BANKRUPTCY AT THE BEACH

BANKRUPTCY AND CONSUMER LAW SECTION
ALABAMA STATE BAR

JUNE 3-4, 2022

CONSUMER KEYNOTE

TEN TIMELY (AND TIMELESS) TOPICS IN CONSUMER CASES

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These materials are presented by the author as a continuing legal education program speaker and not as a bankruptcy judge. In the words of the Honorable Barbara J. Houser, a United States Bankruptcy Judge for the Northern District of Texas, do not cite me to me.

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I. POSTPETITION PAYMENT OF DEBTOR'S ATTORNEY'S FEES

An individual debtor who does not need to file a Chapter 13 case may have an immediate need to file a Chapter 7 case – to stay a pending wage garnishment, for example – but have no immediately available cash to pay the filing fee and the fee for an attorney's services in the case. Consumer lawyers may want to market their availability to provide "no money down" or "low money down" bankruptcy representation.[1] Even if no immediate urgency exists, debtors may prefer to pay for a Chapter 7 bankruptcy over time.[2]

May the debtor and the attorney agree that the attorney will file the Chapter 7 case, advance the filing fee, and receive reimbursement for the filing fee and payment of the attorney's fees from the debtor after the filing of the case?

From a debtor's standpoint, the answer should be an unqualified yes. But the courts have complicated the matter so that the answer is no. Courts assume that the debtor's obligations to reimburse the filing fee and to pay attorney's fees arise from a prepetition agreement. Because prepetition debts are discharged, the attorney's postpetition collection violates the automatic stay and, after entry of discharge, the discharge injunction.[3]

The court in *In re Brown,* 631 B.R. 77, 85 (Bankr. S.D. Fla. 2021), summarized the rule:

> [A] chapter 7 lawyer must be paid by the debtor, but the chapter 7 lawyer cannot look to the estate or to the debtor postpetition for payment of fees for services rendered or to be rendered if the obligation to pay the fee arises prepetition.

The Final Report of the American Bankruptcy Institute's Commission on Consumer Bankruptcy concluded that "the dischargeability of prepetition attorney's fees in chapter 7 hinders access to the bankruptcy system and access to justice."[4] The Report noted four payment options for a debtor desiring counsel who cannot pay all of the attorney's fee for representation in a Chapter 7 case prior to its filing:

1. The debtor can delay filing the case until all of the attorney's fee has been paid.

2. The lawyer can file the case without full payment and hope for voluntary payment of fees postpetition.

3. The attorney can bifurcate the representation agreement into prepetition and postpetition segments, with a separate agreement, which the debtor signs after filing, dealing with postpetition services and compensation.

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[1] *See In re Brown,* 631 B.R. 77, 84 (Bankr. S.D. Fla. 2021).
[2] *See, e.g., In re Carr,* 613 B.R. 427 (Bankr. E.D. Ky. 2020).
[3] *E.g., Rittenhouse v. Eisen,* 404 F.3d 395 (6th Cir. 2005); *In re Fickling,* 361 F.3d 172 (2d Cir. 2004); *Bethea v. Adams & Assoc.,* 352 F.3d 1125, 1128 (2d Cir. 2003); *In re Biggar,* 110 F.3d 685 (9th Cir. 1997).
[4] *Final Report of the ABI Commission on Consumer Bankruptcy,* § 3.01 Chapter 7 Attorney's Fees at 89 (American Bankruptcy Institute, 2017-2019).

4. The debtor can file a Chapter 13 case so that the attorney's fees may be paid postpetition.

A prospective Chapter 7 debtor may not have the luxury of waiting weeks or months before filing bankruptcy. Lawyers are unlikely, at least on a regular basis, to rely on voluntary postpetition payments.

The viable options, therefore, are fee arrangements for a Chapter 7 case that rest on a *postpetition* agreement to pay fees or the filing of a so-called "fee-centric" Chapter 13 case designed primarily to provide for payment of the debtor's lawyer.[5]

The Chapter 7 alternative is better for the debtor but poses challenges for the lawyer. The Chapter 13 alternative may be easier for the lawyer but cannot be in the best interest of the debtor who will pay more and does not need to be in a bankruptcy case for three years.

A. Postpetition Payment in Chapter 7 Cases

Fees for postpetition services are not dischargeable

The fact that a debtor's obligation to pay attorney's fees for a Chapter 7 case pursuant to a prepetition agreement is discharged does not mean that an attorney who renders services after the filing is not entitled to compensation for postpetition services, which is not discharged.[6]

Invoking this principle, consumer lawyers have developed a "dual contract" or "two contract" procedure that separates prepetition and postpetition services and compensation. It involves the "bifurcation" of services into two segments. Specifically, it contemplates (1) the filing of a bankruptcy case pursuant to a prepetition retainer agreement for prepetition services and (2) the attorney's postpetition representation for a postpetition fee paid in installments, if the debtor retains the attorney after the filing of the petition.

Postpetition reimbursement of filing fee advanced by lawyer

Some attorneys have included reimbursement of the filing fee as part of the postpetition payments so that the debtor can file a bankruptcy case with "no money down" – and so that they can market their services on this basis.

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[5] Advising the debtor to pay the lawyer's fees with a credit card is not a viable option. *Caldwell v. Kaufman (In re Caldwell),* 886 F.3d 1153 (11th Cir. 2018) (attorney who instructs debtor to pay retainer by credit card may be liable for violation of 11 U.S.C. § 526(a)(4)).

[6] *E.g., Gordon v. Hines (In re Hines),* 147 F.3d 1185 (9th Cir. 1998); *see Rittenhouse v. Eisen,* 404 F.3d 395, 397 (6th Cir. 2005); *In re Fickling,* 361 F.3d 172, 176 (2d Cir. 2004); *Bethea v. Adams & Assoc.,* 352 F.3d 1125 (2d Cir. 2003) ("[Debtors] who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins – for a lawyer's aid is helpful in prosecuting the case as well as in filing it."). *see also Lamie v. United States Trustee,* 540 U.S. 526, 535–36, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

The court in *Gordon v. Hines (In re Hines),* 147 F.3d 1185 (9th Cir. 1998), concluded that an attorney who renders postpetition services is entitled to fees on a *quantum meruit* basis.

Courts have disagreed as to whether this is permissible.

One view is (1) the filing fee is a prepetition debt and that the debtor's obligation to repay it to the attorney is dischargeable; (2) the lawyer's advance of the filing fee with the expectation of repayment violates 11 U.S.C. § 526(a)(4), which prohibits advising a debtor to incur debt in contemplation of filing a bankruptcy case; and (3) the lawyer's payment of the filing fee is a violation of professional ethics rules that prohibit a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation.[7] *In re Brown,* 631 B.R. 77, 101-03 (Bankr. S.D. Fla. 2021) (Isicoff, C.J., expressing view of all judges in the district); *accord, In re Baldwin,* 2021 WL 4592265 (Bankr. W.D. Ky. 2021), (Lloyd, J., expressing view of all judges in the district), *reconsideration denied,* 2022 WL 107376 (Bankr. W.D. Ky. 2022).

In *In re Carr,* 613 B.R. 427, 437 (Bankr. E.D. Ky. 2020), however, the court permitted postpetition reimbursement of the filing fee when the postpetition agreement for services provided that the debtor's postpetition payments first be applied to reimburse the filing fee. The court ruled that this provision complied with Bankruptcy Rule 1006(b)(3), which states that "all installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments to an attorney . . . ." The court also ruled that the practice did not violate § 526(a)(4). The court did not consider the other two issues just discussed.

Exploration of these issues is for another day.[8] The discussion here deals with payment of postpetition attorney's fees without regard to whether the filing fee is included in the installment payments.

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[7] The applicable rule of professional conduct in Alabama is Ala. R. Prof. Cond. 1.8(e).

[8] Several issues could be explored.

1. In view of the fact that the filing fee must accompany the petition or be paid in *postpetition* installments (Bankruptcy Rule 1006(a),(b)) is the filing fee a postpetition debt? Until the petition is filed, it's not due. Is the obligation to reimburse it a debt that "arose *before* the filing of the petition" that is discharged under 11 U.S.C. § 727(b)?

2. In *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 243,130 S. Ct. 1324, 1336, 176 L.Ed.2d 79 (2010), the Supreme Court stated, "[W]e conclude that § 526(a)(4) prohibits a debt relief agency from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose."

The debtor's lawyer (with full knowledge of the impending bankruptcy) is offering to extend credit (if it is a prepetition debt) for the purpose of facilitating the very relief that the client wants and effectively to substitute the lawyer for the United States as the recipient of the money for the filing fee that the debtor must pay. This would seem to be a "valid purpose" rather than "misconduct designed to manipulate the protections of the bankruptcy section," as *Milavetz* described the intent of § 526(a)(4). *Id.*

Section 526(a)(4) also prohibits a lawyer from advising a client to incur debt to pay for representation in a bankruptcy case. The Eleventh Circuit in *Caldwell v Kaufman,* 886 F.3d 1153, 1159 (11th Cir. 2018), ruled that the prohibition is aimed at advice to a client to incur debt to pay the lawyer. When the lawyer is *extending* the credit, it would not seem that the prohibition applies.

The court in *In re Carr,* 631 B.R. 427, 436-37 (Bankr. E.D. Ky. 2020), ruled for these reasons that the attorneys who had advanced the filing fee had not violated § 526(a)(4).

3. Does the ethical restriction on providing *financial assistance* to a client, Ala. R. Prof. Cond. 1.8(e), prohibit the advance of a filing fee when the client is obligated to repay it? This would be news to the lawyers (retained on a noncontingency basis) who regularly advance costs and expenses during the course of litigation and bill the client for it.

4. Does Bankruptcy Rule 1006(b)(3) have anything to do with this? Subdivision (b) of Rule 1006 deals with payment of the filing fee in installments. It protects the interests of the United States in having the fee paid. If the lawyer pays the fee, why does it matter that the reimbursement of the lawyer for the fee occur first?

The bifurcation model for separate prepetition and postpetition representation agreements

The paradigm for the dual contract arrangement is as follows:

1. The lawyer meets with the client and conducts "due diligence" necessary to comply with professional and statutory requirements to provide competent representation, to evaluate whether a Chapter 7 case is appropriate, and to make full and accurate disclosures in the bankruptcy filing.

2. The lawyer explains the options for paying attorney's fees, which typically are a flat fee paid in full before filing or the postpetition payment of some or all of the fee in installments.

3. The installment arrangement requires two representation agreements, one for prepetition services and another for postpetition services. Attached to the prepetition agreement is the postpetition agreement, but the debtor does not sign it. The prepetition contract states that the attorney is willing to providing postpetition services as stated in the postpetition agreement and that the debtor has the option of retaining the attorney for postpetition services.

4. The prepetition agreement describes the services to be rendered prepetition, and the postpetition agreement describes the services that will be rendered postpetition.

5. Both agreements contain disclosures to the debtor in order to comply with the professional obligation that a client may consent on a limitation of representation only after informed consent in writing. *See* Ala. R. Prof. Cond. 1.2(c). Later text discusses the disclosure requirements that courts have imposed.

6. If the court requires it,[9] the postpetition agreement provides either that that the debtor has the right to rescind the postpetition contract for a reasonable time or that the debtor not sign it until a reasonable time after the filing of the case. The time is typically 14 days.

7. A court typically has a local rule, order, or practice that requires an attorney filing a case on behalf of a debtor to represent the debtor in all aspects of the case, unless and until the court permits withdrawal. Some courts permit an exception for adversary proceedings or contested matters. To comply with such a rule, the prepetition contract provides that the lawyer will provide postpetition services even if the debtor does not agree to the postpetition agreement unless the court permits withdrawal.

8. The attorney discloses the entire arrangement on Form 2030 in compliance with the requirements of 11 U.S.C. § 329 and Bankruptcy Rule 2016.

[9] *E.g., In re Brown,* 631 B.R. 77 (Bankr. S.D. Fla. 2021); *Walton v. Clark & Washington, P.C.,* 469 B.R. 383 (Bankr. M.D. Fla. 2012). *See also In re Carr,* 613 B.R. 427 (Bankr. E.D. Ky. 2020) (approving dual contract procedure with 14-day rescission period).

Whether bifurcation is permissible

Attorneys who have employed the dual contract procedure have faced challenges from United States Trustees and courts *sua sponte* that question whether such arrangements are permissible at all or object to particular features.

A critical issue is whether the bifurcation of representation of the debtor into prepetition and postpetition segments, with separate compensation arrangements, is permissible under any circumstances.

Two bankruptcy courts have ruled that bifurcation is not permissible because of a local rule requiring counsel who files a bankruptcy case to represent the debtor during the case unless and until the court permits the debtor to withdraw.[10] Courts have also found that the two contract procedure impermissibly limits the attorney's obligations as a debt relief agency under 11 US.C. §§ 526 and 528.[11] Other courts have cancelled postpetition fee agreements and required disgorgement of fees in the circumstances of the case.[12]

Most courts, however, have concluded that no *per se* rule prevents bifurcation and have permitted dual contract arrangements under specified conditions.[13] The Southern District of Alabama permits the dual contract procedure by local rule. S.D. Ala. Bankr. L.R. 2016-1.[14]

Requirements for permissible bifurcation generally

The required conditions arise from:

> (1) the requirements of professional responsibility relating to competency and limitations on the scope of representation in a matter; [15]

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[10] *In re Baldwin,* 2021 WL 4592265 (Bankr. W.D. Ky. 2021) (Lloyd, J., expressing the views of all the bankruptcy judges in the district), *reconsideration denied,* 2022 WL 107376 (Bankr. W.D. Ky. 2022); *In re Prophet,* 628 B.R. 788 (Bankr. D. S.C. 2021), *rev'd and remanded,* 2022 WL 766350 (Bankr. D. S.C. Mar. 14, 2022).

[11] *E.g., In re Jackson,* 2014 WL 3722019 (Bankr. W.D. La. 2014); *In re Green,* 2014 WL 3724986 (Bankr. W.D. La. 2014) (same).

[12] *E.g., see In re Milner,* 612 B.R. 415 (Bankr. W.D. Okla. 2019); *In re Wright,* 591 B.R. 68 (Bankr. N.D. Okla. 2018); *In re Grimmett,* 2017 WL 2437231 (Bankr. D. Idaho 2017).

[13] *E.g., In re Prophet,* 2022 WL 766350 (D. S.C. Mar. 14, 2022); *In re Brown,* 631 B.R. 77 (Bankr. S.D. Fla. 2021); *In re Carr,* 613 B.R. 427 (Bankr. E.D. Ky. 2020); *In re Hazlett,* 2019 WL 1567751 (Bankr. D Utah 2019); *Walton v. Clark & Washington, P.C.,* 469 B.R. 383 (Bankr. M.D. Fla. 2012); *In re Slabbinck,* 482 B.R. 576 (Bankr. E.D. Mich. 2012); *see In re Prophet,* 2022 WL 766350 (D. S.C. Mar. 14, 2022*)* (ruling that bifurcation is not *per se* impermissible and remanding to bankruptcy court for determining whether the fees were reasonable, whether factoring of them is permissible, the adequacy of disclosures, and whether the debtor gave informed consent); *In re Milner,* 612 B.R. 415 (Bankr. W.D. Okla. 2019) (bifurcation is permissible, but not in this case because attorney failed to make proper disclosures, the postpetition fee was unreasonable, and the contracts did not comply with § 528); *In re Waldo,* 417 B.R. 854 (Bankr. E.D. Tenn. 2009) (rejecting bifurcation model used by counsel but endorsing bifurcation in dicta); *In re Lawson,* 437 B.R. 609 (Bankr. E.D. Tenn. 2020) (same); *In re Griffin,* 313 B.R. 757, 769-70 (Bankr. N.D. Ill. 2004) (endorsing bifurcation of services model in dicta and providing guidance); *In re Abdel-Hak,* 2012 WL 5874317 at * 7 (Bankr. E.D. Mich. 2012) (same).

