



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Midwestern Bankruptcy Institute

Consumer Track

Hot Topics in Chapter 13

Sponsored by Polsinelli

Hon. Dennis R. Dow, Moderator

U.S. Bankruptcy Court (W.D. Mo.) | Kansas City

Joyce Bradley Babin

Chapter 13 Standing Trustee | Little Rock, Ark.

January M. Bailey

Prelle Eron & Bailey | Wichita, Kan.

Jeffrey S. Fraser

Albertelli Law | Lake Worth, Fla.

ABI Midwest Bankruptcy Institute 2021

HOT TOPICS IN CHAPTER 13

- 1) MORTGAGE ISSUES including post-petition mortgage defaults, mortgage mediation programs, and Rule 3002.1 issues and case summaries

**Jeffrey S. Fraser, Esq., Partner, Bankruptcy, Albertelli Law*

**The Honorable Dennis R. Dow, Bankruptcy Court, Western District of Missouri*

- 2) STUDENT LOAN ISSUES, including application of plan payments to principal, dischargeability, and bankruptcy reform

**January M. Bailey, Attorney, Prella Eron & Bailey*

- 3) PAYMENT OF ADMINISTRATIVE CLAIMS of trustee fees and debtors' attorney fees

**Joyce Bradley Babin, Chapter 13 Standing Trustee*

- 4) RECENT CASE SUMMARIES

Mortgage Issues – Topic #1:

- a. **Direct-pay mortgage defaults post plan completion.**
 - a. In re Kinney, 10 Cir. App. (July 23, 2021) (No. 20-1122). – See attached summary
- b. **Mortgage defaults post-petition and forbearance [CARES Act/ Consolidated Appropriations Act (CAA)]**
 - a. *Forbearance Notices* – under the CARES Act and the CAA – mortgagors under federally-backed residential and multifamily mortgages can request payment forbearance notices due to a COVID-19 hardship. The hardship does not have to be specific, just “COVID related”.
 - b. *Expiration of the Forbearance.* At the end of the forbearance period, the mortgagor must address forborne payments (i.e., modification, deferral, or extension of the forbearance). In the case, of bankruptcy, such forbearance delinquencies can be addressed through chapter 13.
 - c. *Supplemental Proof of Claim (“SPOC”).*
 - i. Under **§501(f)** – a temporary Bankruptcy Code provision – permits creditors to file a supplemental proof of claim for CARES Act forbearance claim in Chapter 13 cases (even if the bar date has passed)
 - ii. The CAA modification of **§1329(e)(2)** – if the debtor fails to modify the plan after the SPOC is filed, the bankruptcy court (on its own motion), the U.S. Trustee’s office, the Chapter 13 trustee and/or any party in interest may move for such modification.
 - iii. *Conduit Jurisdictions* – SPOCs are helpful (or even necessary) so that the Chapter 13 trustee is aware how much is due and owing on the forborne ongoing mortgage payments and can address accordingly. To ensure the mortgage is current at the of the bankruptcy, this information is crucial. If a servicer fails to file a SPOC, the service may not be able to use the provisions of §1328 to modify the debtor’s plan to pay the amounts forborne.
 - iv. *Non-Conduit Jurisdictions* – what happens *outside* the bankruptcy during a Chapter 13 plan is sometimes just as important as what is occurring inside

the bankruptcy. If the court, debtor's attorney, and chapter 13 trustee are not aware of a forbearance, the debtor may reach the end of a bankruptcy plan, be more than three months behind on their mortgage, and then not be entitled to a discharge. *See In re Kinney.*

v. The Federal SPOC form sunsets on December 27, 2021.

d. **Mortgage Modification Mediations (“MMM”) in Florida.**

- i. *General Description.* A bankruptcy mediation program for debtors in Florida (Southern and Middle Districts) designed specifically for debtors seeking to modify the terms of their mortgages with mortgage lenders, under the protection of the automatic stay and bankruptcy system. The overall purpose of the program is to facilitate the most transparent loan modification review possible, with a goal of eliminating modification denials for technical and avoidable reasons.
- ii. *Adequate Protection Payments.* In Florida, the MMM Program requires that the debtor file a verified motion for mediation and obtain an order on such motion. In a chapter 13 case, the debtor must file a plan providing adequate protection payments to the mortgage creditor – the lesser of 31% of the debtor's gross monthly income or the contractual payment as reflected on the mortgage creditor's proof of claim.
- iii. *The MMM Portal.* The portal serves as a confidential forum for the mediation where the debtor/debtor attorney, mortgage creditor attorney, mortgage underwriter, and mediator exchange documents relevant to the loan modification application, comment and discuss loan modification documents, and schedule mediation conference(s).
- iv. *Final Report.* The Mediator shall file a final report indicating whether an agreement was reached between the parties. If “no agreement,” the debtor is required to file a modified plan proposing a separate and appropriate treatment. If an “agreement” is reached, the debtor shall file a motion to approve such agreement and amend or modify the plan accordingly.

e. Rule 3002.1 notice violations.

- i. Not sanctionable? (*PHH Mortgage v. Senenich, (In re Gravel)*, 2nd Cir App., August 2, 2021. (See attached case summary)
- ii. Reasonableness of attorney fees for case review, filing claims. See attached case summary *In re Norbeck*, Case No. 18-3365, Bankr. W.D. Mich. (2021); *In re Okafor*, 2018 WL 6722423 (Bankr. W.D. Mo. 2018) (Dow, J.).
- iii. Problems with direct pay mortgages and post-petition fee notices not being filed.

I. Student Loan Issues

A. Dischargeability

1. 11 U.S.C. § 523(a)(8) – Discharge is granted, unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

2. Burden of Proof

- a. Loan qualifies for nondischargeability – Lender – *Love v. United States Dep’t of Educ. (In re Love)*, 2021 Bankr. LEXIS 1160, 2021 WL 1732255 (Bankr. D. Kan. 2021).
- b. Nondischargeable loan should be discharged (undue hardship) – Borrower
- c. *Brunner Test* (every circuit except 1st and 8th) - (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. Note that in adopting the *Brunner Test*, the 10th Circuit states that the good faith should focus on questions surrounding the legitimacy for seeking a discharge. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004).
- d. Totality of Circumstances (8th Circuit, 1st Circuit BAP) - (1) the debtor's past, present and reasonably reliable future financial resources; (2) a calculation of the debtor's and his dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.

B. How are payments applied by student loan creditor? Can the debtor or court require that payments be applied to principal only?

2021 MIDWESTERN BANKRUPTCY INSTITUTE

1. See §1322(b)(10) – The plan may not: provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims
 2. *In re Duensing* (Kansas - 2019 Bankr. LEXIS 598). Chapter 12 case, plan proposed to pay student loan creditor's claim in full and that payments should be applied to principal only. Interest accrued during case was not discharged.
 - a. 1222(b)(11) is similar to 1322(b)(10) – the plan may provide for payment of interest accruing after the date of the filing of the petition...only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims.
 - b. ECMC argued that student loan regulations require how it applies the payments, first to interest, then to principal.
 - c. Practically speaking, what is the difference? For ECMC's balance of \$3,907.72, at the end of the 40 quarters in this proposed plan:
 - i. Applying payments to prepetition accrued interest, then to principal leaves post petition interest of \$1,612.51.
 - ii. Applying payments to prepetition accrued interest, then postpetition accrued interest, then to principal leaves a principal balance of \$2,896.49.
 - d. Court held that student loan regulations allow for payment of principal only, 1222(b)(11) precludes the treatment ECMC sought.
 3. *Jordahl v. Burrell* (*In re Jordahl*), 539 B.R. 567 (8th Circuit BAP, 2015). Plan cannot propose payment of interest on student loans unless all claims paid in full.
- C. 11 U.S.C. § 523(a)(8)(A)(ii)
1. *McDaniel v. Navient Sols. LLC* (*In re McDaniel*), 973 F.3d 1083 (10th Cir. 2020). The language "an obligation to repay funds received as an educational benefit" signifies a conditional grant of funding for education—akin to a stipend and scholarship—as opposed to a loan of funds for education.
 2. *Homaidan v. Sallie Mae, Inc.*, No. 20-1981, 2021 U.S. App. LEXIS 20934 (2d Cir. July 15, 2021). "Educational benefit" is therefore best read to refer to conditional grant payments similar to scholarships and stipends.
- D. Congressional Reform?
1. Senate Bill 2598, introduced by Senator Richard Durbin on 8/4/21. Available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2598/text?r=8&s=1>. Changes 523(a)(8) to read:
(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational

