term limit Sept. 30, 2023, and a supportive Fellow. Winston is someone well-worthy of a profile in the *The Federal Lawyer*.

Winston originally hails from North Carolina. To the surprise of all, including himself, he departed the Carolinian culture to attend then-Southwest Missouri State University, now Missouri State University, in Springfield, Mo., where he double majored in English and mathematics. Of course, he would next go to law school. While at SWMS, Winston was in the Reserve Officer Training Corps (ROTC), the Army's college-based officer training program. As such, Winston became a commissioned lieutenant the day he graduated, with delayed active duty. Winston taught English and math in Missouri for a year before applying to law schools and eventually moving to Virginia to attend the College of William & Mary's Marshall-Wythe School of Law (the nation's oldest law school) and receive his Juris Doctor degree.

Winston graduated from law school in 1967 and was assigned to the Army's Judge Advocate General's School, or JAG. In 1969, after postgraduate work at the University of Virginia School of Law, he joined the Washington, D.C., law firm of Rhyne & Rhyne. The boutique firm was headed by Charles Rhyne who had successfully argued at the Supreme Court, became the youngest-ever ABA President in 1957, and was a *Time* Magazine cover boy in 1958.

"In my second year of law school, I had the pleasure of meeting Earl Kintner for whom the Earl W. Kintner Public Service Scholarship was later named," Winston wrote in a testimonial. "Earl had accompanied a distinguished alumnus of my law school to our campus to discuss life in Washington, D.C., for young attorneys. It was therefore a unique pleasure for me years later to chair the selection committee for the annual Kintner Scholarship that goes to a graduating high school student whose parent is a public service or judicial member of the FBA."

Winston litigated all over the country. Some of his clients were power companies impacted by the passage of the National Environmental Policy Act (NEPA) in 1970, so he added environmental law to his practice. His experience in this area was noted, and he was offered a job as special counsel to the Atomic Energy Commission. He was there for one year when another new agency, the U.S. Consumer Product Safety Commission, tapped him to become assistant general counsel for enforcement, which put him in charge of nationwide litigation. All the while, he was still in the U.S. Army Reserve with legal assignments in that capacity.

In the late 1970s, Winston earned a Master of Laws degree from the JAG School. In 1982, he was invited to join the U.S. Environmental Protection Agency in a senior administrative role which no longer required trying individual cases. Winston then accepted a legislative fellowship in the U.S. Senate, focusing on environmental issues in the Great Lakes region.

Even when he was busy with official business Winston was able to indulge his longtime passion to teach. He was part of a small team that developed a course on negotiation skills which was taught nationally for the U.S. Department of Justice, as he had previously done for a course that was taught to EPA and state environmental personnel. He served on the staff and faculty of the Army's JAG School, attaining the rank of colonel. He also taught paralegal courses at the University of Maryland University College for 14 years, earning the "Teacher of the Year Award" in his final year. He only stopped teaching in Maryland when the North American Free Trade Agreement was being drafted, and he was needed in Mexico. For three years, Winston and a team of scientists and technical experts provided training to more than 500 Mexican professionals on issues related to inspections, water quality, and hazardous waste disposal. Winston next became an adjunct professor at the George Washington University Law School in Washington, D.C., teaching a course on negotiations.

Winston is an active member of the Cosmos Club, a social club that offers intellectual and cultural programs in Washington, D.C., where members must be "distinguished in science, literature, the arts or public service." He was invited to join in 2000 upon receiving the Legion of Merit, one of the Army's highest noncombat awards, after 31 years of commissioned service—which certainly added to his membership qualifications. As a member, Winston has hosted several Fellows Dinners at the Cosmos Club.

On a personal note, Winston lives in the District of Columbia with Billy, the four-pound blueberry-eating chihuahua whom Winston deems his "bodyguard." He is the father of three children, pre-deceased by one. Winston particularly enjoys attending theater and concerts as well as the simple act of reading. His special skill is playing the organ and piano, and he has promised to do so at the next available FBA occasion.

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About the Earl W. Kintner Public Service Scholarship

Recognizing the value of public service, the Foundation annually funds at least one $5,000 scholarship to graduating high school seniors planning to attend a four-year college or university whose parent or guardian is a current federal government attorney or federal judge and a member of the Federal Bar Association. The scholarship may be used for tuition, books, fees, or housing.

The Earl W. Kintner Public Service Scholarship is funded by the Earl W. Kintner Memorial Fund. Kintner, chair of the Federal Trade Commission from 1959 to 1961, was a distinguished member of the Federal Bar Association, having served as a two-time national president and as president of the Foundation. Kintner recruited hundreds of members for FBA membership during his active years of leadership with the bar. He passed away in 1991 at the age of 79.

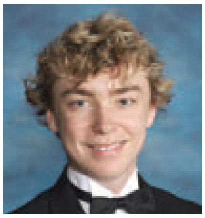
The 2023 scholarship recipients were Gabrielle Nicoleau, the daughter of Raynette Nicoleau, senior counsel with the U.S. Securities and Exchange Commission and Evan Kiess, the son of Kimberly Swank, a U.S. Magistrate Judge for the Eastern District of North Carolina. Gabrielle, an accomplished student leader, is attending Duke University this fall where she hopes to gain a "broader knowledge of the world and humanity, as well as a deeper understanding of self." Evan, a gifted student athlete, attends the University of North Carolina at Chapel Hill in pursuit of dual degrees in chemistry and Spanish literature and a career in chemistry lab research.

Public Service Scholarship applicants must submit an online application, personal essay, academic transcript, and their college or university letter of acceptance. The applicants are evaluated on academic achievement, leadership recognition, school and community service and activities, and compelling personal essay content and quality. The deadline for applications and required documentation is April 30 of each year.

A committee comprised of Foundation board members and volunteer Fellows meets annually to select the scholarship recipients. This year's committee members are:

Karen King, Chair (Lafayette/Acadiana Chapter)
Cal Chipchase (Hawaii Chapter)
Hon. Michael Newman (Dayton Chapter)
Sheri Mecklenburg (Chicago Chapter)
Mark Vincent (Utah Chapter)
Maura Black (Rhode Island Chapter)
Joseph Feldstein (Puerto Rico Chapter)
Christie Varnado (South Carolina Chapter)
James Satola (Northern District of Ohio Chapter)
Andrew Loewenstein (Palm Beach Chapter)

SCHOLARSHIP WINNER: Evan Kiess



When I was 12 years old, my dad told me that the drains in the street lead to the ocean. This fascinated me. How could water get from the middle of a city directly into the sea? I had to get to the bottom of this. Luckily for me, a small creek ran through my backyard. I got a map of the local area from my dad, and he helped me find where the nearby stream ended. It turned out that the little creek ran all the way from our backyard to the Pamlico Sound. I couldn't believe it; a stream no more than two feet across would become 30 miles wide. I decided that I would explore this by using a single rubber ducky.