[14] The text of the rule is set out at the end of this Part I.

[15] The Alabama Rules of Professional Conduct comparable to the ethical rules that courts have applied in other states are Rules 1.1 and 1.2(c).

(2) provisions of the Bankruptcy Code governing (a) the reasonableness of compensation (§ 329), (b) disclosure obligations and other duties of a debtor's bankruptcy lawyer (§§ 527, 528), and (c) the debtor's duties (§ 521); and

(3) a bankruptcy court's local rule that requires an attorney to represent the debtor in the bankruptcy case unless and until the court permits withdrawal (sometimes with exceptions for adversary proceedings and other specified matters).

Bifurcation implicates the professional responsibility rules because it "unbundles" prepetition and postpetition services into two contracts. The prepetition contract necessarily imposes a limitation on the scope of the representation by excluding postpetition services that are necessary to accomplish the objective of the bankruptcy filing. Unbundling creates issues as to the operation of Bankruptcy Code provisions governing the attorney's duties and assistance to the debtor in the performance of the debtor's duties. And it is inconsistent with the requirements of a local rule that a debtor represent the debtor in the case unless and until the court permits withdrawal.

Essential practices for permissible bifurcation of representation and fees

Courts permitting bifurcation have resolved the concerns just discussed by specifying conditions under which bifurcation is permissible. *In re Brown*, 631 B.R. 77 (Bankr. S.D. Fla. 2021), contains a recent and useful summary. Notably, *Brown* states that the legal conclusions in the opinion "represent the legal conclusions of all of the judges of the Bankruptcy Court of the Southern District of Florida." *Id.* at 85-86.

The cases permitting bifurcation generally state the following requirements:

1. There must be two contracts, one for prepetition services and one for postpetition services. They must be in writing.

2. The attorney must present all payment options to the debtor and adequately explain them.

3. The attorney must present the postpetition contract at the time the prepetition contract is signed. The debtor cannot sign the postpetition contract until the petition is filed. The court may require that the debtor receive and sign a separate disclosure form that clearly explains the

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Alabama Rule 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation with respect to a matter. In such circumstances, competence means the knowledge, skill, thoroughness, and preparation reasonably necessary for such limited representation.

Alabama Rule 1.2(c) permits a lawyer to limit the scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." The informed consent must ordinarily be in writing. Exceptions exist if representation consists solely of telephonic consultation, in certain pro bono circumstances, and when a court appoints an attorney for a limited purpose set forth in the appointment order.

debtor's postpetition options: continue with current counsel, proceed *pro se*, or retain new counsel. *Brown,* 77 B.R. at 100; *Walton v. Clark & Washington, P.C.,* 469 B.R. 383 (Bankr. M.D. Fla. 2012).

4. Each fee agreement must specifically describe the services that will or may be provided under each one. The prepetition agreement must clearly describe the services that must be performed as well as any other services that may be provided. Any services that are not included in the flat fee must be specified, and the fee for the attorney's performance of them must be clearly explained. *Brown* discusses the requirements for proper description and categorization of services and includes extensive excerpts from the documentation that the attorneys used that the court generally permitted, with some directions for changes in future cases.

5. To insure the client's "informed consent," both the prepetition and postpetition agreements must clearly explain:

(a) that the debtor is not required to retain the attorney postpetition;

(b) what the debtor's options are if the debtor chooses not to retain the attorney postpetition and the consequences of such options;

(c) that any obligation for fees for prepetition services is dischargeable;

(d) that the attorney will provide postpetition services until permitted to withdraw;

(e) that the debtor may consult with independent counsel about retaining the attorney postpetition; and

(f) that, if the debtor retains the attorney for postpetition services, the debtor can be sued for nonpayment and the debt will not be discharged.

6. The debtor should have "breathing room" after the filing of the petition to decide whether to retain the attorney for postpetition services. This can be accomplished either by waiting 14 days before the debtor signs the postpetition agreement or by permitting the debtor to rescind the postpetition agreement within 14 days after it is signed. S.D. Ala. Bankr. LR 2016-2 requires that the prepetition agreement allow the debtor at least ten days postpetition to decide whether to enter into a postpetition services contract.

7. The attorney must file Form 2030 to completely and accurately describe the compensation arrangement as § 329 and Bankruptcy Rule 2016 require.

8. As noted above, the two contract procedure requires consideration of professional responsibility rules, provisions of the Bankruptcy Code, and any local rule that requires representation of a debtor after filing the case until the court permits withdrawal. In *In re Brown*,

631 B.R. 77, 97-98 (Bankr. S.D. Fla. 2021), the concluded that the statutes and rules collectively require the following:

> a. Sufficient inquiry by the attorney, not staff, when initially meeting with a client to ascertain whether filing bankruptcy is the appropriate relief and determining under what chapter a bankruptcy case could or should be filed.
>
> b. The attorney must adequately inform a potential debtor of the consequences of the choices.
>
> c. The attorney must assist the debtor with all of the debtor's obligations under § 521 unless the court permits the attorney to withdraw.
>
> d. The attorney must prepare all documents necessary to commence the bankruptcy case, including, at a minimum, the petition, the creditor's matrix, any motion to waive or pay the filing fee installments, the statement of attorney compensation,[16] the credit counseling certificate (or a motion to waive it or file it late).[17]
>
> e. The attorney must attend the § 341 meeting unless the court permits withdrawal before the meeting.

9. The attorney must provide postpetition representation in accordance with the court's local rule unless and until the court permits withdrawal, even if the debtor does not retain the lawyer for postpetition services. S.D. Ala. Bankr. L. R. 2016-2 states that the court may consider a motion to withdraw on an expedited basis and requires service of it on the debtor, trustee, and bankruptcy administrator.

10. If the attorney advances the filing fee (which *Brown* and similar cases do not permit), the agreements should provide for reimbursement of the filing fee before application of the debtor's payments to fees so that no Bankruptcy Rule 1006(b) issue arises.[18] S.D. Ala. Bankr. L. R. 2016-2 requires payment of the filing fee in full before payment of any attorney's fees.

11. Both prepetition and postpetition fees must be reasonable.

Reasonableness of postpetition compensation

Whether postpetition compensation is reasonable raises two issues.

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[16] The court in *In re Carr,* 613 B.R. 427, 432 (Bankr. E.D. Ky. 2020), noted that the debtor's attorney had waited to file the disclosure of compensation until the debtor decided whether to retain the debtor for postpetition services. The court in approving the dual contract procedure did not address the issue of whether the attorney had to file the statement with the petition.

[17] The court recognized that in emergency circumstances the attorney could file a "bare bones" petition but cautioned that "even in that circumstance the attorney and the debtor must be sufficient informed prior to filing the petition to comply with Rule 9011, and certain documents must be prepared and filed." *Brown,* 631 B.R. at 98.

[18] *See In re Carr,* 613 B.R. 427, 437 (Bankr. E.D. Ky. 2020); *In re Wright,* 591 B.R. 68, 96-97 (Bankr. N.D. Okla. 2018).

The first arises from the fact that the nature of Chapter 7 practice necessarily requires substantial services prior to the filing, especially if the schedules, statement of financial affairs, and other required documents are filed with the petition. In *Brown,* 631 B.R. at 93, for example, the United States Trustee argued:

> [I]f a lawyer does what a lawyer is supposed to do prepetition – meet with the client to determine which chapter of bankruptcy, or bankruptcy at all, is in the client's best interest and complete the debtor's schedules and statement of financial affairs, as well as all other documents required to be filed with the petition – there won't be much to do postpetition that is not ministerial.

The argument continues that the two contract procedure is just "a disguised way to pay for prepetition services postpetition" and that the fees are therefore unreasonable under § 329. Further, if such services were provided postpetition, then the attorney failed to provide competent prepetition representation and may have violated Bankruptcy Rule 9011 by filing the petition without adequate inquiry. *Id. See also In re Carr,* 613 B.R. 427, 439 (Bankr. E.D. Ky. 2020); *In re Hazlett,* 2019 WL 1567751 at * 11 (Bankr. D. Utah 2019).

Brown, Carr, and *Hazlett* rejected the argument. *Brown and Carr* ruled that the test is whether the fees under both contracts are reasonable and that the reasonableness of the postpetition fee is not determined by comparing it to the prepetition one. *Brown,* 631 B.R. at 93-94; *Carr,* 613 B.R. at 439. All of the courts ruled that the postpetition fees were reasonable.

The second issue is whether the fees are reasonable when the total of the fees for prepetition and postpetition services exceeds the amount of the flat fee the lawyer charges clients who pay prepetition. Some courts have concluded that a fee paid in installments that is higher than a fee paid in full is unreasonable to the extent of the difference.[19] In *In re Carr,* 613 B.R. 427 (Bankr. E.D. Ky. 2020), however, the court without addressing the issue found that a postpetition fee was reasonable even though it was $350 more than the attorney's flat fee if paid prepetition.

The court in *In re Hazlett,* 2019 WL 1567751 at * 10 (Bankr. D. Utah 2019), observed that an attorney may charge a client who must use a bifurcated agreement more than one who pays an up-front retainer, but that "the pricing differential must be based on reasonable and quantifiable factors, and it must not include the cost of pre-petition services. Also, if the price differential is challenged by any party, including the Court, counsel should be prepared to justify it."

[19] *E.g.*, *In re Allen,* 628 B.R. 641 (B.A.P. 2021) ($1,665 for fee paid in installments, $1,165 if paid upfront; $500 difference for the same services is unreasonable); *In re Baldwin,* 2021 WL 4592265 at * 15 (Bankr. W.D. Ky. 2021), *reconsideration denied,* 2022 WL 107376 (Bankr. W.D. Ky. 2022) ($2,200 for fee paid in installments; attorney consistently used a flat fee of $1,250 in other cases; $950 difference is not justified); *In re Milner,* 612 B.R. 415, 440 (Bankr. W.D. Okla. 2019) ($2,700 for fee paid in installments; attorney regularly charged $1,500 to $1,800 flat fee; difference of $ 900 to $1,200 more is not justified).

Factoring of receivable for postpetition representation

Some attorneys have contracted with companies such as BK Billing or Fresh Start Funding to factor a debtor's postpetition fee obligation. The factoring agreement typically provides for an assignment of the client's debt to the factor in exchange for immediate cash payment of a portion of the amount due, often 75 percent of the amount due. The factor may reduce the amount paid upon assignment of the receivable by an additional 15% as a reserve for default under the agreements.[20]

Considering the United States Trustee's challenge to the factoring of postpetition fees in *In re Hazlett,* 2019 WL 1567751 at *11-12 (D. Utah. 2019), the court noted that a Utah ethics opinion[21] had addressed the issue as follows:

> While it is not a violation of the Utah Rules of Professional Conduct to sell a lawyer's accounts receivable, the client must be fully informed with respect to the transaction. The client must be offered the same discounted price. The client must consent in writing to the sale and must be informed that the legal fees for post-petition work are not dischargeable. The lawyer must inform the client that the legal financing company will collect the fee and if there were to be a dispute between the finance company and the client, the lawyer would not represent the client.

The *Hazlett* court concluded that the factoring arrangement there generally complied with the ethics opinion and that the factoring, accompanied by disclosure the court found adequate, did not justify the imposition of sanctions.[22]

The court in *In re Ndon,* 2018 WL 6839745 (Bankr. D. Del. 2018), found that the factored, postpetition fee charged by the debtor's attorney was reasonable. The court did not question or address the factoring arrangement.

Other courts have ruled that factoring is not permissible. The court in *In re Baldwin,* 2021 WL 4592265 (Bankr. W.D. Ky. 2021), *reconsideration denied,* 2022 WL 107376 (Bankr. W.D. Ky. 2022), did so in the context of determinations that bifurcation itself is impermissible in view of its local rule requiring an attorney to provide postpetition services until withdrawal is permitted. The bankruptcy court in South Carolina reached the same conclusion but the district court reversed and remanded. *In re Prophet,* 628 B.R. 788 (Bankr. D. S.C. 2021), *rev'd and remanded,* 2022 WL 766350 (Bankr. D. S.C. Mar. 14, 2022).

The court in *In re Brown,* 631 B.R. 77, 99 n. 34 (Bankr. S.D. Fla. 2011), addressed the issue even though it was not before it:

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[20] For a description of arrangements with BK Billing, see *In re Kolle,* 2021 WL 5872265 at * 15-16 (Bankr. W.D. Mo. 2021); *In re Wright,* 591 B.R. 68, 72-73 (Bankr. N.D. Okla. 2018).

[21] Opinion No. 17-06, Utah Ethics Opinion, Utah State Bar Ethics Advisory Opinion Committee, issued Sept. 27, 2017, revised Aug. 16, 2018, available at http:/utahbar.org/wp-content/uploads/2018/09/17-06-Revised-002.pdf.

[22] The law firm in the case later stopped factoring its fees. *In re Hazlett,* 609 B.R. 430, 442 (Bankr. D. Utah).

None of the Law Firms factored their fees so this opinion does not address the adequacy of any disclosures relating to factoring. However, the Court has determined that it will not allow any attorney to factor its legal fees. This creates an inherent conflict of interest between the attorney and the debtor, and violates R. Regulating Fla. Bar. 4-5.4, 4-1.8, and 4.1.7.

Issues with regard to factoring in the two contract situation include proper disclosure,[23] whether the factoring creates an impermissible conflict of interest, and whether it constitutes impermissible sharing of fees with a non-lawyer.[24]

For a thorough examination of disclosure requirements and ethical issues involved in the use of factoring agreements, see *In re Kolle,* 2021 WL 5872265 (Bankr. W.D. Mo. 2021).

B. Payment Through Chapter 13 Case

An alternative for a debtor who desires representation in a bankruptcy case but cannot afford to pay a prepetition retainer is the filing of a Chapter 13 case. Chapter 13 does not specifically address whether the filing of a Chapter 13 case primarily to permit payment of legal fees is permissible. The question is whether such a filing meets the good faith requirements for confirmation in 11 U.S.C. § 1325(a)(3) (proposal of plan in good faith) and (7) (filing of petition in good faith).

The Eleventh Circuit has ruled that it is not a *per se* violation of the good faith requirement of 11 U.S.C. § 1325(a)(3) for a Chapter 13 plan to provide for payment only of attorney's fees when the debtor cannot pay an attorney to file a Chapter 7 case. *Brown v. Gore (In re Brown),* 742 F.3d 1309 (11th Cir. 2014).[25]

In *In re Powe,* 2020 WL 6065178 (Bankr. S.D. Ala. 2020), the debtor filed a Chapter 13 case to stop a wage garnishment instead of a Chapter 7 case because she could not pay the attorney's fee for a Chapter 7 case before filing. The plan proposed to pay $135 a month for 36 months, which the Chapter 13 trustee estimated would pay the attorney's fee of $3,400 and $1,809.84 on unsecured claims in addition to the Chapter 13 trustee's statutory fee.

The Chapter 13 trustee objected that the plan was not filed in good faith because it was essentially a "fee-centric" plan." The debtor had no other reason to choose Chapter 13 over Chapter 7.