AMERICAN BANKRUPTCY INSTITUTE

benefit, scholarship, or stipend received from a governmental unit or nonprofit institution, unless—

(A) excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents; or

(B) the first payment on such debt became due before the 10-year period (exclusive of any applicable suspension of the repayment period) ending on the date of the filing of the petition;

(8A) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A) an obligation to repay funds received as an educational benefit, scholarship, or stipend, other than an obligation described in paragraph (8); or

(B) any educational loan, other than a loan described in paragraph (8), that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual

2. Discharges federal loans after 10 years. No similar provision on private student loans.

3. Bill also includes "institutional risk-sharing", meaning that university will share burden of bankrupted loans. United Negro College Fund, Inc. lobbying against bill with this provision, stating that HBCU's will be disproportionately affected.

E. Recent Case Law - 2021

Monyak v. Navient Sols., LLC, Nos. 19-17712, 20-1020, 2021 Bankr. LEXIS 239 (Bankr. N.D. Ohio Feb. 2, 2021). Because debtor's initial purpose when applying for loans was solely to pay qualified higher education expenses, the loans in question were qualified educational loans within the meaning of 11 U.S.C.S. § 523(a)(8)(B) and were nondischargeable, absent a determination that excepting such debt from discharge under § 523(a)(8) would impose an undue hardship on the debtor and the debtor's dependents.

Medina v. Nat'l Collegiate Student Loan Trust 2006-3, No. 3:20-cv-01912-BEN-MDD, 2021 U.S. Dist. LEXIS 75882 (S.D. Cal. Apr. 19, 2021). [1]-Bankruptcy court did not err in ruling that debtor's student loan debt was not dischargeable under 11 U.S.C.S. § 523(a)(8) because the court correctly determined that the lender was a nonprofit institution; [2]-Bankruptcy court did not err in determining the lender actually guaranteed the relevant loan program and looked to the date the loan was made in determining whether the lender guaranteed the loan; [3]-Lender's guaranty of the loan program constituted funding within the meaning of § 523(a)(8) because without the lender's guaranty to purchase defaulted loans from the program, the loans would not have been made.

Mallett v. Mallett (In re Mallett), 625 B.R. 553 (Bankr. M.D. Fla. 2021). [1]-Debtor's loan from her then-husband's grandmother was nondischargeable under 11 U.S.C.S. § 523(a)(8)(B) because debtor admitted her original student loans were "qualified education loans" for tax

purposes, which meant she admitted they were "qualified education loans" for nondischargeability purposes. Evidence that debtor took the student loan interest deduction was evidence that the loan was a "qualified education loan" under I.R.C. § 221(d)(1).

Palmer v. Galaxy Int'l Purchasing, LLC (In re Palmer), Nos. 12-51428, 15-05073, 2021 Bankr. LEXIS 834 (Bankr. N.D. Ohio Mar. 31, 2021). [1]-State court judgment had no preclusive effect on a creditor's claim because the state court's conclusions regarding the applicability or scope of the discharge would not bind the bankruptcy court; [2]-Creditor failed to show by a preponderance of the evidence that its claim was nondischargeable, as it did not show the existence of an educational loan within the meaning of 11 U.S.C.S. § 523(a)(8) where debtor's testimony was probative evidence that no loan was consummated even though one had been intended, as evidenced by the documents introduced at trial; [3]-Preponderance of the evidence established that there was in fact no educational purpose to whatever financial transaction might have been consummated between debtor and the bank and thus, creditor's claim was not supported by or on account of an educational loan for purposes of § 523(a)(8)(A)(i).

Randall v. Navient Sols. (In re Randall), 628 B.R. 772 (Bankr. D. Md. 2021). [1]-The debtor established that requiring her to repay the full amount of her student loan debt to the creditor would have imposed an undue hardship on her in accordance with 11 U.S.C.S. § 523(a)(8) and the Brunner test because, if the debtor was required to repay all of her debt to the creditor, she could not have maintained a minimal standard of living, the debtor's current situation was unlikely to improve or even stay the same for the foreseeable future, and the debtor, within her limits, made good faith attempts to repay or otherwise address her debt; [2]-A partial discharge of the debtor's student debt was appropriate and warranted in this case because the debtor did have some ability to repay at least a portion of the debt, and such a partial discharge in the face of undue hardship was permissible.

Educ. Credit Mgmt. Corp. v. Goodvin, No. 20-cv-1247-JWL, 2021 U.S. Dist. LEXIS 49890 (D. Kan. Mar. 17, 2021). [1]-Bankruptcy court did not err in permitting partial discharge of debtor's student loan debts as debtor met his burden with respect to all three prongs of the Brunner test and showed that exception of his student loan debts from discharge would impose an undue hardship under 11 U.S.C.S. § 523(a)(8); [2]-Debtor met the first prong of the Brunner test because, with only \$209 in disposable income, he could not afford monthly interest, let alone principal payments; [3]-Debtor satisfied the second prong of the Brunner test as his inability to pay the principal of those loans would likely persist throughout the payment obligation; [3]-Debtor satisfied the third Brunner prong because his failure to participate in an Income-Driven Repayment (IDR) plan was reasonable and should not be given controlling weight.

Loper v. Nat'l Collegiate Student Loan Trust (In re Loper), Nos. 6:19-bk-03347-KSJ, 6:19-ap-361-KSJ, 2021 Bankr. LEXIS 791 (Bankr. M.D. Fla. Mar. 29, 2021). [1]-Debtor's student loan, which was guaranteed by a nonprofit institution, met the "funded in whole or in part" requirement in 11 U.S.C.S. § 523(a)(8)(A)(i); [2]-Debtor's loan was not dischargeable, as she had no undue

hardship preventing her from repaying the loan and no compelling argument why the loan was not a qualified education loan under § 523(a)(8)(A)(i).

Hock v. Dep't of Educ. (In re Hock), Nos. 18-31795, 19-03016, 2021 Bankr. LEXIS 636 (Bankr. W.D.N.C. Mar. 17, 2021). [1]-In finding that debtor failed to satisfy the first Brunner factor for an undue hardship discharge under 11 U.S.C.S. § 523(a)(8), as she did not prove that based on current income and expenses, she could not repay her student loans and maintain a minimal standard of living, the court rejected the argument that "current monthly income" under 11 U.S.C.S. § 1325(b) or "disposable income" under 11 U.S.C.S. §§ 707(b) and 1325(b) were applicable; [2]-Debtor failed to satisfy the second Brunner factor, as her household income was entirely derived from social security, disability, and pension income and those revenues would continue irrespective of her ability to work; [3]-Debtor failed to satisfy the third Brunner factor where, inter alia, she did not consider an income-contingent repayment plan or pursue a total and permanent disability discharge.

Hull v. United States Dep't of Educ. (In re Hull), No. 18-32076, 2021 Bankr. LEXIS 1097 (Bankr. W.D. Ky. Apr. 23, 2021). [1]-In this action involving the dischargeability of certain student loan debts pursuant to 11 U.S.C.S. § 523(a)(8), the debtor was denied summary judgment because the debtor could afford to maintain a minimal standard of living and repay her student loans. Additionally, the debtor was unable to demonstrate a good faith effort to repay her student loans because although the debtor maintained consistent employment with net income of more than 3 times the poverty level, she failed to make even nominal student loan payments for over seven years.