After a $0.99 purchase from the nearby dollar store, I set out for the truth. Letting the ducky go in my backyard, I watched as it slowly moved northeast. Shortly thereafter, the duckie made it into the Tar River, which became the Pamlico River. From there, the Pamlico Sound was a straight shot. Sure, this "experiment" was flawed in many ways, but it allowed me to understand how pollutants and other trash could travel from a backyard to the ocean and why we should ensure that garbage is kept out of storm drains. More importantly, I learned the importance of conservation and how chemical fertilizers destroy marine ecosystems.

Now, I drive through Eastern North Carolina looking at those same metal drains and am reminded of that rubber ducky. On top of many of those drains sit trash and litter. This trash, just like my rubber ducky, travels down the drains into the waterways, polluting the water and causing millions of wildlife deaths every year. To me, this story is more than just an anecdote; it highlights the curiosity that has driven me since a young age.

As I look forward to college, I hope to pursue a dual-degree in chemistry and Spanish literature at UNC Chapel Hill. This year I took organic chemistry and materials chemistry. These classes, although challenging, intensified my passion for chemistry. Since first taking a Spanish class in kindergarten, I have fallen in love with the language and the cultures of Spanish-speaking countries. These interests have driven, and continue to drive me towards a career in chemistry. Through my (albeit limited) exposure to academia, I have gained an interest in professorship. This career path would allow me to continue researching in a lab environment, which I very much enjoy.

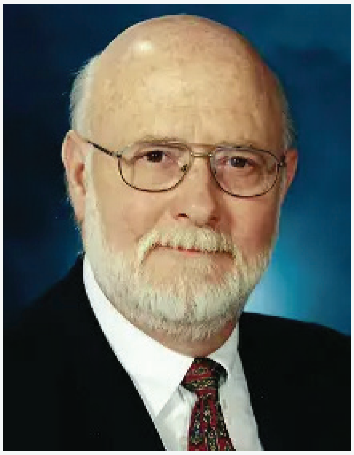
SCHOLARSHIP WINNER: Gabrielle Nicoleau

I hope to gain from a college education a broader knowledge of the world and humanity, as well as a deeper understanding of self. I plan to approach college with wide eyes to expand my world and knowledge. I will enhance my abilities to reason effectively, exercise strong judgment, and synthesize knowledge. I want to explore STEM subjects and beyond, such as generating stories, poems and scripts that reflect the artist in me. I also look forward to studying the constellations, the oceans, Vedic astrology and maybe a totally new language/culture/history. I want to learn more about the struggles of my ancestors who were taken from their native land and enslaved, and their journey through emancipation, civil rights, and beyond. It is through this broad brush that I believe I can understand who I am and who I wish to become in the future. From the knowledge that I gain from a college education, I hope to focus on advocacy to help others.

Two clubs that I've dedicated myself to since the 9th grade that really opened my eyes to my life's purpose are Key Club and Model United Nations. When I first joined these clubs, I was naive and I didn't fully understand their value. I joined Key Club for the community service hours required to graduate and Model UN to add an academic club on my college application. I quickly realized what these clubs were about, and that there were multiple benefits to joining them. Because of these clubs, I have grown as a person. Key Club has taught me the value of giving back to my community, and Model UN has taught me that public speaking skills are a lifelong benefit. The passion I gained for these clubs pushed me to want to be a leader in them. In Key Club, I served my junior year as secretary and senior year as vice president. In Model UN, I served both my junior and senior years as president. These clubs, and having leadership roles in them, gave me a sense of purpose. The confidence and humility I have learned from these clubs will serve me well as a college student and beyond.

After college, I hope to land a career where I can advocate for others. I have always received an immense sense of personal satisfaction by helping others. I also love to write and to utilize the power of words. It is my dream to one day find an occupation suited for me that allows me to truly utilize the power of words and connect, inspire, and advocate for many people. Although I'm not sure which occupation that'll be, I know that the main focus and drive behind it will be to do just that.

About the the Robert A. McNew Law Student Scholarship



The Robert A. McNew Law Student Scholarship is named in honor of Bob McNew, a stalwart supporter of the Foundation. Bob was an active member of the FBA for more than 30 years during which time he founded the Fellows program and served as president of both the FBA and the Foundation of the Federal Bar Association as well as a director of the Federal Bar Building Corp. Bob continued to support the Foundation in his retirement until his recent passing on Nov. 14.

The Law Student Scholarship was created in 2015 to promote the practice of federal law by annually awarding at least one scholarship of $5,000 to a law student attending an ABA accredited law school. The scholarship recipient must be a Federal Bar Association law student associate member in good standing with demonstrated academic achievement and participation in the FBA, law school and community activities. Students who exhibit professionalism and high character in their personal and professional lives as demonstrated in application materials are encouraged to apply.

The 2023 scholarship recipients were Lakshmi (Lex) Kumar, a second-year law student at Tulane Law School, and Ta'Chelle Jones, a third-year student at Oklahoma City University School of Law. Lex has received numerous honors, including the Porter Hedges Diversity Fellowship which provides the opportunity to intern with Porter Hedges law firm in Houston for three summers. The FBA Oklahoma City Chapter named Ta'Chelle as its 2022 Holloway Scholar, an award which recognizes students who demonstrate high levels of commitment to civility, professionalism, academic excellence, and community involvement. She also received the Outstanding Senior Law Student Award from the Oklahoma Bar Association (2022-2023).

Students apply for this scholarship by completing an online application, writing a personal essay, and providing their academic transcript and two letters of recommendation by Nov. 1 of each year. To date, 11 students have received scholarships to law schools throughout the country, including Charleston School of Law, University of St. Thomas School of Law, University of Oklahoma, Tulane Law School, and University of Utah S.J. Quinney College of Law.