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[23] *See, e.g., In re Kolle,* 2021 WL 5872265 (Bankr. W.D. Mo. 2021); *In re Baldwin,* 2021 WL 4592265 at *12-13 (Bankr. W.D. Ky. 2021), reconsideration denied, 2022 WL 107376 (Bankr. W.D. Ky. 2022); *In re Wright,* 591 B.R. 68 (Bankr. N.D. Okla. 2018). For a discussion of disclosure requirements by a representative of Fresh Start Funding, see *There's No Such Thing As Too Much Information,* 38-July Am. Bankr. Inst. L. J. 20 (2019).

[24] Arizona Ethics Opinion 98-05 states: "It is unethical for a lawyer to enter into a factoring agreement calling for the outright sale of client accounts receivable because the agreement constitutes a sharing of legal fees by a lawyer with a non-lawyer.

[25] *Accord, e.g., Sikes v. Crager (In re Crager),* 691 F.3d 671 (5th Cir.2012); *Berliner v. Pappalardo (In re Puffer),* 674 F.3d 78, 83 (1st Cir.2012). For a review of these and other cases, see *In re Wark,* 542 B.R. 522 (Bankr. D. Kan. 2015).

Judge Callaway noted that it was possible for a debtor to find an attorney who would agree to postpetition payment of fees for a Chapter 7 case but that "the debtor bar generally did not want to be in the business of collecting from their own impecunious clients. . . .Debtors' counsel understandably prefer to have the court and the chapter 13 trustee collect their fees through the chapter 13 plan rather than having to attempt to collect directly from their own clients to get paid for chapter 7 legal work that has already been done." *Id.* at *2.

Judge Callaway observed, *id.* at *2:

> Many debtors would clearly benefit from filing chapter 7 instead of 13. They would pay less and get a discharge quickly with little risk of their case being dismissed. However, a debtor paying attorneys' fess through a chapter 13 plan does benefit somewhat from spreading the payments out over a longer period of time. The court doubts that many attorneys would want to extend postpetition payments for more than a few months.

Further, Judge Callaway noted, the debtor "in an ideal world with complete transparency" could "shop around" and find a local attorney who would accept fees for a Chapter 7 case either partially or wholly postpetition. *Id.* at *3.

But he declined to conclude that it was bad faith on *the debtor's* part that she did not file a Chapter 7 case because "such a finding would penalize debtors because their *attorneys* want to be paid postpetition through a chapter 13 plan rather than directly." *Id.* at *3 (emphasis in original).

The court thus overruled the trustee's objection based on good faith. But it reduced the attorney's fee for the case to $1,500 rather than the $2,400 fee that the plan proposed. *Id.* The reduction in fees benefits the unsecured creditors, not the debtor. She must pay a total of $4,860 under the proposed plan (36 months x $135 per month); the unsecured creditors thus receive more because the attorney receives less. The debtor pays the same amount.

C. Observations

1. Dischargeability of prepetition agreement to pay postpetition fees.

All of the issues just addressed did not have to come up. Courts could have accepted the concept that a debtor's obligation to pay a fee for services in a Chapter 7 bankruptcy case does not arise until the case is filed and that, therefore, the obligation is a postpetition one that is not discharged. Most, if not all, of the prepetition services that a debtor's attorney provides before a Chapter 7 filing are meaningless and have no value until the filing occurs.

Alternatively, an exception to the general discharge rules could be found in § 329, which requires an attorney representing a debtor to file a statement of compensation "paid or *agreed to be paid.*" If the debtor's agreement to pay compensation after the filing is dischargeable, § 329(a) has no need, at least in a Chapter 7 case, to deal with what the debtor *already* agreed to pay in the future because it is dischargeable (thus of no concern to the debtor) and not paid from the estate (thus of no concern to creditors).

2. **The Chapter 13 Alternative**

As the court observed in *In re Hazlett*, 2019 WL 1567751 at * 6 (Bankr. D. Utah 2019), "In all instances, a debtor's inability to pay an up-front retainer should not be the deciding factor in choosing between filing under Chapter 7 or Chapter 13."

If a court does not permit a two contract procedure, it is the deciding factor for such a debtor. Otherwise, a debtor who needs bankruptcy relief will either have to proceed *pro se,* find an attorney who will provide services *pro bono*, or file a Chapter 13 case.

3. Reasonableness of fees in dual contract cases

Courts have justifiably focused on the unfortunate fact that a debtor who pays in installments often pays more than a debtor who pays upfront for the same services.

Although the concern is a valid one, a debtor paying more in a two contract model is *still* better off than a debtor who uses Chapter 13 to pay attorney's fees. For example, the debtor in *Powe* would be better off even if she paid twice as much ($1600-$3200) as the typical chapter 7 retainer ($800-$1600) in installments than the $4,860 she proposed to pay over 36 months in her plan. And she would get a discharge earlier.

4. Factoring

For the same reasons, a debtor is better off under a factoring arrangement, even if the debtor's total payments exceed the amount of an upfront retainer to cover a 25% factoring fee. Under a factoring agreement, a $2,000 postpetition fee paid in installments would result in $1500 to the lawyer, within the $800-1600 range of typical Chapter 7 retainers. The result seems offensive and unfair. But it is still better for most debtors than making payments for 36 months in a Chapter 13 case.

That said, it is nevertheless difficult to square a factoring arrangement with the lawyer's professional responsibilities. Is immediate cash really that important?

A lawyer who is, or is considering, factoring must study *In re Kolle,* 2021 WL 5872265 (Bankr. E.D. Mo. 2021), to understand all of the problems that such an arrangement raises and to determine whether the lawyer can develop documentation and procedures that resolve the numerous problems the court identified.

Local Bankruptcy Rule 2016-2
U.S. Bankruptcy Court for the Southern District of Alabama

SEPARATE PRE- AND POSTPETITION LEGAL SERVICES CONTRACTS IN CHAPTER 7 CASES

The debtor and the debtor's counsel may agree to separate prepetition and postpetition contracts for legal services in a chapter 7 bankruptcy case. The contracts shall be in writing and comply with Alabama Rules of Professional Conduct 1.1 and 1.2, Bankruptcy Code §§ 526-28, and any other applicable standards. The prepetition agreement must allow the debtor at least 10 days postpetition to decide whether to enter into a postpetition legal services contract and must provide that the debtor's counsel will remain as counsel of record until allowed to withdraw. The postpetition contract must cover all remaining aspects of the case except for adversary proceedings. All compensation paid or agreed to be paid must be disclosed pursuant to Bankruptcy Code § 329(a) and Bankruptcy Rule 2016(b). Pursuant to Bankruptcy Rule 1006(b)(3), no attorney's fees shall be paid or accepted postpetition until the filing fee has been paid in full.

If the debtor's counsel has not agreed to postpetition representation and the debtor fails to enter into an agreement for postpetition legal services, the court may allow the attorney to withdraw from the representation of the debtor upon the attorney's motion with service on the debtor, trustee, and bankruptcy administrator. Motions to withdraw may be considered on an expedited basis without being set for hearing.

II. GARNISHMENT OF FUNDS HELD BY TRUSTEE UPON DISMISSAL OF CHAPTER 13 CASE

***Bednar v. Bednar (In re Bednar),* 2021 WL 1625399 (B.A.P. 10th Cir. 2021) (unpublished), *appeal dismissed for lack of finality,* 2021 WL 5856864 (10th Cir. 2021)**

After the bankruptcy court denied confirmation of the debtor's plan in his third Chapter 13 case and dismissed it because he was not eligible for chapter 13, judgment creditors sought leave to garnish about $29,000 in the hands of the trustee, the amount of the debtor's plan payments after deduction of the trustee's fees. The debtor's former spouse also asserted a garnishment right based on domestic support obligations owed to her that were superior to the interests of the other creditors.

The bankruptcy court denied the motions under the so-called *Barton* doctrine. The *Barton* doctrine requires leave of the bankruptcy court before commencement of an action against a bankruptcy trustee. *Barton v. Balbour,* 104 U.S. 126, 26 L.Ed. 672, 1881 WL 19839 (1881). *See generally* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 2 CHAPTER 13 PRACTICE AND PROCEDURE § 17:6 (2d ed. 2021).

The bankruptcy court reasoned that subjecting chapter 13 trustees to garnishments would create a "tremendous administrative burden." In addition, the bankruptcy court concluded that the plain language of § 1326(a)(2) required the trustee to return funds to the debtor, with no possibility of any intervening diversion. 2021 WL 1625399 at *2.

The Bankruptcy Appellate Panel agreed that the *Barton* doctrine applied but observed that the doctrine "does not establish a *per se* ban on garnishments against a trustee, it merely requires bankruptcy court approval before the garnishment may be filed." *Id.* at *4, *quoting In re Jankauskas,* 593 B.R. 1, 9 (Bankr. N.D. Ga. 2018) (Cavender, J.) (Concluding on trustee's motion for direction with regard to disbursement of garnished funds received from a state court that the funds should be returned to the state court and that creditor's filing of garnishment action against trustee without leave of court violated *Barton* doctrine).

The BAP concluded that the exercise of discretion in deciding whether to grant leave to garnish the trustee is "much broader in scope and encompasses much wider factors than potential inconvenience or burden to the Trustee. The mere possibility of inconvenience cannot serve as a blanket protection for trustees from a legal process to which any other person may be subjected." *Id* at *5. The court found it significant that the bankruptcy court had acknowledged that the administrative duties may be minimal in the one case before it. *Id.*

The BAP thus remanded for the bankruptcy court to exercise its discretion by weighing the factors it identified in determining whether to grant leave.

The BAP explained that the court must first require the party seeking leave to make a *prima facie* case against the trustee, showing that the claim is not without foundation. Then, the bankruptcy court must consider the potential effect of a judgment against the trustee on the debtor's estate.

The BAP listed five factors that the Ninth Circuit Bankruptcy Appellate Panel identified in *Kashani v. Fulton (In re Kashani),* 190 B.R. 875, 886-87 (B.A.P. 9th Cir. 1995):

> 1. Whether the acts or transactions relate to the carrying on of the business connected with the property of the bankruptcy estate. If the proceeding is under 28 U.S.C. § 959(a), then no court approval is necessary. However, the moving party may request this initial review by the bankruptcy court in the motion for leave to sue the trustee, or perhaps in the form of a complaint, seeking a declaratory judgment from the bankruptcy court.
>
> 2. If approval from the appointing court appears necessary, do the claims pertain to actions of the trustee while administering the estate? By asking this question, the court may determine whether the proceeding is a core proceeding or a proceeding which is related to a case or proceeding under Title 11, United States Code.
>
> 3. Do the claims involve the individual acting within the scope of his or her authority under the statute or orders of the bankruptcy court, so that the trustee is entitled to quasi-judicial or derived judicial immunity?
>
> 4. Are the movants or proposed plaintiffs seeking to surcharge the trustee; that is, seeking a judgment against the trustee personally?
>
> 5. Do the claims involve the trustee's breaching her fiduciary duty either through negligent or willful misconduct?

With regard to the § 1326(a)(2) issue, the court extensively reviewed the conflicting caselaw. A "plain meaning" analysis concludes that § 1326(a)(2) and § 349(b)(3) unambiguously require the return of all payments to the debtor after preconfirmation dismissal. Other courts, however, find ambiguity in § 1326(a)(2) within the context of § 349(b)(3) and permit creditors to reach plan payments.

The BAP agreed with the latter approach and held that funds could be subjected to garnishment. *Id.* at *10-11.

On remand, the bankruptcy court granted leave to pursue garnishment in the state court. *In re Bednar,* 2021 WL 4483473 (Bankr. W.D. Okla. 2021).

III. SANCTIONS FOR MORTGAGE CREDITOR'S VIOLATION OF RULES GOVERNING DISCLOSURE OF POSTPETITION CHARGES AND DETERMINATION OF FINAL CURE AMOUNT

***PHH Mortgage Corp. v. Sensenich (In re Gravel),* 6 F.4th 503 (2d Cir. 2021)**

This case involves punitive monetary sanctions of $350,000 that the bankruptcy court imposed against a mortgage servicer for sending mortgage statements to the debtors in three Chapter 13 cases that included improper postpetition late charges and property inspection fees. After the trustee sought sanctions, the servicer removed them from the statements.

In each of three cases, the bankruptcy court imposed sanctions of $25,000 (a total of $75,000) because the servicer sent 25 monthly statements that included postpetition charges that had not been disclosed as Bankruptcy Rule 3002.1(c) requires. The sanction was $1,000 per violation.

In two cases, the servicer listed the charges on monthly statements sent after the bankruptcy court had entered orders determining that the debtor had paid all required postpetition charges. The sanction was $175,000 in one case and $100,000 in the other, a total of $275,000.

The Second Circuit reversed.

With regard to the $275,000 sanctions, the Second Circuit held that the servicer had not violated the court's orders as a matter of law because, although they declared that the debtors were current, they did not expressly enjoin the recording of the fees. *Id.* at 511. Under the Supreme Court's ruling in *Taggart v. Lorenzen,* 139 S.Ct. 1795 (2019), the court reasoned, a bankruptcy court can hold a creditor in contempt for violating the court's injunction only if "there is no fair ground of doubt as to whether the order barred the creditor's conduct." 6 F.4th at 512, *quoting Taggart,* 139 S.Ct. at 1799. The court declined to determine whether the bankruptcy court had inherent authority to award non-contempt-based sanctions because, it said, the bankruptcy court relied only on its contempt powers. 6 F.4th at 512.

With regard to the $75,000 sanctions, the Second Circuit held that Bankruptcy Rule 3002.1(i) does not authorize the imposition of punitive sanctions for a violation of Rule 3002.1(c). *Id.* at 514-16. Further, the court ruled, it could not consider whether the bankruptcy court had inherent authority to do so because, the court said, although the bankruptcy court had "alluded" to its inherent authority, "it did not assess whether the sanction was authorized under it." *Id.* at 516.

The dissent agreed that the orders with regard to the $275,000 sanctions did not clearly and unambiguously prohibit the listing of the charges but concluded that the bankruptcy court had authority under Rule 3002.1(i) and its inherent powers to sanction the servicer for its failure to disclose the charges. *Id.* at 517-31.

It is interesting to consider the Second Circuit's opinion in the light of the bankruptcy court's rulings that awarded the sanctions.

In each of the cases, the servicer had not provided notice of the charges within 180 days after they were incurred, as Bankruptcy Rule 3002.1(c) requires. In two of the cases, the servicer sent monthly statements showing the charges after the bankruptcy court had entered orders under Bankruptcy Rule 3002.1(h) determining that the debtors had cured prepetition defaults and had paid all required prepetition amounts. In one case, the servicer had earlier agreed to an order that included a $9,000 sanction for improper application of postpetition payments.

After the trustee sought sanctions, the servicer removed the charges from the mortgage statements and opposed the imposition of sanctions. The total amount of improperly listed charges in all three cases was $ 716.

In its initial ruling, the bankruptcy court awarded two types of sanctions. *In re Gravel,* 556 B.R. 561 (Bankr. D. Vt. 2016), *vacated and remanded sub nom. PHH Mortgage Corp. v. Sensenich (In re Gravel),* 2017 WL 6999820 (D. Vt. 2017).

First, it found that the servicer had violated Rule 3002.1(c) 25 times in each case and imposed a sanction under of $ 1,000 per violation, a total of $ 75,000, pursuant to Rule 3002.1(i)(2), which permits a court to grant "other appropriate relief" for a violation of Rule 3002.1(c).