Tingling v. Educ. Credit Mgmt. Corp. (In re Tingling), 990 F.3d 304 (2d Cir. 2021). [1]-A district court properly affirmed that a bankruptcy court did not abuse its discretion in basing its pretrial order on a joint pretrial memorandum edited by both parties and in disallowing the debtor's unilateral modifications to it, as the interests of justice in the case did not so require; [2]-Ruling that the debtor had failed to establish undue hardship under 11 U.S.C.S. § 523(a)(8) was proper because, using the Brunner test, the record showed that her income (which exceeded federal poverty levels) and expenses allowed her to make loan repayments while maintaining a minimal standard of living, and she failed to undertake steps to improve her overall financial condition, reduce her discretionary expenses, or avail herself of repayment options available for the loans.

Stevenson v. Educ. Credit Mgmt. Corp. (In re Stevenson), Nos. 19-12869-t7, 19-1085-t, 2021 Bankr. LEXIS 889 (Bankr. D.N.M. Apr. 2, 2021). [1]-A debtor was not entitled to an undue hardship discharge of her student loans under 11 U.S.C.S. § 523(a)(8) because she failed to show an undue hardship; [2]-The debtor failed to show that, based on current income and expenses, she could not maintain a minimal standard of living while satisfying her loan obligation, particularly as she could have significantly reduced her monthly expenses without foregoing necessities; [3]-The debtor's financial situation was likely to improve in the near future, and although the debtor satisfied the good faith element of the applicable Brunner test, contrary to the debtor's contention, the fact that the loan payments could be viewed solely as

negative amortization payments, this characterization did not alter the conclusion that excepting the debtor's student loan from discharge would not impose an undue hardship.

Promisco v. United States Dep't of Educ. (In re Promisco), 625 B.R. 715 (Bankr. N.D. Ill. 2021). [1]-Debtor's request that his student loan obligation to creditor be determined to be dischargeable as an undue hardship, pursuant to 11 U.S.C.S. § 523(a)(8), was denied because debtor's recent work history demonstrated his employability and suggested of increased financial circumstances in the future, debtor's mother was not a proper dependent, and while debtor was enrolled in an income-based repayment plan, debtor had yet to make a single payment on the loans.

Fernandez v. Nat'l Collegiate Student Loan Trust 2006-2 (In re Fernandez-Lopez), Nos. DL 14-01520, 20-80069, 2021 Bankr. LEXIS 329 (Bankr. W.D. Mich. Feb. 10, 2021). [1]-Where debtor sought a declaration that her debt to defendant was discharged in her Chapter 7 bankruptcy case because it was not a qualified education loan under 11 U.S.C.S. § 523(a)(8)(B), collateral estoppel did not apply to a state court judgment that did not necessarily determine the nature of the loan, only that debtor breached her contract and owed money to defendant; [2]-As for a judgment against debtor's father, it was not binding on her in her capacity as party, as opposed to privy; [3]-Drawing inferences in favor of debtor, as the non-moving party, the court noted the gross disparity between debtor's cost of attending community college for one semester compared to the funds dispersed, which created a genuine and material question as to whether the loan was a qualified education loan under § 523(a)(8)(B) and 26 U.S.C.S. § 221(d)(1).

Epperson v. Educ. Credit Mgmt. Corp. (In re Epperson), Nos. 17-42001, 18-4015, 2021 Bankr. LEXIS 422 (Bankr. E.D. Tex. Feb. 24, 2021). [1]-Because debtor failed to establish the first element of the Brunner test by a preponderance of the evidence, the court's inquiry regarding the dischargeability of debtor's student loan obligation concluded and the referenced student loan remained nondischargeable. The evidence presented by debtor did not reflect compliance with the established legal requirement that a debtor had a heightened obligation to apply his or her income to the repayment of a student loan before the loan could be discharged under 11 U.S.C.S. § 523(a)(8).

Griffith v. Cleveland State Univ. Student Loans (In re Griffith), Nos. 17-31905-hdh7, 17-03051-hdh, 2021 Bankr. LEXIS 1744 (Bankr. N.D. Tex. June 30, 2021). HOLDINGS: [1]-Debtor's student loan debt was nondischargeable under 11 U.S.C.S. § 523(a)(8) because debtor did not demonstrate a good faith effort to repay the loans where aside from one isolated payment to a single lender in September 2014, debtor had shown no evidence of voluntary payments on her loans. Nor had she demonstrated that her failure to pay resulted from factors beyond her reasonable control.

Lamb v. Navy Fed. Credit Union (In re Lamb), Nos. BK20-40112, A20-4016, 2021 Bankr. LEXIS 224 (Bankr. D. Neb. Feb. 1, 2021). [1]-The student loan indebtedness owed by the debtor was not subject to discharge under 11 U.S.C.S. § 523(a)(8) because, given the debtor's age and the likelihood that he would have been able to work for 25 or more years, his advanced degree, his

stable government job, his family's good health, as well as the likelihood that many listed expenses were overstated or unnecessary, the debtor had not met his burden of proving undue hardship by a preponderance of the evidence.

Eady v. United States (In re Eady), Nos. 20-40208, 20-04028, 2021 Bankr. LEXIS 1970 (Bankr. E.D. Tex. July 26, 2021). [1]-There was no genuine issue of material fact as to a Chapter 7 debtor's lack of entitlement to discharge his student loans under 11 U.S.C.S. § 523(a)(8) because he did not meet the Williams test as to his minimal standard of living since his salary far exceeded the federal poverty level, and under the Brunner test several of his expenses could be redirected towards his student loan payments, including his 401(k) and children's education fund contributions and his security and home warranty systems, he produced admissible no evidence as to the future ramifications of his medical diagnosis on his ability to work, and he failed to show that additional circumstances would persist for a significant period; [2]-The court also disposed of various evidentiary objections, and the loan was subject to the § 523(a)(8) dischargeability exception.

Parvizi v. United States Dep't of Educ. (In re Parvizi), Nos. 18-30578-EDK, 19-3003, 2021 Bankr. LEXIS 1283 (Bankr. D. Mass. May 12, 2021). [1]-Applying the totality of the circumstances test, the court held that debtor did not prove by a preponderance of the evidence that excepting her student loans from discharge would impose an undue hardship under 11 U.S.C.S. § 523(a)(8), as she was highly educated, suffered from no physical or mental conditions that impeded her ability to work, and, at age 51, likely had many years to productively work before retirement; [2]-Debtor's ability to participate in the Revised Pay As You Earn (REPAYE) income-driven repayment plan weighed heavily against her argument that repayment of the student loans would impose an undue hardship; [3]-Because debtor would be in her seventies by the time she completed an income-based repayment plan, the court ordered, pursuant to 11 U.S.C.S. § 105(a), that any student loan debt remaining unpaid would be deemed discharged as an undue hardship.

Bailey v. Navient Sols., LLC (In re Bailey), Nos. 19-15531-ABA, 19-1159-ABA, 2021 Bankr. LEXIS 1764 (Bankr. D.N.J. June 30, 2021). [1]-Debtor's student load debt was nondischargeable under 11 U.S.C.S. § 523(a)(8) because debtor did not meet the demanding requirement of demonstrating a total incapacity in the future to pay her debts for reasons not within her control as debtor refused to give details about her husband's condition.

In re Quintanilla, Nos. 8:17-bk-09345-RCT, 8:17-ap-00800-RCT, 2021 Bankr. LEXIS 2023 (Bankr. M.D. Fla. June 10, 2021). [1]-The debtor's private student loan debt was non-dischargeable because it was a "qualified education loan" within the meaning of 11 U.S.C.S. § 523(a)(8)(B) of the Bankruptcy Code; debtor was subject to income taxation and thus, as a matter of law, was a "taxpayer" during the 2006-2007 academic year and was carrying at least 1/2 the normal full-time workload for the course of study she was pursuing; [2]-The debtor was not entitled to sanctions against the defendants because defendants conducted themselves appropriately and acted with reasonable diligence and efficiency in defending the litigation.

Marchus v. Student Loans of North Dakota (In re Marchus), Nos. 20-30357, 20-07017, 2021 Bankr. LEXIS 1347 (Bankr. D.N.D. May 18, 2021). [1]-Debtor's student loan was discharged, pursuant to 11 U.S.C.S. § 523(a)(8), because debtor's reasonably reliable future finances were not promising as debtor was almost 64 years old and she held no pension or investment accounts and saved no money for retirement. Additionally, debtor made good faith efforts to maximize her potential and her inability to pay her debts was the consequence of circumstances unrelated to her work ethic or her desire to improve her financial status and pay her debts.