A committee comprised of Foundation board members and volunteer Fellows meets annually to select the scholarship recipients. This year's committee members are:

Hon. Donna Phillips Currault, Chair (New Orleans Chapter)
Ernest Bartol (Eastern District of New York Chapter)
David Guerry (Baton Rouge Chapter)
Hon. Craig A. Gargotta (San Antonio Chapter)
Alexandra Dattilo (Northern District of Ohio Chapter)
Paul Barkhurst (San Antonio Chapter)
Hon. Philip Calabrese (Northern District of Ohio Chapter)
Suzanne Katchmar (Hampton Roads Chapter)
David Goodwin (Minnesota Chapter)
Amy Gell (Southern District of New York Chapter)

SCHOLARSHIP WINNER: Lakshmi (Lex) Kum

X marks the spot. The surgeon lifts my right arm and draws a big black 'X' into my armpit. He rushes off, muttering to himself about his next surgery. I soon realize that it's mine he's talking about: the 6-hour surgery that would balloon into 12 when he pushes apart my ribcage and discovers what he does not expect: the pulmonary vein of my heart is not merely disconnected from my lung but wrapped like a ribbon around my diaphragm. But before that happens, as I lay in the pre-op room waiting for anesthesia, all I can think about is the X: how it's written with permanent marker but is, in fact, impermanent. It will soon wash off but, on this cot in a beige basement between a sea of poked and prodded people, it feels searingly irreversible.

The saying, 'x marks the spot,' entered common usage by way of the British Army. Soldiers would mark a piece of paper with a black 'x' and place it on the heart of the person sentenced to death. My X was a very different one, marking not my end but a beginning. "One in a million," said Dr. Barry Love (yes, that's my cardiologist's real name). He explained that I had a rare congenital heart condition called Scimitar Syndrome, made even rarer by its symptom-free discovery in adulthood. This diagnosis is what led me down the winding path to law school. The heart surgery cut an incision into my life that made me stop and take a serious look at what I wanted for my future. While I loved writing about art, I had been devouring legal news and supreme court decisions in my free time, debating court rulings with friends, volunteering in political organizations and heading to immigration court to accompany those fighting possible deportation. It led me to reconsider my place in the world: my possible end and a possible future. Today, that X reminds me that second chances are rarely given and that I was incredibly fortunate to get one.

The surgery branded me with the physical awareness that time does not stop. Each pause between heartbeats, when that electric muscle could wear out but doesn't, is both a chance and a choice. With the chance I've been given, I'm choosing to get as many varied legal experiences as I can. I've worked at a big law firm in Texas and presented academic research for an environmental fellowship. I'm interning at a New Orleans civil rights organization, assisting a law professor with academic research, and volunteering to provide legal assistance to the Tulane community. I hope to build my law career by first honing my skills at a law firm and then fighting to protect the civil rights of those most in need. As a nontraditional, first-generation, and underrepresented student starting down this path later in life than most, this scholarship would help me put my hard-won perspective to use with an uninterrupted passion. ⊙

SCHOLARSHIP WINNER: Ta'Chelle Jones

"Quit your job and start law school in the middle of a global pandemic" was not an entry on my to-do list. Somehow, though, that is precisely what I did. In my previous career, I worked as an HR Business Partner at the world's largest publicly traded claims management firm. There, I worked on global projects, conducted internal investigations, coached key leaders, and regularly collaborated with internal and external legal counsel.

Through these experiences, I became fascinated with the intersection of business and people, especially in relation to business strategy and how local and federal laws impacted that relationship. Fueled by this budding fascination, I have reveled in the challenge and reward of law school. Through the work ethic and discipline I developed from previous years of post-secondary study and professional work, I set out to approach law school with the same earnest care and professionalism as I had my career.

As a first-generation student and professional, my earliest lessons of professionalism came from watching working-class people like my grandparents and others like them in my community don uniforms, show up daily, and work incredibly hard to support their families. Invoking their dignified lessons of commitment, integrity, and excellence, I consistently arrive to the law school early and leave late, attend classes prepared for the day's assignments, engage with professors, and maintain a daily schedule of my obligations. In this pursuit, I have achieved academic success while serving as a leader on campus, earning awards for top score in several courses, making the Dean's and Faculty Honor Rolls, and remaining in the top ten percent of my class for the entirety of my law school career to date.

Upon graduation, I will join Norton Rose Fulbright as a litigation associate. There, I plan to become licensed in multiple federal jurisdictions as my practice will most certainly require the federal courts. Regardless of the practice, firm, or geographic location, my ongoing goal is to embark on a long legal career that is marked by integrity, professionalism, and excellence. More than a professional aspiration, these are also characteristics that I take care to model in my personal life. Throughout my time as a student and member of the OCU Law community, it is my sincere belief that these guiding principles have shone through the way in which I have conducted myself, the kindness with which I have treated others, and the work product I have put forth.

In preparing to transition from law student to lawyer, this opportunity would be a tremendous help in bridging the financial gap left by not working while I prepare for the bar exam in 2023. It often feels like a luxury to not be working full-time as I journey through law school, but it has also been a hard-fought path to earn scholarships and deplete my personal savings in pursuit of this dream. As such, it would be both an honor and a blessing to be selected as a Robert A. McNew Law Student Scholarship recipient.⊙

About Dr. J. Clay Smith Jr. Diversity in the Legal Profession Scholarship

The Dr. J. Clay Smith Jr. Diversity in the Legal Profession Scholarship is named in memory of Dr. J. Clay Smith Jr., the Federal Bar Association's first African American president. Dr. Smith's long career in public service included serving as associate general counsel for the Federal Communications Commission, commissioner and then interim chair of the Equal Employment Opportunity Commission, and dean of Howard University School of Law. He is the author of Emancipation: The Making of the Black Lawyer, 1844–1944, published in 1993 with a foreword by Thurgood Marshall, the Supreme Court's first African American justice. In September 1981, Dr. Smith presented to the Washington Bar Association a paper he wrote about Louis Mehlinger, a senior attorney with the Department of Justice and the first black member of the FBA (1944). "As the twentieth century closes and as the twenty-first century is born, the Federal Bar Association must continue to be faithful to the principle of race and sex diversity in its leadership ranks at the local and national levels."

The Foundation wishes to continue Dr. J. Clay Smith Jr.'s legacy by encouraging racial and ethnic minority students to pursue a legal education and complete law school. At least one $15,000 scholarship is awarded annually to a first-year law student, disbursed over three years of the student's enrollment at an ABA-accredited law school. Applicants must exhibit high character and professionalism in their personal, professional, and academic lives.

The 2023 scholarship recipients were Deborah Billy Gillis Harry, a first-year law student at University of Houston Law Center, and Kevin Chisholm II, a first-year student at Yale Law School. Deborah is originally from Nigeria. She was the 2022 Blakely-Butler Moot Court Champion and was nominated for the Outstanding Senior Woman award at Texas State University. Kevin received the 2021 Young, Gifted, and Green 40 Under 40 Award which recognizes a young environmental justice advocate who has contributed to the work and mission of the nonprofit organization Black Millennials for Flint (Mich.).