Second, the bankruptcy court concluded that the servicer had violated the court's orders in two of the cases determining that the debtors were current by sending statements that listed the charges. The court imposed sanctions of $ 200,000 in one case and $ 100,000 in the other.

The court ordered the servicer to pay the sanctions to a *pro bono* legal services provider. *In re Gravel,* 556 B.R. 561 (Bankr. D. Vt. 2016).

The district court vacated and remanded. *PHH Mortgage Corp. v. Sensenich (In re Gravel),* 2017 WL 6999820 (D. Vt. 2017).

The District Court ruled that Rule 3002.1(i) did not authorize the imposition of punitive sanctions because a procedural rule could not expand the scope of the bankruptcy court's powers as delineated by statute and precedent. *Id.* at *5. The district court also concluded, "the statutory and inherent powers of the Bankruptcy Court are not sufficient to support the Bankruptcy Court's imposition upon [the servicer] of $300,000 in punitive sanctions." *Id.* at *9. The district court observed that the bankruptcy court may refer a matter to the District Court for criminal contempt proceedings and sanctions, or "may take steps to enforce its orders short of punitive sanctions of the scope and type imposed in these cases." *Id.* at *9. The Second Circuit dismissed an appeal for lack of finality.

The district court noted a circuit split on the question of whether bankruptcy courts have the power to punish criminal contempts or impose punitive sanctions. *Id.* at *6. The district

court agreed with the views of the Ninth, Fifth, and Sixth Circuits that that neither § 105 nor the bankruptcy court's inherent powers were proper sources of authority for the imposition of a serious punitive sanction. *Id.* at *7-8 (discussing *In re Dyer,* 322 F.3d 1178, 1193 (9th Cir. 2003), *In re Hipp, Inc.,* 895 F.2d 1503 (5th Cir. 1990), and *In re John Richards Homes Bldg. Co.,* 552 Fed.Appx. 401, 415-16 (6th Cir. 2013)). The district court opinion rejected the approach of the First and Eighth Circuits that bankruptcy courts have broad authority to impose punitive sanctions for violation of a court order. *Id.* at *8 (discussing *In re Charbono,* 790 F.2d 80, 87 (1st Cir. 2015), and *Isaacson v. Manty,* 721 F.3d 533, 538-39 (8th Cir. 2013)).

On remand, the bankruptcy court defined its task as being to "redetermine the amount of sanctions . . . with a focus on the scope of this Court's statutory and inherent authority to impose punitive sanctions." *In re Gravel,* 601 B.R. 875, 878 (Bankr. D. Vt. 2019). It had to determine, the court said, "what sanctions are less than serious and, as such, within this Court's authority to impose?" *Id.* at 879.

The bankruptcy court first reviewed its authority to impose sanctions. *Id.* at 882-90.

The court noted that the district court had held that its authority under Rule 3002.1(i)(2) could not exceed the scope of the bankruptcy court's powers as delineated by statute and precedent but that it had not held that Rule 3002.1(i)(2) precludes a punitive sanction as "other appropriate relief." *Id.* at 882. Reasoning that the enforcement mechanism of Rule 3002.1(i) was modelled after the provisions for discovery sanctions in Rule 37 of the Federal Rules of Civil Procedure, *id.* at 883-84,the bankruptcy court concluded that the phrase "other appropriate relief" allows a court "to tailor the punitive sanction to be imposed when a party violates a particular rule according to the specific circumstances of the party's conduct." *Id.* at 886.

The bankruptcy court then concluded that, in accordance with the case law the district court had analyzed and the Supreme Court's ruling in *Taggart v. Lorenzen,* 139 S.Ct. 1795 (2019), it had authority under its inherent powers and § 105(a) to impose punitive sanctions for breach of its orders with regard to postpetition mortgage payments provided that the sanctions were "less than serious" and did not exceed the limits of the court's inherent and statutory authority. *Id.* at 888-90. The court noted that its orders operated as a "limited injunction" that prohibited the collection of any fees or expenses that were not properly noticed under Rule 3002.1(b). *Id.* at 889.

The bankruptcy court reasoned that, under the authorities cited by and the analysis of the district court, bankruptcy courts lack authority to impose "serious" non-compensatory punitive damages but may award "mild" non-compensatory sanctions. *Id.* at 892. After an extensive analysis of case law regarding determination of whether a punitive sanction is "modest" or "less than serous," *Id.* at 892-905, the court concluded that a sanction of less than $205,531.30 would be less than a serious punitive sanction if the court determined that a lower amount would be ineffective in deterring future misconduct. *Id.* at 905. The amount is derived from a cap of $100,000 for a non-serious sanction that the Second Circuit set in *United States v. Twentieth Century Fox Film Corp.,* 882 F.2d 656, 665 (2d Cir. 1989), adjusted to 2019 dollars.

Under this standard, the court reduced the sanctions in two of the cases for violation of the orders from $200,000 and $100,000 to $175,000 and $75,000 and reimposed the $25,000 sanction under Rule 3002.1(i) for failure to disclose in all of them. *Id.* at 906-07. The court determined that the sanctions for the Rule 3302.1(i) violations should be paid to the trustee.

The servicer appealed to the district court. The bankruptcy court upon request of the trustee certified the proceeding for direct appeal to the Second Circuit under 28 U.S.C. § 158(d)(2). *In re Gravel,* 2019 WL 3783317 (Bankr. D. Vt. 2019).

The Second Circuit granted the request for direct review and reversed, as explained above. *PHH Mortgage Corp. v. Sensenich (In re Gravel),* 6 F.4th 503, 510 (2d Cir. 2021).

The Second Circuit's ruling raises these potential questions:

1. Could the bankruptcy court have imposed the sanctions under § 105(a) or under its inherent powers? Although the bankruptcy court's opinion might be read as invoking such authority to support the sanctions, the Second Circuit expressly declined to rule on whether such authority could authorize them.

2. Will debtors or trustees request that bankruptcy courts issue orders that not only determine that the debtor has cured prepetition defaults, made all postpetition payments, and has no obligation for any undisclosed postpetition fees, but also include an express injunction against seeking to collect anything else? This was the basis for the Second Circuit's ruling on the $275,000 sanctions – an issue that may not have been raised in the lower courts because their opinions do not appear to mention it.

IV. IS THE DEBTOR'S RIGHT TO VOLUNTARILY DISMISS A CHAPTER 13 CASE SUBJECT TO AN EXCEPTION TO PREVENT ABUSE OF THE BANKRUPTCY PROCESS?

A Chapter 13 debtor has the right to voluntary dismissal of a Chapter 13 case under 11 U.S.C. § 1307(b). It provides (emphasis added):

> On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of [Title 11], the court *shall dismiss* a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Suppose, however, that a debtor has filed the Chapter 13 case in bad faith, or has engaged in some sort of misconduct during the case – transferred valuable property to a friend or relative, for example? The trustee, the bankruptcy administrator, creditors, or perhaps the court think that the case should be converted. Must the bankruptcy court dismiss the case if the debtor so requests?

Consideration of the issues begins with the Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007), which involved whether a bankruptcy court has authority to deny a debtor's right to convert a case from Chapter 7 to Chapter 13 under 11 U.S.C. § 706(a) based on the debtor's bad faith. Section 706(a) provides (emphasis added):

> The debtor *may* convert a case under this chapter to a case under chapter 11, 12, or 13 of [Title 11] at any time, if the case has not been converted under section 1112, 1208, or 1037 of [Title 11]. Any waiver of the right to convert a case under this subsection is unenforceable.

In *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007), the Supreme Court held that a debtor's right to convert from Chapter 7 to Chapter 13 is not absolute and affirmed the bankruptcy court's denial of conversion based on the debtor's bad faith. Because under 11 U.S.C. § 707(d) a debtor may not convert a Chapter 7 case to a case in which the debtor is not eligible, the Court reasoned, the bankruptcy court properly denied the motion because the debtor's bad faith precluded him from qualifying as a Chapter 13 debtor. *Id.* at 372-73.

The *Marrama* Court also observed that the bankruptcy court could have denied conversion under 11 U.S.C. § 105(a), which provides that bankruptcy courts may issue any "order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

Prior to *Marrama,* most courts recognized the unconditional nature of the debtor's right to dismissal of a Chapter 13 case,[26] including the Second Circuit in *In re Barbieri,*199 F.3d 616

[26] *See* W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 2 CHAPTER 13 PRACTICE AND PROCEDURE § 20:4 (2d ed. 2021).

(2d Cir. 1996). Some courts, however, concluded that a court could deny a request for voluntary dismissal to prevent abuse of the bankruptcy process, including the Eighth Circuit in *In re Molitor,* 76 F.3d 218, 220 (8th Cir. 1996).

After *Marrama,* the Fifth and Ninth Circuits ruled that a bankruptcy court could deny a debtor's request for voluntary dismissal for bad faith or other misconduct in the case based on its authority under § 105(a) to prevent an abuse of the bankruptcy process. *Jacobsen v. Moser (In re Jacobsen),* 609 F.3d 647, 660 (5th Cir. 2010); *Rosson v. Fitzgerald (In re Rosson),* 545 F.3d 764 (9th Cir. 2008). Some lower courts adopted this approach, while others continued to hold that the debtor has an absolute right to dismissal based on the clear and mandatory language of § 1307(b).[27]

Six years after *Marrama,* the Supreme Court decided *Law v. Siegel,* 571 U.S. 415, 134 S.Ct. 1188 (2014). In *Law,* the lower courts had invoked § 105(a) to permit the Chapter 7 trustee to surcharge the debtor's exempt property for expenses incurred in administration of the case that resulted from the debtor's fraud, notwithstanding the provisions of 11 U.S.C. § 522(k)'s express prohibition on the use of exempt property for such purposes.

The Supreme Court reversed. The Court ruled that § 105(a) does not authorize a bankruptcy court to "override explicit mandates of other sections of the Bankruptcy Code." *Law,* 571 U.S. at 421. With regard to its *Marrama* decision, the Court stated, "*Marrama* most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code." *Id.* at 426.

Relying on *Law,* the Sixth Circuit in *Smith v. U.S. Bank N.A. (In re Smith),* 999 F.3d 452, 456 (6th Cir. 2021), ruled that § 1307(b) provides the debtor an absolute right to dismissal of a Chapter 13 case. And in *Nichols v. Marana Stockyard & Livestock Market, Inc. (In re Nichols),* 10 F.4th 956 (9th Cir. 2021), the Ninth Circuit overruled its *Rosser* decision and likewise held that the right is absolute in view of the *Law* decision.

The opinion of the Bankruptcy Appellate Panel of the Ninth Circuit in *Nichols*, 618 B.R. 1, 6-12 (B.A.P. 9th Cir.), *rev'd and remanded* 10 F.4th 956 (9th Cir. 2021), sets out the contrary view that *Law* does not limit a bankruptcy court's authority to deny a debtor's request for voluntary dismissal to prevent an abuse of process and collects cases on the issue.

[27] *See id.*

V. PAYMENT OF DSO CLAIM UNDER CHAPTER 13 PLAN

A claim for a domestic support obligation ("DSO"), as defined in 11 U.S.C. § 101(14A), is entitled to first priority under 11 U.S.C. § 507(a)(1). It is not dischargeable in a Chapter 13 case, 11 U.S.C. § 1328(a)(2), 1328(c)(2). Indeed, a debtor cannot receive a "completion" discharge unless all DSO claims have been paid in accordance with the plan. 11 U.S.C. § 1327(a).

A plan must provide for payment of priority claims, including a DSO claim, in full. 11 U.S.C. § 1322(a)(2).[28] A limited exception in § 1322(a)(4) permits a plan to provide for less than full payment of a DSO claim entitled to priority under § 507(a)(1)(B) if the plan provides for payment of all of the debtor's projected disposable income for five years. Claims subject to this exception are DSO claims that have been assigned to a governmental unit for collection. Because the DSO claim is not discharged, a debtor ordinarily has no reason to propose to pay only part of it.

Chapter 13 plans typically provide for payment of the debtor's attorney's fees through the plan. The claim for attorney's fees is an administrative expense under 11 U.S.C. § 503(b)(2), entitled to priority under 11 U.S.C. § 507(a)(2), because they are allowable as professional compensation under 11 U.S.C. § 330(a)(4)(B). Like a DSO claim, the priority claim for the debtor's attorney's fees must be paid in full under 11 U.S.C. § 1322(a)(2).

Another provision, however, also governs payment of the attorney's fees. Under 11 U.S.C. § 1326(b)(1), any unpaid administrative expense claim must be paid "before or at the time of each payment to creditors under the plan."

A DSO claim has priority under § 507(a)(1) over the attorney's fees that have priority under § 507(a)(2). But administrative expenses under § 1326(b)(1) must be paid "before or at" the time of payments to creditors under the plan.

These provisions raise two issues:

(1) Must the DSO claim be paid in full before administrative expenses, usually the debtor's attorney's fees, are paid anything?

(2) Must the plan provide for payment of the debtor's attorney's fees as an administrative expense in full before any payments on the DSO claim?

Although a DSO claim has priority over the debtor's attorney's fees, Chapter 13 does not require that the DSO claim be paid first. Although § 1322(a)(2) requires the payment of priority claims, including a DSO claim, in full, it does not require the payment of priority claims before the payment of other claims. Section 1322(b)(4) permits a plan to provide for payments on any unsecured claim concurrently with payments on any secured claim or any unsecured claim.

[28] For a discussion of whether postpetition interest may or must be paid on a DSO claim, see W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 1 CHAPTER 13 PRACTICE AND PROCEDURE § 6:15 (2d ed. 2021). If the plan does not provide for payment of postpetition interest, the postpetition interest is not discharged. *Id.*

Accordingly, courts have held that these provisions do not require payment of priority claims in order of their priority or that they be paid ahead of other claims.[29]

Courts have divided as to whether § 1326(b)(1) requires the payment of administrative expenses in full before payments to other creditors may begin.

Most courts conclude that § 1326(b)(1) requires the commencement of payments on administrative claims but does not mandate full payment before payments on other claims.[30] Some, however, rule that payments to other creditors cannot begin until administrative claims have been paid.[31]

The majority approach that does not require payment of attorney's fees in full before payments to other creditors eliminates the issue under 11 U.S.C. §§ 1326(a)(1)(B), 1325(a)(5)(B)(iii)(II) and 1325(a)(5)(B)(iii)(I) that the debtor make prepetition and postpetition adequate protection payments on secured claims and that payments on secured claims be in equal monthly amounts. In almost all circumstances, a plan could not provide for payment of the debtor's attorney's fees in full before payments on secured claims as these provisions require.[32]

In summary, the sequence and timing of payments on DSO claims and attorney's fees depend on the terms of the plan.

The form plans adopted by the Bankruptcy Courts in Alabama have provisions that address payment of DSO claims under the plan in various ways. All of them are consistent with the majority approach.

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[29] *E.g.*, *In re Brown*, 2008 WL 205578 (M.D. Ala. 2008); *In re Boler,* 2008 WL 205579 (M.D. Ala. 2008); *In re Chamberlain*, 555 B.R. 14 (Bankr. D. Colo. 2016); *In re Butler*, 403 B.R. 5 (Bankr. W.D. Ark. 2009); *In re Williams,* 385 B.R. 468 (Bankr. S.D. Ga. 2008); *In re Vinnie*, 345 B.R. 386 (Bankr. M.D. Ala. 2006); *In re Sanders,* 341 B.R. 47 (Bankr. N.D. Ala. 2006), *aff'd*, 347 B.R. 776 (N.D. Ala. 2006); *In re Aldridge*, 335 B.R. 889 (Bankr. S.D. Ala. 2005); *In re Schnabel*, 153 B.R. 809, 821 (Bankr. N.D. Ill. 1993); *In re Ferguson*, 134 B.R. 689 (Bankr. S.D. Fla. 1991); *In re Parker*, 15 B.R. 980, 982–83 (Bankr. E.D. Tenn. 1981), *aff'd*, 21 B.R. 692 (E.D. Tenn. 1982); *cf. In re Trombetta*, 383 B.R. 918 (Bankr. S.D. Ill. 2008) (priority claims to be paid in full before general unsecured claims receive distribution from recovery of lien avoidance).