Nitka v. Dep't of Educ. (In re Nitka), No. 20-1270, 2021 U.S. App. LEXIS 12105 (10th Cir. Apr. 23, 2021). [1]-In an action in which the debtor sought a discharge of approximately \$200,000 in law school student loans based on "undue hardship" under 11 U.S.C.S. § 523(a)(8), the grant of summary judgment to the creditor was affirmed because debtor had not shown that his financial difficulties were likely to persist for a significant portion of the repayment period where debtor had a strong potential for future employment.

Graddy v. Educ. Credit Mgmt. Corp. (In re Graddy), 852 F. App'x 509 (11th Cir. 2021). [1]-The judgment finding that the debtor's student loans were not dischargeable, under 11 U.S.C.S. § 523(a)(8), was affirmed because the debtor provided no controlling case law to show an error of law in the bankruptcy court's conclusion that she failed to prove circumstances indicating a future inability to make payments on her student loans. Additionally, to the extent that the debtor claimed error in the admission of loan histories or third-party documents, any error would be harmless.

**3. Chapter 13 Case Dismissals Prior to Confirmation:
Payment of Trustee's Fees and Debtors' Attorney Fees**

A. Allowance of Trustee's Fees.

When a chapter 13 case is dismissed prior to plan confirmation, issues can arise regarding the entitlement to the payments made by the debtor while the case was pending. The trustee is allowed a statutory fee pursuant to 28 U.S.C. § 586(e)(2). Section 1326(a)(2) of the Bankruptcy Code provides payments are to be returned to a debtor after deducting any unpaid claims allowed under 11 U.S.C. § 503(b). Courts have varied regarding whether the trustee's fee must be returned or may be retained upon dismissal of a case prior to confirmation.

1. Statutes Regarding Trustee's Fees.

The determination of the payment of a chapter 13 trustee's statutory fee requires consideration of two statutes: 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(a)(2).

Section 586(e)(2) - The Percentage Fee: Pursuant to 28 U.S.C. § 586(e), a trustee is entitled to collect a percentage fee from "all payments received under plans" in cases where the trustee is appointed. Section 586(e)(2) states in pertinent part:

Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under chapter 12 or 13 or title 11 for which such individual serves as standing trustee.

28 U.S.C. § 586(e)(2).

Section 1326 - Distribution of Payments: Pursuant to 11 U.S.C. § 1326, the debtor is to commence payments under the plan not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount proposed by the plan to the trustee. 11 U.S.C. § 1326(a)(1)(A). Section 1326 (a)(2) next directs the trustee what to do with the payments received:

A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. *If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).*

11 U.S.C. § 1326(a)(2) (emphasis supplied).

2. Trustee's Entitlement to the Statutory Trustee's Fee.

Several cases with varying results have considered whether a chapter 13 trustee is entitled to a statutory fee when a case dismisses prior to confirmation of a plan. The controlling statutes often are found to provide no clear guidance. The majority of the cases have found that a trustee is not entitled to a statutory fee if the case dismisses prior to confirmation. However, an increasing number of cases have determined that the trustee is entitled to retain the fee if the case dismisses prior to confirmation.

An early case to address the issue found the trustee was not entitled to retain a fee. The bankruptcy court in *In re Ward*, 132 B.R. 417, 419 (Bankr. D. Neb. 1991), took a direct approach to the question and found that § 1326(a)(2) allows only deductions for § 503(b) claims and the percentage fee is not a § 503(b) administrative expense. The court further found that the standing trustee's only source of compensation is from cases with confirmed plans.

Later, cases from the Tenth Circuit expanded on this view. In *In re Rivera*, 286 B.R. 292 (Bankr. D.N.M. 2001), the Court noted its agreement with the *Ward* decision and found that the trustee's statutory fee was not an administrative fee under § 503(b) and § 503(b) payments were the only payments that could be distributed upon dismissal pursuant to § 1326(a)(2). The *Rivera* decision was affirmed by the Tenth Circuit Bankruptcy Appellate Panel in *In re Miranda*, 285 B.R. 344 (10th Cir. B.A.P. 2001) (unpublished). The panel agreed that § 1326 unambiguously requires the return of all payments except § 503(b) claims.

The New Mexico bankruptcy court revisited the issue in 2013 in *In re Acevedo*, 497 B.R. 112 (Bankr. D.N.M. 2013) (*en banc*), with the same result. The court found that the two sections can be harmonized if § 586(e) directs the trustee to collect and hold the percentage fees pending plan confirmation while § 1326(a)(2) instructs the trustee on when and how to disburse the payments after confirmation or denial of confirmation.

An Arkansas case, *In re Dickens*, 513 B.R. 906 (Bankr. E.D. Ark. 2014), agreed with *Acevedo* and found that § 586(e)(2) specifies the source from which the trustee is to collect the percentage fee and § 1326(a) addresses the circumstances under which the trustee must return the collected fee to the debtor when a case is dismissed prior to confirmation. The court distinguished between 11 U.S.C. § 1226(a) that specifies that a fee may be taken and § 1326 that does not.

An Ohio case, *In re Lundy*, 2017 WL 4404271 (Bankr. N.D. Ohio 2017), found that pursuant to § 586(e)(2), the trustee is allowed a fee on all payments received in confirmed and unconfirmed cases. However, disbursement of payments upon dismissal is governed by § 1326(a)(2) depending upon confirmation or denial of confirmation. When a plan is not confirmed, the trustee must return the percentage fee less any allowed administrative claims under § 503(b).

A recent decision, *In re Evans*, 615 B.R. 290 (Bankr. D. Idaho 2020) (appeal pending to district court), found that the trustee must return payments, including the trustee's fee, to the debtor if a plan is not confirmed. The court found that § 586 (e)(2) is the source from which the trustee collects the fee and directs the trustee to collect and hold payments pending plan confirmation. Section 1326(a)(2) tells the trustee when and how to disburse payments before and after confirmation.

A minority of cases have found that the trustee is entitled to retain the fee. Shortly after *Evans* was decided, the Idaho bankruptcy court decided another case, *In re Douglas Jerome Harmon and Christina Renna Harmon*, Case No. 1:19-bk-01424 (Bankr. D. Idaho 2020), consistent with the *Evans* case. Upon appeal to the Tenth Circuit Bankruptcy Appellate Panel, a different result was reached. See *McAllister v. Harmon (In re Harmon)*, 2021 WL 3087744 (slip copy) (10th Cir. B.A.P. July 20, 2021). In a lengthy opinion not designated for publication, the appellate panel found that the trustee was entitled to collect the statutory fee under § 586(e)(2) upon receipt of each payment and was not required to disgorge the fee if the case is dismissed prior to confirmation. Although not designated for publication, the *Harmon* case provided a lengthy discussion and summary of the statutes and cases. Additionally, the case had a concurrence and dissent from the panel.

In *Nardello v. Balboa (In re Nardello)*, 2014 WL 3817148 (D.N.J. 2014), the district court affirmed the bankruptcy court's allowance of the trustee's fee on all payments received and disbursements made in the case. Interestingly, in *Nardello*, a portion of the funds the trustee had received had been derived from the sale of real property and not plan payments. Slip op. at 2. In *In re Daniel Richard Doll*, Case No. 17-20831 (Bankr. D. Colo. Feb. 19, 2021), the bankruptcy judge found after a thorough analysis of the statutes and other cases and ruled that the appropriate interpretation was for the chapter 13 trustee was permitted to retain the fee after the debtor's case was dismissed prior to confirmation.

Although the historical trend has been for chapter 13 trustees not to retain a fee on cases that dismiss prior to confirmation, there does appear to be a more recent trend that trustees are entitled to retain the fee. It remains to be seen if other courts will address the issue – and with what results.

3. Relevant Cases.

a. Disallowing the Trustee's Statutory Fee.