Students apply for this scholarship by completing an online application, writing a personal essay, and providing their enrollment verification, academic transcript and two letters of recommendation by Nov. 1 of each year. To date, five students have received scholarships to law schools throughout the country, including Harvard Law School, Loyola University Chicago School of Law, Houston Law Center, Columbia Law, and Yale Law School.

A committee comprised of Foundation board members and volunteer Fellows meets annually to select the scholarship recipients. This year's committee members are:

Jim Hammerschmidt, Chair (Maryland Chapter)
Ashley Belleau (New Orleans Chapter)
Stephen Jackson (Hampton Roads Chapter)
Rachel Rose (Southern District of Texas Chapter)
Carol Scott (Pentagon Chapter)
Betty Stevens (Northern Virginia Chapter)
Kukui Claydon (Hawaii Chapter)
Kelly Scalise (New Orleans Chapter)
Jonathan Entin (Northern District of Ohio Chapter)
Hon. Robin Feder (Hawaii Chapter)

SCHOLARSHIP WINNER: Deborah Billy Gillis Harry

My interest in becoming an attorney originated from my personal experiences and intrinsic goal of adding value to our world through my professional contributions in the legal industry. Originally from Nigeria, my parents immigrated my family of nine to the United States to pursue the American dream. I spent my childhood immersed in the American culture without knowledge of what would lie in my adulthood. As one of the oldest of seven children, I quickly learned the perils of the American legal immigration system and the impact it would have in my life. Despite following all the rules and maintaining legal status at all times, I found myself in limbo after I turned 21 years old and was no longer under my parent's immigration status. This reality created an enormous burden on my personal identity as well as my career trajectory due to instability and the backlog of the U.S. immigration system.

My life seemed to pause while I navigated immigration hurdles. The last seven years were filled with financial and emotional challenges as I fought hard to remain in legal status. Nonetheless, I never gave up on my dreams of becoming an attorney and I practiced gratitude for every opportunity I received. I engaged in extensive research of immigration laws to gather knowledge in search of relief. Through hard work and perseverance, I filed my immigration documents myself and got the relief I needed to make my dreams a reality. I am driven by my desire to become the best version of myself in every area of my life. In spite of my circumstances, I graduated from my undergraduate program with Magna Cum Laude and Alpha Chi (Top 10%) honors. Afterwards, I pursued a Masters in Legal Studies as a Texas State Graduate Merit Fellow while simultaneously getting a Paralegal and Mediation certificate. Despite the struggles I faced in my personal life, I graduated with a 3.82 GPA. During my graduate program, I volunteered at CANLAW Clinic Austin, where I served as a paralegal and provided pro bono estate planning to cancer patients, most of whom were terminal. Through volunteering, I was able to see first-hand how valuable free legal clinics were to the community.

Over the years, I worked diligently to build my confidence through perseverance and self-love to pursue my dream of becoming an attorney. Today, I am attending my dream law school and I am thrilled to be in a reality that seemed so out of reach to my younger self. Within the first month of my law school career, I competed in the 2022 Blakely-Butler Moot Court Competition against 32 law students, mostly 2Ls and 3Ls. The final round was judged by four presiding Texas appellate judges and my team was named the winner of the Championship title. Additionally, I won the Best Speaker award. Through my spirit of excellence, I am certain that I will add to the diversity of the legal profession as an exceptional attorney who will positively impact numerous lives.

SCHOLARSHIP WINNER: Kevin Chisolm II

My grandmother left me treasures. As a teenager, I remember pulling the box containing these treasures out of my closet, and opening it to the earthy, cedar smell of old paper. There they were in her methodical handwriting, our greatest heirlooms: annotated family trees. The trees told the stories of family members who lived centuries ago. The first was Julia Oliver, born into slavery in 1796. Julia often spoke of "the night the stars fell" in 1833, when a meteor shower emblazoned southern skies with shooting stars that appeared to be crashing down to earth. As Dr. Cornel West said, "our roots determine our routes." My grandmother's treasures aided me in the illumination of both. From these historical documents I realized that throughout American history, my family has pursued higher education and used our skills to advance the Black community. I grew up regularly visiting my mother's pre-K classrooms when she was a public-school teacher in a predominantly Black neighborhood. She instilled in me a deep appreciation of the power of education when she spoke of students who could only afford to eat at school, and how a strong educational foundation can help lift a family out of poverty. Her values mirror those of my great-great grandmother, Kate Bradley Stovall, who founded the Southern California Alumni Association to promote higher education in the Black community. From my grandmother researching Black women's health to her uncle offering free medical services to his neighbors during the Great Depression, I see the legacies of education and service deeply rooted in my bloodline. This family background shaped my mission to serve others. I began my mission at a majority-white international boarding school, where serving in leadership positions made me a voice for Black students on campus and gave me a platform to speak about issues that predominantly affect marginalized groups. James Baldwin, Toni Morrison, and Ta-Nehisi Coates gave me the language to articulate how systemic racism continues to plague the Black community. Their writing inspired me to attend Howard University. I was attracted to the institution's legacy for producing Black thought leaders. While at Howard, I was determined to prepare myself to address the greatest challenges of my generation, such as mass incarceration, police brutality, and voter suppression. My various work experiences have helped me confirm the law will be my mechanism of change. After completing college, I worked as an organizer at Civic Nation, where I created the digital infrastructure for voter registration campaigns aimed at building political power in communities of color. In addition to digital organizing, I joined the legislative advocacy team where I lobbied for the passage of federal voting rights bills like the For The People Act. These experiences helped me build my organizing, critical thinking, and writing skills and set the foundation for my legal career. Working in the voting rights space exposed me to the dire stakes of voter suppression and attacks on democracy. I will use the legal tools I'm learning at Yale to work to protect these civil rights that are currently being actively litigated, rights that were hard-fought by folks like my ancestors. The summer before matriculating at Yale, I experienced what practicing social justice work as an attorney is like. As a Sponsors for Educational Opportunity (SEO) fellow at Jenner & Block LLP, I spoke with lawyers in the Election Law & Redistricting practice group to hear what it is like to work on voting rights issues daily. I had the privilege of joining the Post-Dobbs Decision Task Force where I researched statements made by conservative attorney generals on federal overreach in the context of healthcare decisions, in anticipation of the inconsistent prosecutions they will then pursue of women seeking abortion access. I also did pro-bono work with the Innocence Project and was introduced to the post-conviction litigation process. I plan on using this experience as a student in the Challenging Mass Incarceration clinic at Yale. Receiving the Dr. J. Clay Smith Jr. scholarship would help me achieve these goals by supporting my cost of living as a student, therefore decreasing the amount of time I spend working to support myself outside of school. I have reached out to library officials to inquire about working during the spring semester, drove for UberEATS, and requested supplemental loans once this semester. The stress of requesting extra loans and working significant hours during the school year would hinder my ability to participate in clinics and extracurricular activities aimed at developing my skills as a civil rights lawyer. As a scholarship recipient, I would be able to focus less on the logistics of supporting myself and more on my evolving capacity to assist others. In 1992, Dr. J. Clay Smith Jr. inspired black lawyers to "join in the search and agitate for justice because until justice is available to everyone, peace is deferred to all." I seek to use the same legal system that enslaved and segregated my ancestors as a tool to search and agitate for justice. By doing this, I will honor my family and better our country. Those who came before me turned their backs into bridges for me to walk across and act. Now, it is my turn. ⊙