[30] *E.g., Perez v. Peake*, 373 B.R. 468, 489–92 (S.D. Tex. 2007); *In re Helligrath*, 569 B.R. 709 (Bankr. S.D. Ohio 2017); *In re Bosse*, 407 B.R. 444 (Bankr. D. Me. 2009); *In re Bellamy*, 379 B.R. 86 (Bankr. D. Md. 2007); *In re Collins,* 2007 WL 2116416 (Bankr. E.D. Tenn. 2007); *In re Balderas*, 328 B.R. 707, 717 (Bankr. W.D. Tex. 2005); *In re Pappas & Rose, P.C.*, 229 B.R. 815, 820 (W.D. Okla. 1998); *In re Cook*, 205 B.R. 437, 443 (Bankr. N.D. Fla. 1997); *In re Aldridge*, 335 B.R. 889 (Bankr. S.D. Ala. 2005); *In re Parker,* 15 B.R. 980, 983 (Bankr. E.D. Tenn. 1981), *aff'd*, 21 B.R. 692 (E.D. Tenn. 1982).

[31] *E.g., In re Shorb*, 101 B.R. 185, 187 (B.A.P. 9th Cir. 1989); *In re Butler*, 403 B.R. 5 (Bankr. W.D. Ark. 2009*); In re Bellamy*, 379 B.R. 86 (Bankr. D. Md. 2007); *In re DeSardi*, 340 B.R. 790, 808 (Bankr. S.D. Tex. 2006); *In re Harris*, 304 B.R. 751, 758 (Bankr. E.D. Mich. 2004).

[32] See W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 1 CHAPTER 13 PRACTICE AND PROCEDURE § 6:5 (2d ed. 2021).

VI. THREE STUDENT LOAN ISSUES

Dischargeability – 11 U.S.C. § 523(a)(8)

About nine years ago, Alexandra Elizabeth Acosta-Coniff began her quest for a determination that her student loan debt of about $112,000 was not excepted from discharge under 11 U.S.C. § 523(a)(8). Representing herself *pro se*, she prevailed initially in the bankruptcy court. *Acosta-Coniff v. ECMC (In re Acosta-Coniff)*, 536 B.R. 326 (Bankr. M.D. Ala. 2015) (Sawyer, J.).

The court found that the then 44-year old high school teacher and single mother with two sons (1) could not maintain a minimal standard of living if forced to repay the student loan; (2) was not likely to receive significant pay increases in the near future; and (3) had made a good faith effort to repay the loan. Based on these factual findings, the court concluded that the satisfied the three-part test for dischargeability of a student loan set forth in *Brunner v. N.Y. State Higher Educ. Servs. Corp.,* 831 F.2d (2d Cir. 1987), applied by the Eleventh Circuit in *Helman Ins. Corp. of Am. v. Cox (In re Cox),* 338 F.3d 1238 (11th Cir. 2003), and *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley),* 494 F.3d 1320, 1325-27 (11th Cir. 2007).

The District Court reversed. *ECMC v. Acosta-Coniff (In re Acosta-Coniff),* 550 B.R. 557 (M.D. Ala. 2016) (Watkins, C.J.). The court concluded that the debtor had failed to meet the second prong of the *Brunner* test that her inability to pay would likely persist for a significant portion of the repayment period.

With the assistance of counsel,[33] the debtor appealed to the Eleventh Circuit, which reversed and remanded. *ECMC v. Acosta-Coniff (In re Acosta-Coniff),* 686 Fed. Appx. 647 (11th Cir. 2017) (per curiam) (unpublished). The Eleventh Circuit remanded because it could not determine whether the District Court had applied a clear error or *de novo* standard of review.

The Eleventh Circuit noted that the District Court had opined that the debtor had "only herself to blame for incurring student debt in the pursuit of multiple degrees that she should have known would not lead to an increase in income sufficient to cover the debt." *Id.* at 650. The court gave explicit instructions about the District Court's opinion, *id.*:

> As noted, the second prong is a forward-looking test that focuses on whether a debtor has shown her inability to repay the loan during a significant portion of the repayment period. It does not look backward to assess blame for the student debtor's financial circumstances. Thus, even if the court concludes a debtor has acted recklessly or foolishly in accumulating her student debt, that does not play into an analysis under the second prong. Nor should it be considered on remand in analysis of that prong.

[33] Her lead counsel on the appeal was Hon. Eugene Wedoff, a former bankruptcy judge who, after his retirement, represented consumer debtors *pro bono* in bankruptcy appeals. Also representing the debtor were Nicholas E. Ballen, Catherine L. Steege, and Carl Nicholas Wedoff of Jenner and Block, LLP.

On remand, the District Court remanded to the bankruptcy court for further factual determinations with regard to all three prongs of the *Brunner* test. *EMC v. Acosta-Coniff (In re Acosta-Coniff),* 583 B.R. 275 (Bankr. M.D. Ala. 2018).[34]

With regard to the first prong, the District Court ruled that the Bankruptcy Court committed legal error in its ruling that potential payments under an income contingent repayment plan ("ICRP") were not relevant and that it committed legal and factual error by not deciding whether the debtor could make a reduced ICRP payment. *Id.* at 279-82. The District Court further concluded that the Bankruptcy Court's calculation of the debtor's monthly expenses was clearly erroneous. *Id.* at 282.

The District Court concluded that the Bankruptcy Court had not made sufficient findings of fact to support its conclusion that the debtor had met the second prong and directed the Bankruptcy Court to do so. *Id.* at 282-283.

Finally, the District Court ruled that the Bankruptcy Court clearly erred by not considering the debtor's efforts, if any, to minimize her expenses, to maximize her income, and to apply for an ICRP in its analysis of her good faith. *Id.* at 284.

On remand, the Bankruptcy Court made detailed findings of fact and again concluded that the loan was dischargeable. *Acosta-Coniff v. ECMC (In re Acosta-Coniff),* 632 B.R. 322 (Bankr. M.D. Ala. 2021).

The court stated that the "minimal standard of living" prong of the *Brunner* test was a standard "somewhere between poverty and mere difficulty" that required "more than a showing of tight finances." *Id.* at 30.[35] After a thorough review of the debtor's expenses, the court determined that she was living a "modest life." *Id.* at 343-44. The court further determined that her disposable net income was less than she would have to pay under an ICRP. *Id.* at 346.

With regard to the second prong of the *Brunner* test, the court found that the debtor was at the top of the salary range for her teaching position and that she had been repeatedly denied advancement despite her Master's Degrees in Learning Disabilities and Educational Leadership and a Doctoral Degree in special education. Seeking a position in another district was not an option because she would lose tenure and would have to move away from her family, on which she frequently relied for support. Finally, the court noted that the debtor had been treated for morbid obesity and adult-onset type-II diabetes and that her health would continue to decline as she aged, despite her efforts to get control of her health. *Id.* at 347. The court, therefore, concluded that additional circumstances existed that indicated that the debtor's state of affairs was likely to persist for a significant portion of the repayment period for the debt.

Finally, the court concluded that the debtor satisfied the "good faith" prong. She had obtained her doctoral degree in an effort to maximize income and had attempted to minimize her

[34] Aaron Gavid McLeod of Adams and Reese, LLP, joined the debtor's appellate lawyers in representation of her in the district court and in the bankruptcy court on remand from the district court.
[35] The court quoted *In re McLaney,* 375 B.R. 666, 674 (M.D. Ala. 2007), and *In re Johnson,* 550 B.R. 874, 879 (M.D. Ala. 2016).

expenses. Notably, the court found that her expenses for a community center family membership and Netflix subscription were reasonable. The debtor had made payments toward her student loan, obtained multiple forbearances and one deferment, and had attempted to obtain partial forgiveness of the debt. *Id.* at 348.

The creditor appealed. Docket No. 116, Adv. No. 13-3059 (Bankr. M.D. Ala. Oct. 11, 2021). On December 10, 2021, the District Court dismissed it upon the parties' stipulation of voluntary dismissal. *ECMC v. Acosta-Coniff,* Appeal No. 2:21-cv-683-RAH (M.D. Ala. Dec. 10, 2021).[36]

Ms. Acosta-Coniff's timeless saga came to an end.

Is a student loan a "consumer debt" for purposes of dismissal for abuse under § 707(b)?

Section 707(b)(1) provides for dismissal (or conversion to Chapter 13 with the debtor's consent) of a Chapter 7 case for "abuse" in a case filed by an individual whose debts are "primarily consumer debts." If most of the debtor's debt consists of student loans, the question is whether the student loans are "consumer debts." If not, then § 707(b)(1) does not apply.

Reviewing the different approaches that courts have taken to determination of this issue, the court in *Townson v. Ruff (In re Ruff),* Case No. 20-68555, ECF No. 41 (Bankr. N.D. Ga. Mar. 31, 2022), ruled that, under the circumstances of the case, the student loan was not a consumer debt and that, therefore, § 707(b)(1) did not apply.

The undisputed facts were: (1) the debtor had used proceeds of the student loans for tuition, not living expenses; (2) her purpose for obtaining a degree was to improve her skills and enhance her prospects for advancing her career in order to make more money; and (3) a college degree was not required for her existing job, and no current opportunity existed with her employer for her advancement to a position for which a college degree was required.

An excerpt from the opinion that discusses the competing approaches follows this Part of the Materials.

Can a Chapter 13 plan treat a student loan differently from other unsecured debt?

11 U.S.C. § 1322(b)(1) permits separate classification of claims, provided that the classification does not "discriminate unfairly." The Bankruptcy Code generally does not provide for payment of postpetition interest on an unsecured claim, but 11 U.S.C. § 1322(b)(10) permits it on a nondischargeable claim if the plan provides for payment in full of other unsecured claims.

Suppose a debtor with long-term student debt wants to continue to make payments on the student loan during the course of the Chapter 13 case but is unable to pay other unsecured debt in

[36] The dismissal order noted that the creditor requested dismissal of the appeal because it was moot, but construed it as a request for voluntary dismissal. Catherine L. Steege, one of the debtor's lawyers, reported to the author that the dismissal did not occur as the result of a settlement.

full. Can the plan propose cure and maintenance treatment of the student loan debt under 11 U.S.C. § 1322(b)(5) without paying general unsecured debt in full?

What if the debtor could pay off the student loan during the term of the plan? Must the plan also provide for full payment of unsecured creditors?

Under either circumstance, is payment of postpetition interest permissible?

These are good questions. The answers depend on the circumstances of the case and which of several approaches in the case law that the court follows. Discussion of them is beyond the scope of these materials.

For a discussion of different treatment of student loans in a plan, see W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 1 CHAPTER 13 PRACTICE AND PROCEDURE § 7:12 (2d ed. 2021). See also *id.* § 7:10 (discussing unfair discrimination generally).

For a discussion of whether § 1322(b)(10) prohibits payment of postpetition interest when a plan proposes to cure defaults and maintain payments on a nondischargeable long-term debt if the plan does not provide for full payment of other claims, see *id.* § 7.5.

Excerpt from *Townson v. Ruff (In re Ruff)*
Case No. 20-68555, ECF No. 41
U.S. Bankruptcy Court, N.D. Ga.
(March 31, 2022)

Held, the debtor's student loan is not a "consumer debt" for purposes of 11 U.S.C. § 707(b)(1) and, therefore, the case is not subject to dismissal for abuse.

* * * * *

The case law establishes that no per se rule exists for determining whether a student loan is a "consumer debt." It suggests that making the distinction involves two inquiries.

The first inquiry is how the debtor used the loan proceeds. To the extent that a debtor incurs student debt to pay living expenses while pursing a degree, the debt is a consumer debt. *E.g., Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 807 (10th Cir. 1999); *In re De Cunae*, 2013 WL 6389205, at * 3 (Bankr. S.D. Tex. 2013).

The second inquiry is necessary when, as in this proceeding, a debtor uses the student loan proceeds only for the payment of tuition, not for personal living expenses. Whether a student loan is a consumer debt in this circumstance requires determination of whether the debtor had a "profit motive," determined by reference to her situation at the time the debt was incurred. Courts have taken two approaches to this question, illustrated by the conflicting decisions of the bankruptcy court and the district court in the *Palmer* cases discussed above.

The bankruptcy court in *In re Palmer*, 342 B.R. 289, 297 (Bankr. D. Colo. 2013) ("*Palmer I*"), stated the following requirement for a student loan to be incurred with a profit motive so that it is not a consumer debt:

> [T]he debtor must demonstrate a tangible benefit to an existing business or show some requirement for advancement or greater compensation in current job or organization. The goal must be more than a hope or an aspiration that the education funded, in whole or in part, by student loans will necessarily lead to a better life through more income or profit.

Other courts have adopted this "tangible benefit" approach, which effectively requires a connection between the education and a debtor's current business or currently available opportunity for advancement or an increase in compensation. *E.g., In re Valdivia*, 2020 WL 4939161 (Bankr. E.D.N.C. 2020); *In re Missick*, 2019 WL 8756605 (Bankr. M.D. Fla. 2019); *In re Ferreira*, 549 B.R. 232 (Bankr. E.D. Cal. 2016). *See also In re Steiner*, 2020 WL 2027250 (Bankr. S.D. Ill. 2020).

The district court in *Palmer* rejected the tangible benefit requirement. *Palmer v. Laying (In re Palmer)*, 559 B.R. 746 (D. Colo. 2016) ("*Palmer II*"). Concluding that "the primary purpose for which the debt was incurred must be determinative," the *Palmer II* court held a student loan could be a non-consumer debt if it was incurred "primarily as a business investment in oneself." *Id*., 559 B.R. at 750. *Accord, In re De Cunae*, 2013 WL 6389205, at *4 (Bankr.

S.D. Tex. 2013) ("[S]tudent loan proceeds that are used for direct educational expenses with the intent that the education received will enhance the borrower's ability to earn a future living are not consumer debts.").

Under the *Palmer I* approach that requires a tangible benefit, the student loans here are consumer debts because the education that they financed was not connected to an existing opportunity for advancement or greater compensation with the Debtor's employer. Under the *Palmer II* approach, however, the student loans are not consumer debts because the Debtor incurred them as an investment in herself, that is, to make more money by enhancing her prospects for a better job.

In this Court's judgment, the district court's approach in *Palmer II* is the better one.

Although the Eleventh Circuit has not addressed the question of how to determine whether a debt is a "consumer debt," other Circuits agree that a debt is not a consumer debt if the debtor incurred it with a "profit motive." *E.g., Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 807 (10th Cir. 1999); *In re Booth*, 858 F.2d 1051 (5th Cir. 1988); *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060 (9th Cir. 2017); *Lind-Waldock & Co. v. Morehead (In re Morehead)*, 1 Fed. Appx. 104 (4th Cir. 2001); *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146 (4th Cir. 1996). *See also In re Rucker*, 610 B.R. 570 (Bankr. N.D. Tex. 2019); *In re Meyer*, 296 B.R. 849, 865 (Bankr. N.D. Ala. 2003); *In re Bell*, 65 B.R. 575 (Bankr. E.D. Mich. 1986). The Tenth Circuit's ruling in *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 807 (10th Cir. 1999) ("*Stewart III*"), is the only case addressing the issue in the context of a student loan at the Circuit level, but it did not reach the precise issue here, determining that at least some portion of the student loan debts represented consumer debt because the loan proceeds were used for personal expenses.