In re Evans, 615 B.R. 290 (Bankr. D. Idaho 2020) (appeal pending to district court). Finding that the correct interpretation was consistent with the reasoning of *Acevedo*, *Dickens* and *Lundy*, the bankruptcy court found that § 586 (e)(2) directs the trustee to collect and hold payments pending plan confirmation and the source from which the trustee collects the fee, and § 1326(a)(2) tells the trustee when and how to disburse payments before and after confirmation. The trustee was required to return all payments to the debtor pursuant to § 1326(a)(2).

In re Lundy, No. 15-32271, 2017 WL 4404271 (Bankr. N.D. Ohio 2017).

Section § 586(e)(2) required trustee to collect the applicable percentage fee from all payments that the trustee receives under confirmed and unconfirmed plans and to hold the fee pending confirmation. Disbursement is governed by § 1326(a)(2) and (b). Where a plan is not confirmed, § 1326(a)(2) requires the trustee to return the payments including the statutory percentage fee after deducting any administrative expense claims.

In re Dickens, 513 B.R. 906 (Bankr. E.D. Ark. 2014).

The bankruptcy court found that the trustee was not entitled to retain a percentage fee when a case dismisses prior to confirmation. Section 586(e)(2) was ambiguous regarding whether the trustee could retain the fee and had to be read in conjunction with § 1326(a)(2). Reading the two statutes together, the court found § 586(e)(2) prescribes how the fee is collected and § 1326(a) governs when the fee must be returned. § 586(e)(2) specifies the source from which the trustee is to collect the percentage fee and § 1326(a) addresses the circumstances under which the trustee must return the collected fee to the debtor when a case is dismissed prior to confirmation. The court found the fact that 11 U.S.C. § 1226(a) specifies that a fee may be taken and § 1326 does not further influenced the decision. The court rejected a public policy argument that allowing a fee in all cases was more equitable leaving the issue for Congress to decide.

In re Acevedo, 497 B.R. 112 (Bankr. D.N.M. 2013) (*en banc*).

Revisiting the previous rulings of *Rivera* and *Miranda*, the New Mexico bankruptcy court found that the trustee would not be entitled to retain fees on a dismissed unconfirmed case. The court found three possible characterizations of construction: mandatory construction (obligates the trustee to collect fees from all payments received under a plan); collect and hold construction (requires the trustee to collect and hold the fees pending confirmation and then disbursed as directed under 1326(a)(2) and § 586(3)(2)); and responsibility and source construction (identifies trustee as collector of fees and plan payments as sole source of collection but does not find when the fees should be collected). The court found the most harmonious reading of § 586(e) and § 1326(a)(2) was to consider that § 586 directs the trustee to collect and hold the percentage fees pending plan confirmation while § 1326(a)(2) instructs the trustee on when and how to disburse the payments after confirmation or denial of confirmation. To do so, the court had to reject the other two “plausible constructions.”

In re Rivera, 268 B.R. 292 (Bankr. D.N.M. 2001, *aff'd sub nom.*, *Skehen v. Miranda* (*In re Miranda*, 285 B.R. 344 (10th Cir. B.A.P. 2001) (*unpublished*)).

Section 1326 unambiguously requires the return of all payments except § 503(b) claims. The parallel chapter 12 statute, § 1226(a) specifies that a chapter 12 trustee can receive fee payments if the plan is not confirmed, but § 1326(a)(2) does not contain a similar provision.

In re Edge, 122 B.R. 219 (D. Vt. 1990).

Funds allocated for trustee's percentage fee are not payments under a chapter 13 plan.

Pelofsky v. Wallace (In re Pelofsky), 102 F.3d 350 (8th Cir. 1996).

Trustee's fee is not a payment under a chapter 13 plan.

b. Allowing the Trustee's Statutory Fee.

McAllister v. Harmon (In re Harmon), 2021 WL 3087744 (B.A.P. 9th Cir. July 20, 2021) (not designated for publication).

In an issue of first impression for the Ninth Circuit, the bankruptcy appellate panel found that a chapter 13 trustee was entitled to a statutory fee on receipt of each plan payment. "[T]he bankruptcy court's ruling that the trustee "collect and hold" the fee was not a reasonable interpretation because neither 1326(a) – nor any other provision of the Bankruptcy Code – provides for disbursement of the fee." Section 586(e)(2) is the only statute that provides for payment of a standing trustee's fee, and it simply mandates that a trustee "shall collect such percentage fee from all payments received . . . under plans." The panel noted that it was aware that both 11 U.S.C. §§ 1194(a)(3) and 1226(a)(2) expressly provide that a standing trustee may retain the fee upon a preconfirmation dismissal but did not apply the negative inference canon or the canon against surplusage to contravene plain language because the application would create its own ambiguity and surplusage. The panel found that because § 1326 was enacted prior to § 1194 and § 1226, the weight of any negative inference was greatly reduced. The court concluded that § 586(e) establishes a percentage fee which must be collected from all chapter 13 plan payments to compensate standing trustees for administrative tasks which they must perform regardless of whether a plan is confirmed. The statutory fee operates independently of the compensation and priority schemes of the Bankruptcy Code.

In re Daniel Richard Doll, Case No. 17-20831 (Bankr. D. Colo., Feb. 19, 2021).

The chapter 13 trustee was permitted to retain the fee after the debtor's case was dismissed prior to confirmation. The court provided a chronological summary of cases that have addressed the issue of fee retention and considered the Tenth Circuit Court of Appeals decision in *In re BDT Farms, Inc.*, 21 F.3d 1019 (10th Cir. 1994) which found § 586(e) was unambiguous in a chapter 12 case when considering the limits on a trustee fee. The court disagreed with the *Acevedo* case that did not follow *BDT Farms*. The court noted that the United States Trustee's Handbook for Chapter 13 Trustees was revised in 2014 to provide that the percentage fee is collected at the time of payment and transferred to the trustee's operating account. The

court found no controlling law in its jurisdiction that would reverse the United States Trustee's position in *BDT Farms* finding that § 586(e) was not ambiguous. The court agreed with the minority position that the language unambiguously requires the trustee to obtain payment of the percentage fee upon receipt of each plan payment.

In re Soussis, 624 B.R. 559 (Bankr. E.D.N.Y. 2020).

The bankruptcy court found that § 586(e)(2) and § 1326(a)(2) were straightforward in their meaning, and the trustee was allowed to keep the statutorily prescribed fees when the debtor's case was dismissed prior to confirmation over the debtor's assertion that the trustee's fees should be disgorged. The court found that the debtor had not established a basis for disgorgement. The court did not have authority to fix the dollar amount that the trustee received, and the fee was a statutory fee not subject to modification. Section 586(e)(2) was unambiguous in its directive that the chapter 13 trustee collect and keep the fee upon receipt of plan payments by the debtor, but § 1326 revealed that the trustee is directed to only return funds earmarked for creditors in the event the plan is not confirmed.

Nardello v. Balboa (In re Nardello), 514 B.R. 105 (D.N.J. 2014).

The district court affirmed the bankruptcy court's finding that the trustee was entitled to collect a percentage fee from all payments received regardless of the debtor's particular interest in the property. The court found that § 586 governs how the trustee is compensated; § 586 is ambiguous because it does not define "all payments received under plans," particularly when viewed with §§ 1325 and 1326. The court gave persuasive value with the United States Trustee's Handbook for Chapter 13 Trustees.

In re Turner, 168 B.R. 882 (Bankr. W.D. Tex. 1995).

"Payments received" under § 586 must include amounts for trustee's percentage fee.

In re BDT Farms, 21 F.3d 1019 (10th Cir. 1994).

The trustee may collect a percentage fee on "all payments received."

B. Allowance of Attorneys Fees as Administrative Expense at Dismissal or Conversion.

The allowance of a debtor's attorney's fee for cases that dismiss prior to confirmation varies among jurisdictions across the country. Some courts allow a payment to be made at dismissal and some do not. Some courts require an application for administrative claim to be filed and granted before dismissal. Some courts allow the application for administrative claim to be filed and granted before or after dismissal.

Courts are divided on whether § 349(b) or § 1326(a)(2) govern disbursement of funds held by a chapter 13 trustee upon dismissal. Section 349(b) directs that property of the estate be

returned to the debtor upon dismissal while § 1326(a)(2) dictates the manner in which the trustee should distribute plan payments if the plan is not confirmed prior to dismissal and includes the directive for § 503(b) awards.