Haythe *continued from page 83*

On the FBA front, Winston has been a member of the National Council, the Federal Career Services Division, and the Veterans and Military Law Section. He is a Sustaining Life Fellow of the Foundation and was a member of the original Fellows Committee established in 2002. In his capacity as a Foundation Director for 2 terms, Winston provided a voice to the Board reflecting his background of combining all things legal, teaching, and intellectual. As he has put it:

> I think one of the initial motivating factors for me to go to law school was that I would learn, shall we say, "the buttons of power," and how to push them and when to push them to effect change for the betterment of humankind. That's what it was all about. ⊙

Winston Haythe and Aaron Bulloff enjoy "sweets and treats" at the Memphis Rock 'n' Soul Museum during the 2023 FBA Annual Meeting and Convention.

About the Fellows of the Foundation

The Foundation Fellows program began in 2002 to recognize individuals who have demonstrated exceptional commitment to and leadership within both the FBA and the legal community and to provide financial and service in support of the Foundation. Fellows are part of an exclusive, distinguished group; currently, 279 Fellows of the Foundation make up just 1.8 percent of the Federal Bar Association membership.

To become a Fellow, one must be an FBA member in good standing and have been a member of the association for at least five years. A candidate nominated for Fellowship must have exhibited leadership and commit to the financial support of the Foundation by pledging $1,500 (may be paid in installments of $500 over a three-year period). Nominees are approved by the Foundation Board of Directors prior to the mailing of formal invitations. Those interested in becoming Fellows may self-nominate by submitting a self-nomination form found at foundation@fedbar.org. Current Fellows may nominate colleagues for Fellowship by contacting the Foundation at foundation@fedbar.org. The new class of Fellows is inducted during a ceremony held each September at the FBA's Annual Meeting and Convention.

The Fellows Committee is responsible for identifying and recruiting individuals who embody the highest standards of professionalism, integrity, and leadership and who are committed to advancing the mission of the Foundation and strengthening the Foundation through financial support and volunteering. The committee develops and implements effective recruitment and communication strategies that will engage FBA members and inspire them to become Fellows and plans events or activities which are desirable and appropriate for Fellows' participation, enjoyment, and support. The committee communicates the benefits and responsibilities of being a Fellow clearly and, through its activities, will enhance the prestige and visibility of the Fellows.

One of the committee's objectives is to expand the number of exclusive social gatherings for Fellows beyond the current annual Fellows Dinner during the FBA Leadership Summit in Washington, D.C., each spring and the Fellows Champagne Toast at the September FBA Annual Meeting and Convention. Another objective is to increase the number of Fellows who serve on the Foundation's six program committees, including those which review applications for grants and scholarships and those seeking to increase the Foundation's publicity and fundraising efforts. Support of the Foundation by service as well as by financial contribution is the hallmark of Fellowship.

The Fellows program is steered by the Fellows Committee. Immediate Foundation Board Past-President Aaron Bulloff (canoelaw@gmail.com) is the chair of the committee and its members are:

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Know that when you become a Fellow, you will be joining your colleagues on the following pages in supporting the Foundation, the charitable and service arm of the Federal Bar Association.

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TESTIMONIAL

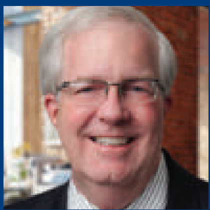
"I can recall jumping at the chance to become a Fellow of the FBA Foundation, but at the same time wondering: Am I worthy of a distinction like this? I had always thought of the Fellows as a group of former national FBA presidents and other high-level leaders who gather and talk about FBA matters that I knew little about. But I was incorrect in my assessment in a couple of ways.

First, the Foundation is indeed comprised of the Association's leaders (some former, some current), but also many others who simply care deeply about the FBA and its mission. I know now that the Foundation is something of a more concentrated version of the Association that it supports, in that the Fellows are likewise devoted to service, not self-promotion. Each member has made a public, financial commitment to promote the interests of the Federal Courts, the judges and counsel practicing within those Courts, and perhaps most importantly, the American public that is so deeply affected by what happens in the Federal Courts (whether they truly realize that or not). The Foundation serves as a powerful resource to manage the funds contributed by its many benefactors. The Foundation delivers the goodwill of the FBA, in the form of promoting legal and civics education, scholarship, assistance to our Chapters, Sections, and Divisions when they have a need, and so much more.

And the second way in which my assessment was off-the-mark is that, when the Fellows gather, it is not all FBA chat. I see the Fellows as being just as devoted to one another as they are to the welfare our of Federal Court system. It turns out that Fellows events are typically a lot of fun. Those dinners and other gatherings mark a festive celebration of getting to know one another, and of making memories together while we serve the Association and its mission that we love. And one of the best parts of being a Fellow is having the opportunity to nominate worthy members of the Association who would enjoy being a part of it all."

— **KEVIN MAXIM,** FY24 NATIONAL MEMBERSHIP CHAIR

TESTIMONIAL



"I was 'Double Bobbed' on the roof patio of the M Street Building by Bob McNew and Bob Mueller in the fall of 2000, both of whom recruited me to become a Charter Fellow as a youngster—quite an opportunity! By that time, I already loved the Federal Bar Association and was concluding my year as General Counsel, having been a member since my first week as a lawyer in 1988. I met Bob McNew at the 1992 Cleveland Convention as he was sitting next to Justice Blackmun who I also was pleased to meet as a nubile lawyer. Ponder which one meant more to my practice? It was Bob McNew who extracted one of Eaton Corporation's most powerful trial lawyers from his garage as he was arriving home for the evening and sent him back to the office to help ME defeat a temporary restraining order which was to be heard in Ohio the next morning, brought against Crosman Corp., my new and well-known New York client. The tangible power of Bob and leveraging the power of the FBA relationships! No FBA member was insignificant to Bob—we all were worthy of his attention. Thanks to Bob and the FBA for adding zest to law practice."