The *Palmer II* approach is more consistent with the profit motive standard than the *Palmer I* view that a student loan is a consumer debt in the absence of a "tangible benefit" or a current connection to the debtor's existing opportunities. A debtor who wants an education to make more money has a profit motive regardless of whether she expects additional income from an existing opportunity with her current employer or from a different position somewhere else. No principled reason exists for making a distinction between the two situations.

For example, under the *Palmer I* rule, a secondary school math teacher who must make progress toward a master's degree to keep her job has a "profit motive," but an hourly worker in a child-care facility who wants to get a college degree to get a job as a certified kindergarten teacher does not. The Court sees no difference in the two situations.

The Court concludes, therefore, that the Debtor's student loan debt is not "consumer debt" as defined in 11 U.S.C. § 101(8). Accordingly, the Debtor's debts are not "primarily consumer debts," and the "means test" provisions of 11 U.S.C. § 707(b) do not apply in her case.

VII. RE-OPENING CHAPTER 7 CASES YEARS AFTER DISCHARGE TO ADMINISTER PRODUCTS LIABILITY SETTLEMENT PROCEEDS

In the Northern District of Georgia, a number of cases have arisen recently in which, years after the debtor filed bankruptcy and received a Chapter 7 discharge, the United States Trustee moved to reopen the case based on the discovery that the debtor was entitled to settlement proceeds based on a claim for exposure to, or use of, a harmful product prior to the petition that was not scheduled.

Judge Cavender dealt with one of them in *In re Burris,* 2022 WL 1131950 (Bankr. N.D. Ga. 2022). The debtor had been diagnosed with non-Hodgkin lymphoma (NHL) years before the filing of his bankruptcy case in 2009, but he did not schedule any claims relating to his cancer.

Over three years after the bankruptcy case was closed, the World Health Organization published a study linking glyphosate, a common herbicide, to NHL. The 2015 publication was the first authoritative statement that labelled glyphosate as carcinogenic to humans, and it resulted in thousands of claims against Monsanto, the maker of the product. The debtor had used glyphosate for many years prior to his cancer diagnosis.

When the debtor learned of the link in 2019, he retained counsel to assert claims against Monsanto. After he was offered a settlement, the United States Trustee moved to reopen the bankruptcy case, asserting that the settlement proceeds may be property of the estate.

The court noted that 11 U.S.C. § 350(b) provides that a case may be re-opened "to administer assets, to accord relief to the debtor, or for other cause." But the court also noted that re-opening would be futile if the settlement proceeds were not property of the estate. Thus, the court reasoned, "The real question before the Court is whether the Settlement Funds are property of the bankruptcy estate." *Id.* at *2.

The United States Trustee argued that the debtor's product liability claim was property of the estate because it accrued at the time of his cancer diagnosis, which occurred prior to the filing of the petition. The debtor contended that, under Georgia law, the claim did not accrue until the 2015 WHO report because the element of causation could not be established prior to that report.

The court agreed with the debtor, concluding that, under Georgia law, "[T]he true test to determine when the cause of action accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result." *Id.* at *3, *quoting Amu v. Barnes*, 283 Ga. 549, 551, 662 S.E.2d 113, 116 (2008) (*quoting Allrid v. Emory Univ.*, 249 Ga. 35, 36, 285 S.E.2d 521 (1982)).

Because the settlement proceeds were not property of the estate, the court denied the motion to reopen.

The court in conclusion addressed the United States Trustee's argument that the case should be re-opened to permit a trustee to fully investigate and brief the issue of whether the cause of action accrued prepetition. The court declined to do so, *id.* at *3:

> The Court has carefully considered whether reopening to allow further investigation is appropriate, but the Court finds consideration of the fresh start, the interest of finality, and the length of time that has elapsed weigh heavily against reopening the case at this point.[37] The Burrises filed their bankruptcy case over 12 years ago. The estate closed over a decade ago. The Judge and Trustee originally assigned to the case both retired years ago. Mr. Burris continues to suffer the effects of his cancer and is unable to work. Much of his pain and suffering was no doubt suffered in the years since his bankruptcy filing. While the Court understands the need to define property of the estate broadly and to administer all assets of the estate, the Court is hard-pressed to understand what purpose is truly served by hailing the Burrises back into court all these years after they filed bankruptcy when there is not a hint of bad faith for their failure to disclose claims no one could have known existed. To rule otherwise would subject debtors like the Burrises to a form of endless bankruptcy purgatory, not fully recognizing the fresh start the Bankruptcy Code intended for honest but unfortunate debtors. Whatever prejudice might result to creditors because they will not be paid some portion of the Settlement Funds on claims that are over 13 years old at this point, the Court finds the interest of the fresh start and finality outweigh such prejudice.

Judge Baisier similarly denied a motion of the United States Trustee to reopen a case in *In re Hernandez-Castro,* 2022 WL 1210080 (Bankr. N.D. Ga. 2022).

[37] The court cited *In re Tarkington*, 301 B.R. 502, 506 (Bankr. E.D. Tenn. 2003) ("In exercising its discretion, the court must balance the policy of a fresh start afforded to the debtor against the rights of affected creditors." (*quoting In re Frasier,* 294 B.R. 362, 366 (Bankr. D. Colo. 2003)).

VIII. SOME OBVIOUS THINGS ABOUT PRACTICE IN CHAPTER 13 CASES

1. Amendments to petition, lists, schedule or statement – Bankruptcy Rule 1009(a).

Although Bankruptcy Rule 1009(a) permits amendment of a petition, list, schedule or statement "as a matter of course at any time before the case is closed," it is not mandatory that an amendment be filed in every case.

Furthermore, it is not necessary that papers be amended more than once.

Debtors forget (and sometimes may try to hide) material information, and often the lawyer learns about it from another source, usually at an inconvenient time.

Cross-examine your client thoroughly, repeatedly, and in language the client can understand.

2. Insist on an employer deduction order.

Anecdotal evidence, at least, indicates that a Chapter 13 case is more likely to succeed if the debtor's employer deducts and remits plan payments.

The reason is obvious: if the money is diverted at the source, the debtor must live within the budget. If the debtor can't live within the budget, the case is not going to work.

3. Don't advise your client to file a Chapter 13 case if Chapter 7 will work.

Alabama is the birthplace of Chapter 13. Timothy W. Dixon and David G. Epstein, *Where Did Chapter 13 Come From and Where Should It Go?,* 10 Amer. Bankr. Inst. L. Rev 741 (2002). See also W. Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 1 CHAPTER 13 PRACTICE AND PROCEDURE § 1:3 – 1:5 (2d ed. 2021) (summarizing provisions of Chapter XIII, enactment of the Bankruptcy Code, and enactment of Chapter 13 and amendments).

That doesn't mean a Chapter 13 case should be filed when a client would be better of in a Chapter 7 case. It is a disservice to the client – if not a violation of the duty of competency – to advise the filing of Chapter 13 case when a Chapter 7 case will work. See Part I.

IX. ALABAMA TITLE PAWN DEVELOPMENTS

Last year's Bankruptcy at the Beach program including Judge Creswell's presentation and materials, *Title Pawn Transactions in Bankruptcy.* The issues continue to work their way through the courts.

Recall that, in *Title Max v. Northington (In re Northington),* 876 F.3d 1302 (11th Cir. 2017), the debtor filed a Chapter 13 case after the maturity date under the title pawn contract for a vehicle but before expiration of the grace period for its redemption under Georgia law. The pawnbroker filed a motion for relief from the automatic stay on the ground that the vehicle was not property of the estate after expiration of the redemption period (as extended by 11 U.S.C. § 108(b)) but did not object to confirmation of the debtor's plan that treated it as a secured claim.

The bankruptcy court denied stay relief, concluding that the vehicle and the right to redeem were property of the estate and remained so after expiration of the redemption period such that the pawnbroker had only a secured claim that could be modified under 11 U.S.C. § 1322(b)(2). Alternatively, the bankruptcy court determined that the pawnbroker was bound by the confirmed plan, to which it had not objected. *Northington,* 876 F.3d at 1307.

The district court affirmed. Without addressing the effect of confirmation, the district court agreed that the vehicle was part of the estate and that, therefore, the pawnbroker held a secured claim. *Id.*

The Eleventh Circuit reversed.

The court first concluded that the pawnbroker's motion for relief from the stay adequately asserted and preserved its position. *Id.* at 1308-09.

On the merits, the court ruled that the automatic stay of 11 U.S.C. § 362(a) did not stop the running of the redemption period and that property of the estate under 11 U.S.C. § 541(a) included only the debtor's interest in the vehicle subject to the right of redemption. Accordingly, upon expiration of the redemption period, the vehicle was no longer property of the estate and the pawnbroker had no claim that could be modified. *Id.* at 1312-15.

Courts have considered several issues under the Alabama Pawnshop Act, Ala. Code §§ 5-19A-1 through 5-19A-20, after *Northington.*

1. Is *Northington* applicable at all to an Alabama title pawn or does the pawnbroker have only a security interest in a pawned vehicle that is not in its possession?

In *TitleMax of Alabama, Inc. v. Hambright (In re Hambright),* 635 B.R. 614 (Bankr. N.D. Ala. 2022), the pawnbroker sought a determination that the pawned vehicle was not property of the estate when the debtor filed a Chapter 13 case after the maturity date but before the 30-day grace period expired. Judge Henderson concluded that the pawn broker held only a security interest in the vehicle but that ownership remained in the debtor because:

1. The vehicle is not a "pledged good" under the Alabama Pawnshop Act because the pawnbroker never possessed the vehicle. The debtor's pledge of the certificate of title did not make the vehicle a pledged good. *Id.* at 671.

2. The pawnbroker and the debtor could not "effect a pre-agreed forfeiture of [the debtor's] UCC rights, or common law equitable title, by contract." *Id.* The pawnbroker, therefore, could not take ownership under the pawnshop contract provision that failure to repay the loan triggered automatic forfeiture of the vehicle.

3. Automatic forfeiture of the unassigned certificate of title did not transfer absolute title of the vehicle to the pawnbroker. *Id.* at 656, 673. The debtor owned the vehicle even though she forfeited the certificate of title to the pawnbroker.

Accordingly, Judge Henderson ruled that, under the Alabama Pawnshop Act, the vehicle remained in the bankruptcy estate after the grace period expired, and the plan could treat the pawnbroker as the holder of a claim secured by a lien in the vehicle.

On appeal, District Judge Maze on April 15, 2022, certified the appeal (and nine other cases consolidated with it) to the Eleventh Circuit pursuant to 28 U.S.C. § 158(d)(2)(B). *TitleMax of Alabama, Inc., v. Hambright,* Case No. 7:21-cv-1602, ECF No. 19 (April 15, 2022). Judge Maze stated, *id.* at 1 (emphasis in original):

> District and bankruptcy courts disagree on this recurring question of Alabama law: When an owner pawns his car's title but keeps the car, then fails to make his loan payments, does the pawnbroker own (a) the title *and* the vehicle or (b) the title but not the vehicle.
>
> This Court believes that the Supreme Court of Alabama should answer this purely state-law question. And the Court would certify the question to the state court if it could. But as explained below, federal law requires the Court to pass the issue up the federal chain, where hopefully the circuit court will either answer it or send it to the State's high court.

Judge Maze noted that the Order "does not address the next question: whether the forfeiture of the certificate of title effects an absolute transfer of ownership and causes the vehicle to 'drop out of the bankruptcy estate'," quoting *Northington,* 876 F.3d at 1306. *Id.* at 8, n. 3.

Judge Maze noted that none of three Eleventh Circuit unpublished opinions controlled the issue[38] and that Alabama case law had not decided the point.[39] *Id.* at 6-8. Further, Judge Maze concluded that the appeals raised a matter of public importance. *Id.* at 8.

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[38] *Eldridge v. Title Max of Alabama, Inc.,* 2021 WL 4129368 (11th Cir. 2021) (per curiam); *TitleMax of Alabama v. Womack (In re Womack),* 2021 WL 3856036 (11th Cir. 2021) (per curiam); *Gunn v. Title Max of Alabama, Inc.,* 317 Fed. Appx. 883 (11th Cir. 2008).

[39] The court discussed *Floyd v. Title Exch. & Pawn of Anniston, Inc.,* 620 So. 2d 576, 579 (1993); *Pattans Ventures, Inc. v. Williams,* 959 So.2d 115, 121 (Ala. Civ. App. 2006); and *Morgan v. Thompson,* 791 So.2d 977, 978 (Ala. Civ. App. 2001).

The Eleventh Circuit has discretion to authorize an appeal under 28 U.S.C. § 158(d)(2). As of the date of preparation of these materials, the Eleventh Circuit had not yet decided whether to take the appeal.

2. If *Northington* is applicable, does a pawned vehicle nevertheless remain property of the estate when the bankruptcy filing occurs before the maturity date?

In *In re Thompson,* 609 B.R. 443 (Bankr. M.D. Ala. 2019), Judge Creswell, citing *Northington,* ruled that a Chapter 13 debtor's pawned vehicle was no longer property of the estate after the redemption period expired, even though the filing occurred before expiration of the maturity date.

Judge Sawyer reached a different conclusion in *In re Womack,* 616 B.R. 420 (Bankr. M.D. Ala. 2020), distinguishing *Northington* because in that case the maturity date had occurred before the filing of the petition. Because the debtor in *Womack* had filed bankruptcy before the maturity date and was not in default on the filing date, he reasoned, the debtor had a property interest in the vehicle itself, not just a right to redemption as in *Northington.* Accordingly, the debtor had legal title to the vehicle, and the pawnbroker held only a security interest that was subject to modification under § 1322(b)(2). The district court affirmed. *TitleMax of Alabama v. Womack (In re Womack),* 2021 WL 1343051 (M.D. Ala. 2021).

The Eleventh Circuit affirmed in an unpublished opinion. *TitleMax of Alabama v. Womack (In re Womack),* 2021 WL 3856036 (11th Cir. 2021) (per curiam). The court determined that, under the terms of the pawn agreement and the Alabama Pawnshop Act, "a pawnbroker's right to title and possession of a pawned vehicle ripens only on *expiration* of the redemption period; until that day, the pawnbroker is a 'lienholder' who 'is entitled [only] to the amount of its interest in the automobile.'" *Id.* at *2 (*quoting State ex rel. Morgan v. Thompson,*791So. 2d 977, 978 (Ala. Civ. App. 2001) (emphasis in original).

Like the lower courts, the Eleventh Circuit distinguished its ruling in *Northington.* The court explained that the statutory right to redeem and the extension of it under § 108(b) never applied because the vehicle became property of the estate and the automatic stay applied to prevent any action by the pawnbroker to obtain possession of property of the estate, to enforce its prepetition lien, or to collect, assess, or recover any prepetition claim. *Id.* at *3.

Because the automatic stay, § 362(a)(3)-(5), "froze the interest" of the pawnbroker as a lienholder with a security interest, the court continued, the debtor could modify its rights as the holder of a secured claim under § 1322(b)(2). *Id.* at *3.