1. Statutes Regarding Attorneys Fees.

Several statutes are relevant in examining cases seeking administrative claims for attorneys fees upon dismissal prior to confirmation. Section 330(a)(4)(B) provides for allowance of compensation in a chapter 13 case:

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B).

Next, § 349(b) governs the dismissal of a Chapter 13 case and states:

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title. . .

(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349 (b).

Section 349 cannot be read alone, but § 1326(a)(2) must also be considered. Section 1326 prescribes the steps the trustee should take when a case is confirmed or if confirmation is denied:

A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

11 U.S.C. § 1326.

Section 1326 dictates how payments are to be disbursed depending upon the disposition of the confirmation of the plan. If confirmation is denied, a claim may be

allowed under 11 U.S.C. § 503(b) for attorneys fees as an administrative claim. Section 503(b) provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—...

(2) compensation and reimbursement awarded under section 330(a) of this title.

11 U.S.C. § 503.

2. Recent Cases and Views.

Cases after the Supreme Court’s ruling in *Harris v. Viegelahn*, ___ U.S. ___, 135 S. Ct. 1829 (2015), have addressed the disposition of funds upon dismissal or conversion. In *Harris*, the Supreme Court found that upon a good faith conversion of a case with a confirmed plan from chapter 13 to chapter 7, 11 U.S.C. § 348(f) dictates that the postpetition wages of a debtor are not property of the estate and must be returned to the debtor rather than distributed to creditors. *Id.* at 1835. At the time of conversion to a chapter 7 case, the chapter 13 trustee’s service terminates. “A debtor’s postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion.” *Id.* at 1837. Because § 348(f)(1)(A) removes postpetition wages from the pool of assets that may be distributed to creditors in a case converted to chapter 7, “[a]llowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design.” *Id.* The Court concluded Section 348(e) terminates the services of a chapter 13 trustee, including the disbursement of payments to creditors under § 1326(c), when a case is converted from chapter 13 to chapter 7. “The moment a case is converted from Chapter 13 to Chapter 7 ... the Chapter 13 trustee is stripped of authority to provide [the disbursement of payments to creditors].” *Id.* at 1838.

The majority of courts have held that if a case has not been confirmed or converted, the trustee’s services are not terminated under § 348(e), and the trustee retains authority to disburse funds pursuant § 1326(a)(2). *In re Wheaton*, 547 B.R. 490, 496–98 (1st Cir. B.A.P. 2016). These courts typically have found that §§ 349(b)(3) and 1326(a)(2) govern the trustee’s disbursement of funds in a chapter 13 case that has been dismissed preconfirmation, but not yet closed, and 1326(a)(2) permits payment of administrative fees under § 503(b). *See, e.g., In re Wheaton*, 547 B.R. 490, 496–98 (1st Cir. B.A.P. 2016); *In re Merovich*, 547 B.R. 643, 648 (Bankr. M.D. Pa. 2016) (Section 1326(a)(2) controls the disbursement of funds held by the chapter 13 trustee on preconfirmation dismissal); *In re Hightower*, No. 14–30452–EJC, 2015 WL 5766676, at 5 (Bankr. S.D. Ga. Sept. 30, 2015) (*Harris* did not apply because case was not confirmed or converted to chapter 7; *In re Kirk*, 537 B.R. 856, 859 (Bankr. N.D. Ohio 2015) (*Harris* did not apply because the chapter 13 case was dismissed not converted, and § 1326(a)(2) dictates the distribution in cases that are dismissed prior to confirmation); *In re Brandon*, 537 B.R. 231, 235 (Bankr. D. Md. 2015) (“[a] case dismissed prior to confirmation of a Chapter 13 plan presents a situation

entirely different from *Harris*”, and *Harris* does not preclude payment by a chapter 13 trustee of allowed compensation of debtor's counsel); *In re Ulmer*, No. 15–30220, 2015 WL 3955258, *1 (Bankr. W.D. La. June 26, 2015) (“[T]his Court finds *Harris* applies only in the instance of conversion and does not abrogate [] § 1326(a)(2)”).

Other courts have considered the issue of entitlement to fees in cases that have dismissed prior to confirmation and have reached the opposite conclusion. These courts have determined that upon dismissal, the funds revert in the debtor.) *See, e.g., In re Beauregard*, 533 B.R. 826, 831 (Bankr. D.N.M. 2015) (“While *Harris* was focused on the second sentence of § 1326(a)(2), there is no principled basis upon which to continue to give effect to the third but not the second sentence of § 1326(a)(2) after conversion”); *In re Sowell*, 535 B.R. 824, 826 (Bankr. D. Minn. 2015) (“While the *Harris* case involved a debtor whose plan had been confirmed, this Court believes that the logic and analysis employed by the Supreme Court applies with equal force to a case, like this one, in which no plan has been confirmed.”); *In re Spraggins*, 2015 WL 5227836 (Bankr. D.N.J. Sept. 3, 2015) (relying on *In re Beauregard* and *In re Sowell*).

3. Representative Cases – Entitlement to Fees at Dismissal Prior to Confirmation of Plan (and a Few After Confirmation and After Conversion).

Fee not allowed (confirmed case; application filed after dismissal):

In re Jason Michael Glur, Case No. 5:18-bk-71487 (Bankr. W.D. Ark., Sept. 30, 2020).

The court denied the debtor’s application for compensation under § 330(a). The application was not approved or requested prior to dismissal of the debtor’s case after plan confirmation. Dismissal of a case reverts the property in the entity in which such property was vested immediately before the commencement of the case, i.e., the estate of the debtor. 11 U.S.C. § 349(b)(3). The trustee’s duty to distribute payments under § 1326(a)(2) ceased to exist at dismissal. The application was denied.

Fee allowed:

In re Nelums, 617 B.R. 70 (Bankr. D. S.C. 2020).

The debtor’s attorney was entitled to compensation for representation of the debtor in a case that dismissed prior to confirmation pursuant to § 330(a)(4)(B). The compensation was reasonable under § 330(a)(3)(F). The trustee was required to deduct the attorney’s remaining compensation as an allowed administrative claim under pursuant to §§ 1326(a)(2) and 503(b)(2).

Fee allowed:

In re Fairnot, 571 B.R. 767, 770–71 (Bankr. E.D. Mich. 2017).

When a chapter 13 case is dismissed prior to confirmation of a plan, the trustee can and must pay any allowed administrative expenses under § 503(b) before returning funds to the debtor. When an order is entered dismissing a case prior to confirmation, the trustee must hold funds on hand until the court has ruled on any

fee application of the debtor's attorney provided that the debtor's attorney files a fee application within seven days after entry of the dismissal order. *Id.* at 771.

Fee not allowed:

In re Ivey, 568 B.R. 85 (Bankr. E.D. Ark. 2017).

Upon conversion from a chapter 13 case to a chapter 7 case, all undistributed funds on hand with the chapter 13 trustee must be returned to the debtor. The debtor, through other counsel, filed a notice of conversion to a chapter 7 case prior to confirmation of a plan, and the attorney who represented the debtor in the chapter 13 case filed a motion for administrative claim for fees and costs pursuant to § 330 and 503(b). The original attorney asked for funds to be distributed prior to distribution of funds to the debtor pursuant to § 1326(a)(2). In denying the application, the court declined to follow *In re Brandon*, 537 B.R. 231 (Bankr. D. Md. 2015), that allowed payment of attorney's fees and joined the courts of *In re Sowell*, 535 B.R. 824 (Bankr. D. Minn. 2015), *In re Beauregard*, 535 B.R. 826 (Bankr. D. N.M. 2015), both of which found that funds on hand after preconfirmation conversion of case must be returned to the debtors). The court found the Supreme Court's case of *Harris v. Viegelaahn*, ___ U.S. ___, 135 S. Ct. 1829 (2015), dictated this result for a case converted prior to confirmation though *Harris* concerned a case dismissed after confirmation.