— **HENRY M. QUILLIAN III,** TWO-TERM FOUNDATION BOARD MEMBER

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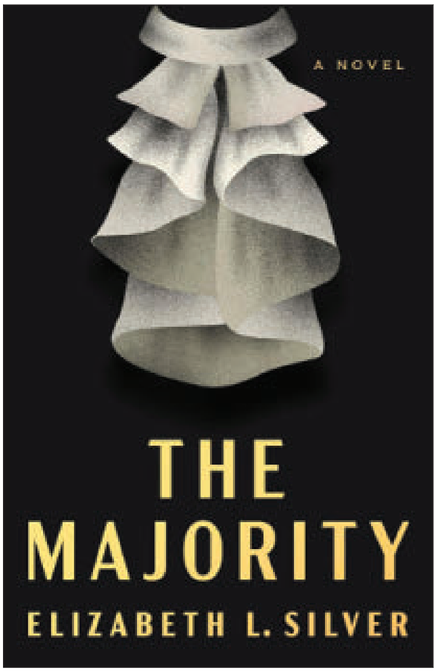
TESTIMONIAL

"I am thrilled to finally become a Foundation Fellow. For many years, I thought it was out of my reach, both financially and as a somewhat recent member of the FBA community at large, having previously been active only in my Section (Immigration). A few consultations solved the financial issues—and receiving the Elaine R. "Boots" Fisher Award last year made me realize I was, indeed, a core member of the FBA.

Membership in the Fellows comes with invitations to two events—a Fellows dinner during the Leadership Training Summit and a Champagne Toast at the annual meeting. But those two events are not why I became a Fellow, even though they are a lot of fun with friends. I became a Fellow to find new and interesting ways to be of service to the FBA and the legal community. There's always something one can do in the FBA as a whole—committees, task forces, sections, divisions, etc.— and that's key for the future of the FBA. But the work of the Foundation in scholarship awards, community outreach and diversity grants, and more helps build the future of the law and, hopefully, improve the public's perception of the legal community. And that's why I was thrilled to be nominated and accepted the Fellowship."

— **ELIZABETH (BETTY) STEVENS,** PAST CHAIR OF THE IMMIGRATION LAW SECTION AND CURRENT MEMBER OF THE SECTIONS AND DIVISIONS COUNCIL



The Majority

By Elizabeth L. Silver

Published July 2023; Riverhead Books

Hardcover, 384 pages, $24.00

Reviewed by: Anna Archer

What are your three major regrets in life? For the heroine of this fictional story about the first female U.S. Supreme Court justice, the three regrets have nothing to do with the law and everything to do with the people she loved. Her overall goal in life seemed to be to make the world better for the next generation, and especially for women. She did that. But as she was reflecting on her life when "half of the United States [was] waiting for her to die,"[1] what resonated the most was not her substantial impact on the law, but how she felt about the personal choices she made on her path to being part of the change.

The Majority is the story of "The Contemptuous S.O.B.," Justice Sylvia Olin Bernstein. It is written in first person, and it is a fictional autobiography. The fictional Justice Bernstein has many similarities to the "Notorious R.B.G.," but there are also many differences, most notably that Justice Ruth Bader Ginsburg was not the first woman on the U.S. Supreme Court.

Readers who are very familiar with Justice Ginsburg's life story will enjoy finding the similarities and differences between Justice Bernstein and Justice Ginsburg. Those who are not will likely be Googling various "facts" to find out if, for example, Justice Ginsburg clerked for the First Circuit Court of Appeals or started a project at the ACLU called the "Seneca Falls Project." Finding the distinctions between Bernstein and Ginsburg makes reading the book fun.

The novel starts out with Justice Bernstein talking about why she is writing her own story and revealing that she would not have been the first female U.S. Supreme Court justice without a little luck. She points out that "history chooses whom to crown an iconoclast, whether they deserve it or not."[2]

Justice Bernstein then tells her story, starting as a 12-year-old girl in Brooklyn, on the day her father's cousin Mariana, a Holocaust survivor, came to live with the Olin family in their tiny apartment. Sylvia's mother endeavored at first to protect Sylvia from hearing about the atrocities of Mariana's experience, but Mariana eventually shared many details with Sylvia. Ultimately, knowing about what Mariana and other members of her family endured simply because they were Jewish profoundly impacted Sylvia's life. Sylvia, like Justice Ginsburg, lost her mother at a young age. Mariana stepped into a mother's role, providing advice and sharing pivotal moments throughout Sylvia's life. Sylvia often considered Mariana's experiences when she was making important choices in her life.

The fictional story of Justice Bernstein's life and the consequences of the choices she made does not speak solely to women who have reached or will reach powerful positions. Instead, it tells at least part of the story of every woman who navigated having a career and family in the 20th century. Sylvia Olin Bernstein encountered discrimination in every phase of her life. As a child, she could not participate in the prayers at her mother's *shiva* because she was a girl. At Harvard, while she was honored to be one of the nine women admitted—out of more than 500 students—she was treated differently because of sex in almost every way one can imagine. Her experiences remind the reader about how extraordinary women who managed to have successful careers despite all the obstacles placed in their way during this time really were.

Many of the challenges that Sylvia Olin Bernstein faced are challenges career women continue to encounter today. As a young mother, Sylvia struggled to balance her family life with her career, often unsuccessfully. In fact, one day when she was late to pick up her daughter because she was busy talking to the plaintiff in a seminal case for women's rights, her daughter "wished aloud that [Sylvia] were ... any one of her [daughter's] friends' mothers who were either baking cookies at home or burning their bras in the streets. Nothing in between." Sylvia reported that "on the six blocks home, my child and I didn't speak once. I had no idea what to say. And I suppose neither did she."[3] This story likely hits a nerve in every parent whose child has been disappointed when a work function had to take priority. Finding the right path to follow one's career goals and also be the parent one's child expects and deserves was a struggle in the 1960s, and it is often still a struggle for women—and men—today.

By the time Sylvia Olin Bernstein was being considered for a seat on the U.S. Supreme Court, society had changed. This was due, in many ways, to Bernstein's work. Yet, the focus during her confirmation hearings was not on her understanding of the law and how she could contribute to the Court. Instead, the key issue was abortion. When asked if she had ever had an abortion, Bernstein first asked, "Are you asking me this as a woman or as a lawyer? As a professor or as a jurist?" The senator admitted he was asking her "*as a woman*."[4] She had made it to a place most lawyers can only dream of being, but the questions were not about how brilliant she was, how hard she could work, or how much she had to give. Rather, the focus was on something that related wholly to her sex.