Although the Womack court stated that the Georgia pawn law in *Northington* "is materially indistinguishable from the Alabama Pawnshop Act," *id.* at *3, a Georgia bankruptcy

court declined to follow it as an unpublished opinion that is not binding. *TitleMax of Georgia, Inc., v. Snyder (In re Snyder),*635 B.R. 901, 914 (Bankr. S.D. Ga. 2022) (Coleman, J.).[40]

The *Snyder* court stated that the two cases could not be distinguished on the ground that the vehicle was property of the estate in *Womack* but not in *Northington,* pointing out that the parties in *Northington* had agreed, and the *Northington* court accepted, that the vehicle in *Northington* became property of the estate upon the filing of the case. *Id.* at 914-15. "The *Womack* panel," the *Snyder* court continued, "incorrectly stated that the property of the estate in *Northington* consisted only of the right of redemption and thus started from a false premise." *Id.* at 915.

The *Snyder* court then determined that the *Womack* court "drew an artificial distinction between what are essentially the two redemption periods in a title pawn transaction." *Id.* at 915. The two periods are the 30-day period ending on the maturity date and the 30-day grace period thereafter. Thus, the *Snyder* court reasoned, the pawn contract triggered the period to redeem the vehicle from its inception: *Id.*

The *Snyder* court noted that the two periods differ in that (1) the pawnbroker may repossess the vehicle only on the maturity date and may not sell it until the grace period expires; and (2) to redeem during the grace period, the borrower must pay an additional interest charge. The two redemption periods are otherwise identical in that the borrower may redeem the vehicle by paying the pawnbroker before the periods expire. *Id.* at 915.

Thus, the court concluded, *id.* at 915-16 (emphasis in original):

> [E]ven in an unmatured pawn transaction, all the borrower has is use of the vehicle and the right to redeem. Moreover, *title* to the vehicle remains in the borrower during both the initial 30-day period and in the 30-day grace period.

The *Womack* court did not explain why outcomes are different depending on whether the debtor filed bankruptcy during the first redemption period (prior to the maturity date) or the second one (the grace period), the *Snyder* court reasoned, but "simply declared, with no analysis, the debtor had a fixed interest in her vehicle because 'her pawn contract had not matured' on the petition date." *Id.* at 916, *quoting Womack,* 2021 WL 3856036 at *3. The *Snyder* court concluded that a distinction based on the filing date of a petition is irrelevant to the *Northington* analysis.

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[40] The *Snyder* court agreed with the court in *TitleMax of Ala., Inc. v. Hambright (in re Hambright*), 2021 WL 5441074, *amended and superseded* 635 B.R. 614 (Bankr. N.D. Ala. 2021), that Georgia's title pawn laws are materially different from Alabama's. *Snyder,* 635 B.R. at 921.

The *Hambright* court explained the material differences, 2021 WL 5441074 at *23, 635 B.R. 654-55:

> Notably, unlike Georgia's pawn laws (the subject of *Northington*) which (1) *deem* a title lender to have possession of a vehicle by virtue of the vehicle's certificate of title, (2) give such a title lender a *statutory right* to possession of the vehicle *pre-default*, and (3) *categorically include* vehicle certificates of title in the state's definition of pledged goods—the Alabama Pawnshop Act says nothing at all about title loans or certificate of title pledges.

The *Snyder* court read *Northington* to hold that the pawned vehicle ceased to be part of the bankruptcy estate once the redemption periods expired because O.C.G.A. § 44-14-403(b) provides that unredeemed pledged goods are automatically forfeited to the pawnbroker and the borrower's interest is automatically extinguished, and nothing in the Bankruptcy Code "thwarted the normal operation of the Georgia pawn statute's automatic extinguishment provision." *Id.* at 918, *quoting Northington,* 876 F.3d at 1315.

The *Snyder* court concluded that following *Womack* to hold that the vehicle remained in the bankruptcy estate despite postpetition expiration of the redemption period would ignore defined property interests under state law and contradicted *Northington*.

Finally, the *Snyder* court rejected *Womack's* analysis that the automatic stay froze the interest of the pawnbroker as a lienholder with a secured interest in the vehicle or resulted in the debtor having a fixed interest in her vehicle. *Northington* rejected this argument, the *Snyder* court said.

Alternatively, the *Snyder* court held that the vehicle dropped out of the estate under 11 U.S.C. § 541(b)(8), which provides .

> (b) Property of the estate does not include—
>
> ...
>
> (8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—
>
> (A) the tangible personal property is in the possession of the pledgee or transferee;
>
> (B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and
>
> (C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b)[.]

The *Snyder* court concluded that the statute applies to a pawn transaction, although it does not use that word,[41] and that a pawnbroker's constructive possession of the pawned vehicle

[41] The court cited Homer Drake, Jr., Paul W. Bonapfel, and Adam M. Goodman, 2 CHAPTER 13 PRACTICE AND PROCEDURE § 14:16 (2d ed. 2021).

under Georgia's pawn statute satisfies the requirement of § 541(b)(8)(A) that the tangible personal property be in the possession of the pawnbroker. *Id.* at 919-20.[42]

Accordingly, the court ruled that all of the elements of § 541(b)(8) were satisfied. Because the debtor had not redeemed the property within the time permitted under § 108(b), the vehicle was no longer property of the estate. *Id.* at 923.

The *Snyder* court also ruled that the debtor could not modify the pawnbroker contract under § 1322(b)(2) by obtaining confirmation prior to expiration of the redemption period.

3. When the bankruptcy court confirms a plan treating a title pawn transaction as a secured claim in the absence of an objection by the pawnbroker, may the pawnbroker later contend that the pawned vehicle is not property of the estate?

In *TitleMax of Alabama, Inc. v. Deakle (In re Deakle),* 2021 WL 1759302 (S.D. Ala. 2021) (Beaverstock, J.), *appeal voluntarily dismissed,* No. 21-11447 (11th Cir. Nov. 29, 2021), the debtor filed a Chapter 13 case after expiration of the grace period for redemption of the pawned vehicle in her possession and proposed to treat the pawnbroker's claim as a secured claim. After the bankruptcy court confirmed the plan in the absence of any objection from the pawnbroker, the pawnbroker moved for an order determining that the automatic stay was not in effect because the vehicle was not property of the estate.

The pawnbroker contended that it was not required to object to confirmation; that 11 U.S.C. § 1327(a) governing the binding effect of a confirmed plan and the Supreme Court's decision in *United Student Aid Funds, Inc., v. Espinosa,* 559 U.S. 260, 275, 130 S.Ct. 1367, 176 L.Ed. 2d 158 (2010), did not apply, and that it was not bound by the confirmed plan because the vehicle was not property of the debtor's bankruptcy estate. *Deakle,* 2021 WL 1759302 at *2.

The court affirmed the bankruptcy court's denial of the motion, concluding that the pawnbroker's failure to object to confirmation resulted in a waiver of forfeiture of the vehicle. The court concluded by noting that a pawnbroker must follow the same rules in Chapter 13 cases as every other creditor, *Id.* at *7:

If you disagree with your treatment in a proposed Chapter 13 plan, you must timely object (*Espinosa*) or otherwise speak up (*Northington*) because you will be bound by the confirmed plan pursuant to 11 U.S.C. § 1327(a).

Judge Robinson similarly concluded that a pawnbroker's failure to object to confirmation waived its forfeiture rights in *In re Cottingham,* 618 B.R. 555 (Bankr. N.D. Ala. 2020).

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[42] The *Snyder* court disagreed with the contrary conclusion in *TitleMax of Ga. Inc. v. Stanfield (In re Stanfield),* 2016 WL 669472 at *3 n.3 (Bankr. S.D. Ga. Feb. 18, 2016).

The *Snyder* court also rejected the ruling in *Moore v. Complete Cash Holdings, LLC (In re Moore)*, 448 B.R. 93, 99 n.8 (Bankr. N.D. Ga. 2011), that the provisions of Georgia law in O.C.G.A. § 44-12-130(5) with regard to the pawnbroker's deemed possession of a pawned vehicle are immaterial because bankruptcy law defines what property of the estate is. State law, the *Snyder* court ruled, including Georgia's deemed possession provision, controls the nature and extent of the debtor's property rights. *Snyder,* 635 B.R. at 921.

In *TitleMax of Alabama, Inc. v. Barnett (In re Barnett),* 2021 WL 426218 (N.D. Ala. 2021), the debtor filed a chapter 13 case after expiration of the redemption period for the vehicle in his possession and proposed a plan dealing the title pawn transaction as a secured claim. About three months after confirmation of the plan, to which the pawnbroker had not objected, it filed a motion requesting a determination that the vehicle was never property of the estate.

The bankruptcy court denied the pawnbroker's motion for two reasons. First, it concluded that the pawned vehicle was not a "pledged good" under the Alabama Pawnshop Act under the analysis previously discussed. Second, it denied the motion based on laches due to the pawnbroker's failure to seek earlier relief.

On appeal, the district court concluded that the vehicle was a pledged good and that it was not property of the estate at the time of the bankruptcy filing. The court remanded for further findings with regard to whether the pawnbroker had waived its right to forfeiture.

4. Can a pawnbroker waive its forfeiture rights under the Alabama Pawnshop Act?

In *Eldrige v. Title Max of Alabama, Inc. (In re Eldridge),* 2021 WL 4129368 (11th Cir. 2021) (per curiam), the Chapter 13 debtor contended that his original pawn agreement had lapsed, resulting in automatic forfeiture of the vehicle to the pawnbroker. A series of renewals that left him in possession of the vehicle, he contended, resulted in sales of the vehicle subject to a lien.

The court concluded that a pawnbroker can waive its automatic right of ownership. The later renewals, therefore, were pawn transactions that did not change the pawn contracts into security agreements. The court concluded, ""[T]he relationship [between the pawnbroker and the debtor] started as a pawn transaction and concluded as a pawn transaction. Accordingly, the bankruptcy court correctly . . . declared the car's title to be [the pawnbroker's] property at the time [the debtor' filed for bankruptcy. *Id.* at 3.

Things worked out well for the pawnbroker in *Eldridge.* Could there be other circumstances under which a debtor establish that the pawnbroker has waived automatic forfeiture?

X. HOW TO LOSE (SUCCESSFULLY)

Materials and Power Point By:

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Presented to the Southeastern Bankruptcy Law Institute
March 2022

Part I: General Thoughts on Winning & Losing

1. You win some you shouldn't win and lose some you shouldn't lose.

- Manage your client's expectations.

2. You don't always win by default.

- ***FRCP 8(a). General Rules of Pleading*.** "A pleading that states a claim for relief must contain:
  (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
  (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
  (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."
- ***FRCP 8(b)(6). Effect of Failing to Deny***. "An allegation – other than one relating to the damages – is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided."
- ***FRCP 9(b). Pleading Special Matters.*** "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."
- ***FRCP 55(a). Entering a Default.*** "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."
- ***FRCP 55(b). Entering a Default Judgment.***
  *"**(1) By the Clerk.*** If the plaintiff's claim is for a sum that can be made certain by computation, the clerk – on the plaintiff's request, with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has defaulted for not appearing and who is neither a minor nor incompetent person.
  (2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has

[1] Originally orally presented by Judges Finkle and Norton on an NCBJ podcast recorded October 2018; written materials presented to the Ross T. Roberts Trial Academy, W.D. MO, Sept. 10, 2019.

appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals – preserving any federal statutory right to a jury trial – when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter."

Selected Case Authorities

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; claim has facial plausibility when plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The bankruptcy court has broad discretion to grant a default judgment; the plaintiff is not entitled to such judgment as a matter of right. While the defendant who defaults may be deemed to have admitted facts alleged in the complaint, the default is not an absolute confession of liability, as facts alleged in the complaint may be insufficient to establish liability. Defendant's default establishes the well-pleaded allegations of the complaint, unless they are contrary to facts judicially noticed or to uncontroverted material in the file. *In re McGee*, 359 B.R. 764, 771-72 (B.A.P. 9th Cir. 2006) (cites omitted).

"Even when a defendent is technically in default and all the requirements for a default judgment are satisfied, a plaintiff is not entitled to default judgment as a matter of right." *Berkley Assurance Co. v. BMG Serv. Group LLC*, 2019 WL 861265 at *1 (E.D. Mo. Feb. 22, 2019) (citing 10 James Wm. Moore, et al., Moore's Federal Practice § 55.31[1] (3d ed. 2018); *Taylor v. City of Ballwin, Mo.,* 859 F.2d 1330, 1332 (8th Cir. 1988)). "Prior to the entry of a discretionary default judgment, this Court should satisfy itself that the moving party is entitled to judgment, including by reviewing the sufficiency of the complaint and the substantive merits of the plaintiff's claim." *Id*. (citing 10 Moore's Federal Practice § 55.31[2]). *See also Ramos-Falcon v. Autoridad de Energia Electrica*, 301 F.3d 1, 2 (1st Cir. 2002) (per curiam) (even after entry of default, before entering default judgment, a court "may examine a plaintiff's complaint, taking all well-pleaded factual allegations as true, to determine whether it alleges a cause of action."); *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7-8 (1st Cir. 2002) (a court "may not automatically grant a motion for summary judgment simply because the opposing party failed [to object]. Rather, the court must determine whether summary judgment is 'appropriate,' which means that it must assure itself that the moving party's submission shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'") (quoting Fed. R. Civ. P. 56(c)).

See also In re Davis, 2019 WL 5592577 at *4 (Bankr. N.D. Ill. 2019) (bankruptcy court required to remand the mortgage company's state court foreclosure action that the debtor had removed to bankruptcy court on the theory that the mortgage company was violating the discharge injunction; under the "well-

pleaded complaint" rule recognized by the Seventh Circuit, a defendant "cannot remove a case to federal court unless the plaintiff's complaint demonstrates that the plaintiff's case arises under federal law" and the Seventh Circuit has applied the "well-pleaded complaint rule to bankruptcy cases; since no basis for federal jurisdiction appeared on the face of the mortgage company's complaint, action had to be remanded for lack of federal jurisdiction, given that the mortgage company had withdrawn its proof of claim after it obtained stay relief to pursue its state law remedies).

3. Don't drink the Kool-Aid!

- Put yourself in the judge's shoes.
- Think about next steps if you lose, particularly a Rule 12 or 56 motion.
- Think about partial summary judgment as an alternative.
- Bonus if you have talked to opposing counsel in advance!

4. Argument isn't evidence.

- Evidence generally comes from witnesses or documents or things, such as objects or facts the court takes judicial notice of, admitted in accordance with the FREs. See FRE 201 (judicial notice); FRE 601 et seq. (witnesses); FRE 701 (lay witness opinion); FRE 702 (expert witness); FRE 901 et seq. (authenticating or identifying evidence); FRE 1001 et seq. (contents of writings, recordings, and photographs).
- ***FRCP 43. Taking Testimony***.
- ***FRCP 52(a)(1). Findings and Conclusions In General.*** "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58."

5. Have a mantra for when you get caught off guard and practice it.

- Your honor, you raise a point I had not thought of – may I ask for leave to brief the issue before you make a final ruling?
- Your honor, I apologize, but I was not prepared for that – may I have a brief recess to discuss this with my client and let you know what our next steps will be?
- Prepare your client for the possibility of losing so that the client doesn't react inappropriately or have an outburst.
- There are ethical considerations: ABA Model Rule 3.5(d), Impartiality and Decorum of the Tribunal, provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal." Many states phrase it as prohibiting "undignified or discourteous conduct degrading to a tribunal," or similar language.
- ABA Model Rule 8.2(a), Judicial and Legal Officials, under the heading of "Maintaining the Integrity of the Profession" also provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Selected Case Authorities

See https://www.law360.com/articles/27556/french-fry-remark-proves-costly-for-mcdermott-head (attorney ordered to take ethics classes for telling a bankruptcy judge she was a few french fries short of a Happy Meal).