Fee not allowed (order not entered prior to dismissal):

In re James, Case No. 6:16-bk-70760, 2017 WL 10742586 (Bankr. W.D. Ark. 2017).

Although the attorney's application for administrative claim had been filed prior to dismissal of the debtor's case prior to confirmation of a plan, an order had not been entered and fees had not been allowed under § 503(b). The trustee was not authorized to deduct the proposed § 503(b) award.

Fee not allowed (converted case):

In re Hoggarth, 546 B.R. 875 (Bankr. D. Colo. 2016).

After conversion of the debtor's case prior to confirmation, the attorney filed an application for an administrative claim. After an analysis of *Harris v. Viegelaahn*, ___ U.S. ___, 135 S. Ct. 1829 (2015), the application was denied. The court distinguished between conversion and dismissal and found that the trustee's authority to distribute payments ended at conversion. The court recognized the harsh result for attorneys that provide a vital service by representing chapter 13 debtors, but found the Court was constrained to enforce the Code.

Fee allowed:

In re Merovich, 547 B.R. 643 (Bankr. M.D. Penn. 2016).

The court found *In re Kirk*, 537 B.R. 856 (Bankr. N.D. Ohio 2015) persuasive and *Harris v. Viegelaahn*, ___ U.S. ___, 135 S. Ct. 1829 (2015), inapplicable to the distribution of funds held by the trustee on a preconfirmation dismissal. Section 349(b) governs the dismissal and reverts property in the debtor subject to § 1326(a)(2) that permits an administrative claim to be allowed § 503(b) and paid prior to distributing funds to the debtor.

Fee allowed:

In re Kirk, 537 B.R. 856, 862 (Bankr. N.D. Ohio 2015).

A motion for administrative expense claim of \$1,000 for postpetition services pursuant to § 503(b)(2) was allowed for a case that dismissed prior to confirmation. The trustee was directed to disburse pursuant to § 1326(a)(2) before disbursing remaining funds. See 11 U.S.C. § 330(a)(4)(B). While § 348(e) provides that the chapter trustee's services terminate immediately upon conversion, § 349 does not contain a similar provision for dismissal and § 1326(a)(2) controlled.

Fee allowed:

In re Brandon, 537 B.R. 231 (Bankr. D. Md. 2015).

The bankruptcy court found that *Harris v. Viegelahn*, ___ U.S. ___, 135 S. Ct. 1829 (2015), did not preclude the court from directing the chapter 13 trustee to pay funds remaining to debtors' counsel up to the amount of the attorney's fee allowed in cases that are dismissed or converted prior to confirmation. Undistributed funds were to be returned to the debtors subject to payment of allowed administrative expenses, including the attorney's fee. Despite § 349, the trustee continued to have some ongoing responsibilities which included payment of administrative claims under § 1326(a)(2). An assignment made by the debtors of the attorney's fees to the attorney also was a valid independent basis upon which to approve payment by the trustee to debtor's counsel.

Fee not allowed (confirmed case):

In re Edwards, 538 B.R. 536 (Bankr. S.D. Ill. 2015).

Postpetition property and wages held by the chapter 13 trustee at the time of dismissal of a confirmed plan must be distributed to the debtor. The court based its decision not on *Harris v. Viegelahn*, ___ U.S. ___, 135 S. Ct. 1829 (2015), but on § 349(b)(3) and the effect of dismissal on a chapter 13 case. Dismissal revests the property with the debtor and renders the chapter 13 plan effectively vacated and prevents the trustee from distributing funds according to the plan's terms. The court discussed in a footnote that although a harsh result for attorneys, that some attorneys take assignments or security interests in the debtor's postpetition wages held by the trustee on the date of conversion to pay allowed unpaid attorneys fees.

Fee not allowed (confirmed plan):

In re Bateson, 551 B.R. 807 (Bankr. E.D. Mich. 2016).

The court found that the same rationale the Supreme Court used in *Harris* for a case that converted after confirmation applies when a Chapter 13 case is dismissed after confirmation. The court reasoned that although the debtor's case was not converted to chapter 7, the Supreme Court's reasoning was applicable.

Fee not allowed:

In re Rogers, 519 B.R. 267 (Bankr. E.D. Ark. 2014).

The bankruptcy court denied a motion to compel the trustee to distribute funds to the attorney instead of the debtor after the case was dismissed prior to confirmation.

The attorney had not had the fees reduced to a sum certain or allowed under § 330(a)(4)(B) or § 503(b) because there was no confirmed plan. The attorney's remedy was to file an application for administrative costs pursuant to § 503(b) for approval by the court. The court allowed the attorney fifteen days to file an application.

Fee allowed (decision prior to *Harris*):

Massachusetts v. Pappalardo (In re Steenstra), 307 B.R. 732 (1st Cir. B.A.P. 2004).

The panel found that upon dismissal, § 349(b)(3) reverts the former property of the bankruptcy estate in the entity that held the property prior to commencement of the case and § 1326(a)(2) provides that postpetition funds should be returned to the debtor if the case is dismissed prior to confirmation. However, § 1326(a)(2) provides that prior to returning the funds to the debtor, the trustee must complete administration of the case by making payments for expenses related to administration under § 503(b).

Fee not fully allowed (attorney's misconduct involved):

In re Marin, 256 B.R. 503 (Bankr. D. Colo. 2000).

Attorney who extracted payments from the debtor other than through proper disclosure or allowance under § 330 violated the provisions of the Bankruptcy Code and fees other than the \$240 retainer the attorney received were disgorged. The court found §§ 329 and 1326(a) "implement a well coordinated scenario" to allow the charges of a professional to be overseen by the court. To receive fees, an attorney must file an application under § 330 and the fees must be allowed for the fees to become an administrative expense under § 503(b) and paid in a chapter 13 case before funds are paid to creditors or returned to the debtors. The attorney's disclosures were inadequate and the attorney shortcut the provisions of § 1326 by inducing the trustee to send the attorney a check representing the payments made in the case so the attorney could deduct his fees. The attorney endorsed the check payable to the debtor without authority to do so. The fact that the debtors were difficult clients did not excuse the attorney from complying with the provisions of the Code. "*There is no other way for an attorney to be paid!*" 256 B.R. at 507 (emphasis original).

In re Norbeck, 2021 WL 2447339 (Bankr. W.D. Mich. June 15, 2021)

(Gregg, J.)

Issue:

Are fees asserted by a mortgagee to prepare a Payment Change Notice and a Fee Notice compensable and reasonable?

Facts:

Mortgagee filed a Payment Change Notice and subsequently filed a Fee Notice asserting attorney fees of \$125 for preparation of the Payment Change Notice by a paralegal and \$150 for preparation of the Fee Notice by an attorney. Debtor objected and argued that the two fees asserted were excessive given the largely clerical or administrative nature of the tasks performed.

Analysis:

Rule 3002 requires the holder of a claim to serve notice of any change in payment under a mortgage and establishes the procedure for the mortgagee to assert fees, expenses or charges related to any payment

change. The holder of the claim bears the burden of proof as to the reasonableness of its fees. Here, the mortgagee failed to include a detailed itemized time statement and the court noted the Fannie Guidelines are not binding on the court nor instructional given the administrative nature of the Payment Change Notice. Further, the court was not persuaded Debtor should be required to pay for preparation of a Payment Change Notice as it did not require any substantive analysis or legal expertise. Similarly, to prepare the Fee Notice the mortgagee did not engage in any legal analysis and the preparation of both the Fee Notice and the Payment Change Notice was nothing more than an administrative or clerical endeavor the Debtor should not be required to pay for.

Holding:

Mortgagee's fee requests denied.

Kinney v. HSBC Bank USA, N.A., (In re Kinney), Case No. 20-1122
(10th Cir., July 23, 2021).

Issue:

If a debtor makes delinquent mortgage payments after the plan's 5-year period, can the bankruptcy court grant a discharge, or is it an impermissible effort to modify the plan resulting in dismissal?

Facts:

Debtor was required to make timely mortgage payments under her Chapter 13 plan through November 2018. In March 2018, Debtor was in a car accident and missed two mortgage payments in the final months of the five-year plan. After the plan ended, Debtor tendered the back payments. The bank filed a motion to dismiss which the bankruptcy court granted, reasoning that a discharge was no longer possible. Debtor appealed.