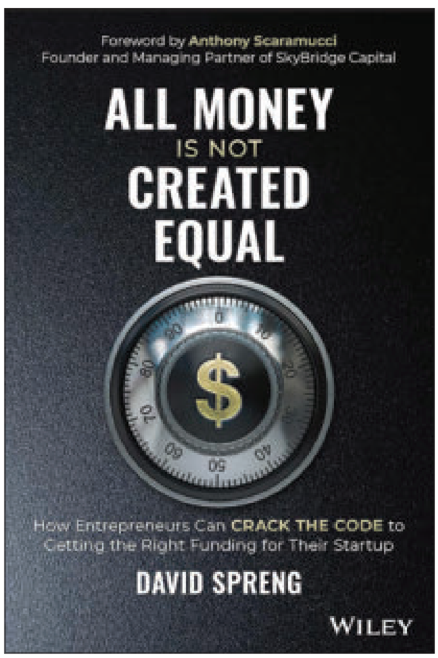
Notwithstanding this line of questioning, Bernstein became the first woman on the U.S. Supreme Court. She described her feeling putting on the robe for the first time as follows: “For the first time in fifty years, I was finally able to breathe.”[5] When Bernstein was sworn in, her daughter, her best friend, and Mariana were beside her, and she imagined her deceased husband, mother, and father being there as well. The people that mattered to her were beside her, and even though her three biggest regrets involved three of those people, they were her cheering section, even from beyond the grave, as she reached the pinnacle of her career and became a shining example for generations of women who dream of being lawyers, judges, or just somehow making a difference. Contemptuous or notorious, fictional, or partially true, her journey is inspiring.

The story about how Justice Bernstein navigated her life choices was the most compelling part of the book, but there were also discussions about the law that lawyers will enjoy. When Sylvia was a student at Harvard, she and her roommate discussed *Muller v. Oregon* (1908) when studying for midterms. Sylvia’s roommate opined that the case demonstrated that women are merely “vessels to them.”[6] Sylvia pointed out that the case had been overruled and, after more discussion about the law and how there were no women at Harvard Law School in 1950 and there were nine in 1960, poignantly observed, “‘It may take a while, but eventually we get there.’”[7]

Later, Sylvia had a discussion with her professor about *Plessy* and *Brown*, and she was struck by how at times the dissent becomes the majority.[8] Sylvia then argued that the Fourteenth Amendment should apply to all people, including women. Her professor advised her to not “make this about you ... or all women.” He said, “This is about the law. You must look at each case individually. And only at its facts.”[9] Sylvia applied this advice to turn dissents into majorities by looking at the facts of the cases individually and using those facts to effectuate changes in the law that benefitted herself and all women. *The Majority* does not provide the types of details about all the cases that resulted in real change the way a biography of Ruth Bader Ginsburg would, but the details provided about Sylvia Olin Bernstein’s cases demonstrate that Bernstein strategically considered the impact of the cases she worked on in much the same way Justice Ginsburg was known to do. The book therefore should satisfy those who are interested in a more intellectual consideration of the evolution of the law as it relates to women over the last century.

While this is a work of fiction that is “loosely based” on Justice Ginsburg’s life, it reveals many truths about what it was really like for women lawyers during Justice Ginsburg’s life. Justice Bernstein’s story reminds readers of how far women have come and how far we have left to go. And it will fill the reader with gratitude for those who continued on the road to change the world for the better despite adversity and thus paved the way for future generations. ⊙

Anna Archer is a Career Law Clerk at the U.S. District Court in the Southern District of Texas. She is also a member of the Editorial Board of The Federal Lawyer and is the Secretary of the Southern District of Texas Chapter.



All Money is not Created Equal: How Entrepreneurs can Crack the Code to Getting the Right Funding for their Startups

By David Spreng
Published July 2023; Wiley
Hardcover, 240 pages, $27.95
Reviewed by: Christopher C. Faille

David Spreng has created an invitation to lawyers. He has done this incidentally, while about other tasks, in his new book about the venture capital (VC) market, and especially about a space within that market known as venture debt (VD). The books suggests that there is a lot of room for attorneys willing to serve the entrepreneurs and the creditors/investors who meet in that space.

Indeed, at one point, Spreng writes, “There are probably a handful of law firms—and maybe 20 lawyers among them—who do 80% of the legal documentation of venture-debt deals, so they are in a good position to advise a company seeking debt.” This certainly suggests that there may be room for a few more such lawyers and firms.

Not long thereafter, Spreng’s discussion turns to “term sheets,” the non-binding agreements customarily drawn up early in the relationship between an entrepreneur and a potential lender, showing the basic terms and conditions of the investment under consideration. He remarks parenthetically, “Almost all of the legal documentation around term sheets can be traced back to the work of one lawyer, John Hale.” Again, the legal community serving this market space sounds like an exclusive club, ripe for new members.

John Hale, by the way, is at present senior counsel with Cooley LLP, a global law firm headquartered in Palo Alto, California.

But my reader may be wondering: Who is David Spreng? He is the founder of Runway Growth Capital, a Silicon Valley based VD lender created in August 2015. Whereas most VC firms are interested in an equity share in promising startups, the VD firms want to lend them money.

The name of Spreng’s firm, Runway Growth, comes from the metaphor of a promising start-up company as a fixed-wing airplane, not a helicopter. The plane must move along the ground (in a “pre-profit stage”) before it can take flight. Runway Growth is especially interested in the final part of the start-up journey, when an entrepreneur may have discovered that he needs a little more runway than he thought he would. Runway’s loans provide that.

The end, the “exit plan” for many in the Silicon Valley ecosystem, the analog to a successful lift-off, is entry into the world of publicly-owned companies, perhaps through an initial public offering, or perhaps through acquisition by a company already part of that world. Of late, there has been a lot of SPAC activity, which combines those two exits: it is a type of merger specifically designed to give one of the partners an exchange presence without the (considerable) fuss of an IPO.

Many writings on venture debt, or even on VC broadly, tend to skip over a question that seems, to an outsider, obvious: Why is an exit plan necessary at all? Or (put a different way) why isn't the "exiting" simply an exit from the condition of dependence on constant new infusions of cash or debt, a take-off into the world of self-sustaining income? There are lots of private businesses in the world, and many of them make money. Not all of them are looking for an escape into the world of public ownership. Why is venture capital/venture debt intent on private firms *with* exit plans?