Attorney suspended for six months for statements made to judges in open court and for letters written to judges accusing them of unethical conduct, including that one judge was "drunk with power," "you were not faithful to the law," "in your ruthless abuse of power and contempt for the rule of law, you silenced me and ordered me out of your court," and "It is the opinion of attorneys and non-attorneys that you and your 'evil' network will seek vengeance upon me for challenging you in this manner," among other comments. Court notes that the attorney's complaints are with the merits of the judge's ruling and whether another judge acted properly in failing to hear his case when scheduled. "There are established mechanisms for raising such issues. Lawyers concerned with a court's ruling have an appropriate avenue to challenge that ruling through an appeal. Lawyers believing a judge is biased have an appropriate avenue to challenge that judge by seeking recusal. … He is also necessarily aware, as are all lawyers licensed in Missouri, that if he believes an ethical violation has occurred, he is required to file a complaint … [but did not do so against either judge.]" *In re Madison*, 282 S.W.3d 350, 358 (Mo. 2009) (en banc).

Attorney given probation after he told the judge, "It's a good thing you are still wearing that robe – why don't you take it off and step outside and I'll show you," and said "That judge is a poster child for judicial elections." *In re Clothier*, 301 Kan 567 (2015) (a minority of the court would have ordered suspension).

6. When you know you are going to lose.

- Signal to the judge, e.g., "I stand on my papers"; "I have no authority to consent but I don't object," etc.
- But, push back if you need to complete the record and the judge is cutting you off, e.g., "Judge, I know you disagree with my position but may I please finish my argument to complete the record?"
- Arguments not preserved before the trial court will not generally be preserved for appeal.
- Carefully consider whether to file a post-trial motion such as a "motion to reconsider." (Note: such motion is really a misnomer; the motion is actually one to alter or amend a judgment under ***FRCP 59*** or for relief from a judgment or order under ***FRCP 60***, both applicable to bankruptcy proceedings by Bankruptcy Rule 9023 and 9024, respectively. *See In Re Guzman*, 567 B.R. 854, 862 (B.A.P. 1st Cir. 2017)).

7. **Know when to back down.**

8. **Mistakes: Only 2 questions.**

    - How do I fix it?
    - How do I keep it from happening again?

9. **Turn a loss into a win.**

10. **Tips on winning (see attached advocacy tips, Part II).**

Part II: Effective Written and Oral Advocacy Tips[2]

1. ***Advocacy in general.***
    - Essential tool in any lawyer's toolkit, even if not a litigator, since advocacy is about stating an argument clearly and persuasively
    - Hardest for new lawyers to conquer nerves/fears
    - Why do you need to conquer your nerves/fears? Because a nervous/fearful lawyer is not as effective – can't think clearly, may forget an important point, often will exhibit mannerisms that are distracting (such as pen clicking or shuffling papers)
    - Nerves/fear are caused by many factors, but some of the most important are not being in control and not being prepared
2. ***Control: You can't control the courtroom, but control what you can control:***
    - Know your judge -- Starts on time? Will rule from bench? Assigned place to sit/stand? etc.
    - Visit the courtroom or watch another docket in advance if you have not appeared before this judge before
    - Wear something comfortable yet powerful (your best power suit) – remember courtrooms are often cold – don't try out new shoes, a new haircut, or a new suit the day of an important argument
    - Arrive early (go to the bathroom, introduce yourself to courtroom personnel, warm up if you arrived from the cold, pick the best seat with direct line of sight to the judge, unpack and arrange your papers, file, etc.)
    - Put away your phone and pay attention; watch other motions being argued
    - When entering an appearance, say your name slowly and with gravitas (nervous people speak more quickly so it is a reminder to you to slow down). Plus, it is embarrassing if the judge has to ask you to repeat your name in front of your client.
3. ***Being Prepared:***
    - A judge's most common complaint is that lawyers aren't prepared, but many people don't focus on how to prepare to become well-prepared
    - Being prepared (and another thing you can control) starts with your written submission: i.e., preparation starts with a well-drafted, organized motion or brief
    - Think of the written submission as a three-legged stool, which needs all three legs to stand:
        - Predicates (jurisdiction, procedure, venue, authority, notice, due process, etc.)
        - Facts
        - Law
    - For Predicates, ask yourself:
        - Why am I in this court?
        - What relief am I asking for?

[2] Originally orally presented by Judge Norton at Stanford Law School; written materials presented to the Ross T. Roberts Trial Academy, W.D. MO in Summer 2017.

- What jurisdiction/authority is there for the court to do what I'm asking it do to?
- Who am I representing?
- The formula I used to start any motion, which helped me drill down on these questions:

  _____, through counsel, Cynthia A. Norton,

  moves/applies to /notices/certifies

  to the court

  for an order pursuant to _____[statute/rule] and _____[any local rule}

  to _____[state the relief requested, e.g., dismissing plaintiff's complaint for failure to state a claim].

  In support, ____ alleges/states:

- For Facts:
  - Tell the story in the right way, and it will lead the factfinder to the right conclusion
  - Start by reading the entire file and court record (you may have forgotten something important, like an admission from the party opponent!)
  - Tell the story, but not in an argumentative way (no adverbs)
  - Don't present something as a fact when it is not – i.e., it is disputed (then you will need evidence, affidavits, etc.)
  - Cite to the record or source when stating a fact
  - Understand the elements of the claim you are proving or disproving so you can make sure you will have evidence or can address the facts for each element
- For Law:
  - Research from the top/down (federal or state statute, national rule of procedure, local rule of procedure; then Supreme Court case, applicable Circuit Court case, District Court or B.A.P case, etc.)
  - If there is a binding case on point (e.g., Supreme Court, Circuit) you must cite it, particularly before you start relying on cases outside your Circuit)
  - Don't stop when you find the first case
  - If there are no binding cases, state so affirmatively
  - Make sure you understand the elements of the claim you are proving or disproving so you can apply the law regarding those elements to the facts of your case
  - Build your own case before you tear down your opponent's
  - Don't plagiarize (we know your writing!)
  - Make sure the cases you rely on support your proposition
  - Muddled thinking leads to muddled writing – understand your argument and don't start writing until you do

- Use outlines if necessary to map out your argument
- Use headings as roadmaps (for the reader, plus it is easier for you to find a particular argument when you are on your feet in an argument)
- Break up long paragraphs
- Be accurate – every word has meaning (thinking of legal writing like poetry and ask – is there a better word to use?)
- Proofread
- Have a spouse, partner, friend read your argument to see if it makes sense and/or read it out loud
- Always ask: is there a shorter, cleaner way to say what I want to say?
- Improve your writing by following noted writers such as Bryan Garner, Word Rake, Ross Guberman, etc.

4. Some Don'ts

- Recognize that judges are trying hard to get it right and sometimes pause when they are talking – don't assume the judge is finished talking
- Don't interrupt; if you do, apologize
- Don't say: "You can't do this"
- Don't argue to opposing counsel; argue to the judge
- Don't drink the Kool-Aid, i.e., don't believe so strongly that you are going to win that you aren't prepared for losing wholly or in part. Ask what if I win – what happens next? What if I lose, what happens next? Remember that litigation is like a train – it keeps moving forward whether you have thought about what happens next or not
- Don't let the judge know your case better than you do
- Develop some mantras that you have practiced for when (not if) you are caught off guard by something you didn't anticipate, e.g., "You raise an interesting point I had not thought of; May I have some time to discuss it with my client? Brief it?"
- Don't bluff; if you don't know, say so
- If you find a mistake in your written submission, address it on the record or amend

Part III: Thoughts on Trial Preparation Strategies For Bankruptcy Lawyers[3]

Before you file the complaint:

- Interview the client thoroughly; take good notes. Make sure you know who is the real party in interest is who has the standing to bring the action.
- Ask who else has knowledge of the events and who might be a good witness.
- Immediately determine if there is a statute of limitations for filing the complaint and calendar it, along with several pre-deadline reminders (e.g., S/L in Johnson case expires on 4/15 – 90 days to go). Err on the side of caution in calculating the statute of limitations (e.g., if it is a one year statute that begins running on Jan. 17, don't calendar Jan. 17 – the deadline may be Jan. 16, or earlier, depending on how the days are counted.
- Gather all pertinent documents and keep them in one place; make copies of the original documents (so you can make notes on them if you need to) and safeguard the originals in a secure location (firm safe deposit box) so they aren't lost or defaced for the trial. Make sure not to rearrange original documents, such as a file folder. If what is in a file folder and/or the order the documents are in may be important, then make a copy and bate-stamp the pages so you have a record.
- Remember to ask for relevant electronic documents, such as calendars, emails, cell phone records, etc., and remind the client of the duty not to erase, discard, throw away, etc., anything relating to the litigation (explain spoliation and sanctions) until you advise it is OK to do so. Remind the client to let you know immediately if he or she finds other documents that may be pertinent.
- Make an initial timeline of the pertinent events with references to where in the file/record you obtained the date/event.
- Ask the client who he or she has talked to about the case or given a statement to (if so, obtain the statement). Remind the client that he or she should not talk to other people about the case or what you have advised as that may waive the attorney-client privilege.
- Ask the client specifically what his or her goals for the litigation may be and make clear you are sure about the goal and that the goal is something you can legally and ethically accomplish.
- Consider whether there may be other related causes of action and discuss with the client the advantages and disadvantages of including those. For example, do you really need FDCPA and FRCA if you have a strong discharge injunction violation? Do you want a jury trial?
- Decide what court is appropriate to bring the action in. Ask yourself: does this court have the authority to do what I want it to do?
- Research the relevant law to make sure you know all the elements so that you can tailor your factual allegations to make sure all relevant elements have been pled.
- Make sure you understand the nature of the remedies you are seeking (Injunctive relief? Declaratory relief? Money judgment? Attorneys fees? Indemnity? Prejudgment interest? etc.).

[3] Originally presented by Judge Norton as part of the W.D. MO Pro Bono Clinic in January 2017.

- Review Fed. R. Bankr. Proc. 7008, 7009, and 7010, and any local rules implementing Rule 8 pleading requirements.
- Manage the client's expectations, by having an engagement letter that clearly specifies the scope of the engagement (does it include appeals?); how attorneys fees and costs will be dealt with; what decisions you are authorized to make on the client's behalf (e.g., do you have the authority to consent to requests for extensions, whether to depose a witness, what witnesses or evidence to adduce at trial, etc.); that you cannot guarantee a particular result; that the client has the duty to respond timely to discovery requests from the other side and to court orders, among other things.
- If ethically required and otherwise appropriate, send a demand letter to the opposing side. Sometimes it is even better to pick up the phone! Maybe this is something that can be settled without litigation?
- Draft the complaint and send it to the client for review and approval before you file it; consider whether the complaint should be verified by the client.
- Double-check the name and organization type of the defendant(s).
- Double-check Rule 7004 to make sure you know how to obtain good service over the defendant(s).
- As a gut check, ask your client what he or she thinks about what the defendant will say in response to the complaint – sometimes surprising things the client "forgot" to tell you pop out at this stage.
- As a final gut check, ask again how you/your client are going to be able to prove what the complaint alleges.

Before you file the answer (in addition to the relevant steps outlined above):

- Calendar the answer date immediately.
- Review the complaint with the client and keep good notes.
- Review the summons/service to make sure service was good.
- Ask if there is any insurance coverage and obtain any applicable policies immediately; calendar any deadlines for making a claim.
- Review Rule 8 regarding pleading and Rules 9(b) and 12 to see what defenses if any may apply.
- Consider whether there are counterclaims or third parties to add (Rules 13 and 14).
- Consider whether there is a jury trial right.
- Consider whether you have a right to attorney fees.
- Draft answer, answering each paragraph separately, keeping in mind the Rule 8 and 11 duties to answer allegations in good faith.

At the time the complaint is filed:

- If you haven't already, make a trial notebook. It will eventually include the complaint, the answer, the pretrial order, witness outlines, exhibit list, pertinent case law, etc.
- Send a copy of the filed complaint to the client and ask the client to review and let you know if there is anything that needs to be amended.

- Request the alias summons and calendar 7 days to serve along with the dates in the pretrial order you receive from the court.
- Calendar other pertinent procedural dates: 21 days to amend once the complaint is served without leave of court (Rule 7015); 35 days for the answer date; 90 days to achieve service (Rule 4(m)).
- Map out discovery strategy; discuss with client for buy-in (not consent, because client doesn't have to consent); calendar potential dates.
- Once the court has set deadlines, then calendar all dates, starting with the trial date and working backwards, e.g., 30 days till trial -- start witness prep; 20 days till trial – subpoena witnesses; 60 days to discovery cut off – send interrogatories; 30 days till dispositive motions – start summary judgment motion, etc.
- Send all the dates to your client and the witnesses you intend to call well in advance!

General Observations Regarding Litigation Preparation

- You must prepare as though you are really going to have to go to trial.
- Trial preparation should be prospective, which involves a different skill set from being a flat fee consumer lawyer.
- Deadlines are important in litigation! Blown discovery deadlines may result in sanctions.
- Rules of Procedure are important in litigation!
- Rules of Evidence are doubly important in litigation!
- Be prepared at all status conferences with the court – consider how much time you need for discovery, whether you will be filing a dispositive motion, what a deadline for amendments should be, what a deadline for designating experts should be, and discuss these with opposing counsel before the status hearing. And have your calendar open!
- Take the time to write a trial brief at the start of your trial preparation. It will force you to focus on the facts you need to prove and what the law is (and a well-written succinct trial brief will really assist the judge). It will also help you order the exhibits in the order they will naturally come into evidence.
- Make sure your client and all your friendly witnesses know in advance (and in plenty of time) when the trial will be and that you will want time to prepare with them.
- Consider whether you need to subpoena hostile witnesses.
- Consider whether to file motions in limine (such as to address an evidence issue in advance).
- Consider bringing a nervous client to the courtroom in advance (ask the courtroom deputy to open the courtroom for you) to show the client where he or she will sit, get sworn, and testify. Be sure to tell the client what to wear, how to act (no grimacing or making faces at the opposing side), to remember to bring a picture ID, etc.
- If using courtroom technology, make a trial run to make sure everything works.
- Prepare a witness outline that tells the story, incorporates your exhibits, and contains the elements necessary to lay the foundation for each exhibit (even if you anticipate stipulating to them by the date of trial).

- Prepare a separate outline of potential cross-examination points for each witness and important exhibit; include references to the FRE you anticipate using to challenge a witness or exhibit.
- Put the exhibits in a notebook marked on each page (in Adobe Professional, use the footer function which has a built-in numbering mechanism, e.g., EXH A p.1 of 8). Remember to have an original exhibit notebook for the witness for the record, in addition to one for you, the judge, perhaps the law clerk, and the client to follow along with.
- NOTE: Since exhibit tabs and notebooks are expensive, scavenge them from other matters and save them to reuse.
- Draft a short opening (what the case is about; how many witnesses you intend to call and briefly what they will testify about; what relief you will be asking for).
- If appropriate, draft a closing.
- Rehearse, rehearse, rehearse, but don't drink the Kool-Aid so much that you don't focus on what the other side's case is going to be and "how you are going to defeat it."
- At this point, you will be prepared, so you can tell yourself, I'm just going to go have fun!