In a digression, Spreng tells us about one of the disincentives of the public markets: securities lawyers! "Pretty much every single merger and acquisition transaction that gets announced involving a public company triggers a lawsuit in which lawyers for the plaintiffs contend that there was a disparity between value and price," he writes. "It comes down to saying that the board didn't do its job; ergo, the board members get sued. These lawsuits are usually a complete scam."

With such aggravations: Why is becoming a public company (or part of a public company) the usual exit plan? The straightforward answer here is that it isn't the managers who need that exit plan, it is the early investors. The managers generally find that they must agree on such a plan to access that capital. Providing seed capital to a startup is a risky matter. Once one gets beyond friends-and-family borrowing, one is asking strangers for funds. The strangers will want to be rewarded for their willingness to bear the risk. The big payouts usually require exit from private status into a listed exchange.

The broadest statement one can make for the purpose of this book is, "a pitch for more pitches."

Spreng outlines for entrepreneurs the reasons they may want to borrow money from such operations as Runway Growth. The great thing about debt, after all, is that it isn't equity. It does not entail a dilution of existing equity.

Suppose, to take an overly simple example, I took money from my brother to get my widget business underway. I told him, "You're my partner, bro, we're half and half on this, and together we own 100% of this new widget idea and the company we'll build on it." Later on, I find that I can only sell further equity stakes if I (we) dilute the equity stake my brother and/or I now have. That may well be wise or necessary, but it will also be painful. Mixing in debt financing lessens the pain as we proceed.

The practice of lending to startups on terms that assist their movement down the runway also creates opportunities for service providers—accountants, independent board members, and lawyers—and as noted Spreng has much to say about these opportunities. It seems unlikely that you, dear reader will be the next John Hale. But it is a perfectly plausible plan for you to aspire to take some of his clients away! ⊙

Christopher Faille is a reporter for a London-based financial news concern. He graduated from law school more than 40 years ago and has thought, written, and published on matters of law and public policy ever since.

Endnotes

[1]Elizabeth L. Silver, The Majority 1 (2023).

[2]*Id.* at 3.

[3]*Id.* at 224.

[4]*Id.* at 353.

[5]*Id.* at 363.

[6]*Id.* at 100.

[7]*Id.* at 103.

[8]*Id.* at 133–34.

[9]*Id.* at 160.

Federal Bar Association Calendar of Events

▸ Visit **Fedbar.org/Events** for more information.

MARCH

MARCH 1, 4–5
48th Annual Tax Law Conference
Washington, D.C. and Zoom

MARCH 20–21
2024 Thurgood Marshall Memorial Moot Court Competition
Washington, D.C.

MARCH 22–23
FBA Leadership Summit
Arlington, Virginia

APRIL

APRIL 4–5
49th Annual Indian Law Conference
Albuquerque, New Mexico

MAY

MAY 2–8
Law & Culture in the Netherlands
CLE Abroad

MAY 10–11
Immigration Law Conference
Salt Lake City, Utah

MAY 30
U.S. Supreme Court Admissions Ceremony
Washington, D.C.

MAY 30–31
39th Annual Insurance Tax Seminar
Washington, D.C.

SEPTEMBER

SEPTEMBER 5–7
Annual Meeting and Convention
Kansas City, Missouri

Southern District of Texas Chapter: Keynote Discussion Speakers Hon. Carlton W. Reeves and Krystal Walker

FIFTH CIRCUIT

Southern District of Texas Chapter

On Oct. 25, 2023, the Southern District of Texas Chapter held its Annual Dinner Honoring the Federal Judiciary at Ballroom at Bayou Place in Houston. Chapter President Phillip Gallagher welcomed the judges and guests. Then, after remarks from Houston Bar Association President Diana Gomez about pro bono initiatives and Chief Judge Randy Crane about the state of the District, Southern District of Texas Federal Public Defender Marjorie Meyers introduced the recipient of this year's Michael T. Shelby Award, Francisco (Frank) Morales. Mr. Morales is Senior Litigation Counsel in Corpus Christi's Federal Public Defender office, and, as noted by Ms. Meyers in her recommendation letter, he "represents exactly the professionalism and dedication the Michael Shelby Award honors." After the presentation of the Shelby Award, Chapter President-Elect Andrew Gould introduced the keynote discussion speakers, the Hon. Carlton W. Reeves of the Southern District of Mississippi and Chair of the U.S. Sentencing Commission, and Krystal Walker, Executive Assistant U.S. Attorney for the U.S. Attorney's Office, Southern District of Texas. Judge Reeves and Ms. Walker discussed Judge Reeves' background, a few of his judicial notable cases and decisions, and the amendments to the Sentencing Guidelines. Gould then provided closing remarks. All of the proceeds from this wonderful event benefit the Blask Foundation, which provides grants to law students who are working with federal agencies within the Southern District of Texas. ⦿

Southern District of Texas Chapter: Michael T. Shelby Award winner Francisco (Frank) Morales

Judicial Clerks

The Clerk of Court of the Southern District of Mississippi and the Mississippi Chapter of the Federal Bar Association hosted a reception for the judicial clerks of the Southern District in the Cochran Federal Courthouse in Jackson, Mississippi. Clerks attended from the Gulf Coast, Hattiesburg, Natchez, and Jackson.

Judge Johnson

U.S. District Court Judge Kristi Johnson spoke to the members of the Mississippi Chapter and their guests at a luncheon meeting at the Capital Club. Judge Johnson responded to questions she solicited from members prior to the meeting and took questions from the floor.

(Top photo) U.S. District Court Judge Kristi Johnson with some of the judicial clerks of the Southern District at the Cochran Federal Courthouse. (Bottom photo) Secretary Jennifer Case, U.S. Attorney's Office, Judge Johnson, Chapter President Blythe Lollar, Butler Snow, and Chapter Vice-President Alison McMinn, Forman Watkins.

SIXTH CIRCUIT

Northern District of Ohio Chapter

On Dec. 15, 2023, the 232nd anniversary of the ratification of the Bill of Rights (the first 10 amendments to the U.S. Constitution), the FBA Northern District of Ohio Chapter continued its tradition of celebrating the "Bill of Rights Birthday" with the fourth grade student classes at the Campus International Elementary School in Cleveland, Ohio. The event was organized by FBA-NDOC Civics Co-Chairs Matthew Gurbach and Warren McClurg. The program involved a lively interactive discussion and Q&A between the panel, moderator, and the students, followed, as always, by cookies for all.

Northern District of Ohio Chapter: Students from the Campus International Elementary School, along with participating Chapter members, L to R: Cuyahoga County Common Pleas Judge Emily Hagan, U.S. Magistrate Judge James Grimes, Warren McClurg, and James Satola.