Analysis:

The 10th Circuit considered whether the bankruptcy code permits the court to treat Debtor's late payments as a "cure" rather than an impermissible "modification" of the plan. The court first looked to the language of 1328 that a discharge is necessary upon the debtor's "completion...of all payments under the plan" to decide if payments after the expiration of the plan's five-year term are "under the plan." Payments are "under the plan" only if they are subject to or under the authority of the plan and the more natural reading is that payments could fall "under" a plan only if the plan remained in existence and thus, a discharge permitted only if the payments had been made during the existence of the plan.

Sections 1322, 1325, 1328 and 1329 are ambiguous but the better interpretation is that late payments are not "under the plan" if it has already expired. To treat the payments as an informal cure rather than an improper modification would nullify the Code's restrictions on modifications. Because the Code's text is ambiguous, the court also reviewed the legislative history and determined that the view that late

payments are not “under the plan” because they came after the plan had already ended is supported by the legislative history of Chapter 13 and Congress intended to strictly limit the time for payments under Chapter 13 plans.

Holding:

Affirm bankruptcy court’s dismissal of the Chapter 13 case.

In re Okafor, 595 B.R. 903 (Bankr. W.D. Mo. 2018) (Dow, J.)

Issue:

Does the filing of a bankruptcy petition sufficiently affect Lender's interests to allow attorney fees as provided in a deed of trust? Does the filing of a proof of claim and reviewing of a plan constitute the unauthorized practice of law by an out-of-state attorney? What is a reasonable fee for review of a Chapter 13 plan and preparation of a proof of claim?

Facts:

Debtors filed bankruptcy in Mo. Lender retained California based attorneys to review Plan and file proof of claim. Attorneys weren't licensed in Mo. nor admitted before the court. Attorneys filed notice of fees and requested \$550 to prepare proof of claim and \$350 for reviewing plan. Debtors objected and argued there wasn't a triggering event under the promissory note or deed of trust that would authorize payment of attorney fees and that the attorney couldn't seek fees if not licensed or otherwise admitted in this jurisdiction.

Lender countered that filing a claim is not the unauthorized practice of law in Mo. or under Rule 9010 and that the bankruptcy filing itself was a triggering event under the deed of trust.

Analysis:

The Court first determined if attorney fees were authorized by the note or deed of trust. The deed of trust terms authorized attorney fees if there is a legal proceeding that might significantly affect Lender's interest in the property. Debtors argued the filing of bankruptcy did not significantly affect Lender's rights because the account was current. The Court looked at the plain language of the deed that includes the word "might" affect Lender's rights and determined a bankruptcy filing certainly might affect Lender's interest in the property. Reviewing the plan and filing a proof of claim are appropriate actions to protect Lender's interest. Debtors' cited authority was not persuasive.

The Court next looked at whether attorneys engaged in the unauthorized practice of law in Mo. by charging to review a plan and file a claim. Rule 9010 was not applicable because attorneys did not

appear before the court. A Mo. Bar Informal Ethics Opinion that determined the preparation, supervision of execution and recording of a deed by an out of state lawyer not licensed in Mo. was not the unauthorized practice of law in Mo. if all of the work was done in the other state strengthens Lender's argument. This Court determined that some type of appearance in a contested matter or adversarial proceeding or filing an adversarial pleading is required. Something more than reviewing a plan and preparing and filing a claim is required to meet the threshold of unauthorized practice of law in Mo.

Finally, the Court looked at the reasonableness of the claimed \$900 attorney fees. Filing a proof of claim is more than a ministerial act but there are certain administrative aspects. The court determined that \$900 is unreasonable for a large law firm that routinely performs such tasks for lenders and specializes in this area and is familiar with the procedure. Because nothing extraordinary or complex was involved, the Court reduced the allowed attorney fees to \$600 (based on an appropriate

hourly rate similar to debtor's attorney of \$300/hour x 2 hours for a reasonable amount of time for the tasks involved).

Holding:

Debtors' objection to attorney fees denied in part and granted in part.

In re Gravel, Case No. 20-1-bk(L), 20-2-bk, 20-3-bk (2nd Cir., August 2, 2021).

Issue:

Did bankruptcy court err in sanctioning creditor for violating a court order that enjoined it from challenging that Debtors were current on their mortgage and for imposing sanctions for violation of Rule 3002.1 notice requirements?

Facts:

After several issues with Creditor incorrectly accounting for Debtors' mortgage payments, the bankruptcy court entered an order enjoining creditor from challenging in another proceeding that Debtors were current on their mortgage. Subsequently, Creditor issued mortgage accountings showing property inspection fees and late fees but claimed they were not attempting to collect these fees and removed them from the statement.

Trustee moved for sanctions for violation of the court's order enjoining Creditor from asserting Debtors were not current on their mortgage and for violation of Rule 3002.1. The bankruptcy court sanctioned Creditor \$225,000 for violation of the court order and \$75,000 for violation of notice requirements under Rule 3002.1.

The Creditor appealed and the District Court vacated and remanded holding that the sanctions exceeded the bankruptcy court's "statutory and inherent powers." The bankruptcy court issued a second set of reduced sanctions and Creditor appealed to the 2nd Circuit and argued Rule 3002.1 does not authorize punitive monetary sanctions and that it did not violate the court order.

Analysis:

The court order declared Debtors current on their mortgage but did not enjoin the recording of expired fees on statements by the Creditor. There was no express injunction of the complained conduct. The 2nd circuit looked at if the bankruptcy court abused its discretion in exercising its contempt power. Contempt power is derived from a court

injunction and section 105(a). The current order wasn't clear and unambiguous in prohibiting Creditor's sanctioned conduct and there was no injunction for the court to enforce. A bankruptcy court cannot hold a party in contempt for violating an order that is subject to varying interpretations. The court applied *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1801 (2019) finding a bankruptcy court may hold a creditor in contempt for violating a court's injunction only "if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct."

The circuit court also found that Rule 3002.1 does not permit the bankruptcy court to impose punitive monetary sanctions. If a creditor fails to provide Rule 3002.1 notice, a court may preclude the creditor from presenting evidence of its claim or award "other appropriate relief." Reasonable expenses and attorneys fees are compensatory forms of relief allowed and this suggests the court is limited to non-punitive sanctions under Rule 3002.1. Other sections of the Code explicitly authorize punitive damages but Rule 3002.1 is silent. Thus, punitive

sanctions do not fall within the “appropriate relief” authorized by 3002.1.

The circuit court did not base its decision on whether a bankruptcy court has authority under its inherent powers because the bankruptcy court did not specify that was the source of its authority for the sanctions. It stated this ruling did not limit a bankruptcy court’s inherent power to sanction offenders that act in bad faith but that the court must make those sufficient findings which this court did not.

Holding:

Sanctions reversed and remanded.

In re Taylor, 16-40873 (Bankr. D. Kan.
July 21, 2021)

July 28, 2021

Chapter 13 Debtors Keep Windfalls with No Connection to Assets on the Filing Date

Taking sides with the minority on a split, bankruptcy judges in Kansas allow chapter 13 debtors to retain windfalls acquired after filing.

Taking sides with the minority on a question where the lower courts are divided, the bankruptcy judges in Kansas decided that the fruits of a post-petition personal injury claim belong to the chapter 13 debtor, not to creditors.

The decision seems to mean chapter 13 debtors are also not required to share post-petition inheritances, lottery winnings and other windfalls that have no connection to prepetition assets.

More specifically, the Kansas judges made two holdings: (1) When confirming an amended chapter 13 plan, the valuation of estate property for the best interests test is made as of the date of confirmation of the modified plan; but (2) property that was newly acquired after the original petition is not included in the best interests test.

The Meager Plan and the Big Settlement

The debtor confirmed a meager chapter 13 plan in 2016. It may have been a case where the debtor was forced into chapter 13 because she couldn't afford to pay a retainer before bankruptcy to file under chapter 7.

The confirmed 56-month plan paid the filing fee, the debtor's counsel's fees and car payments. The plan had nothing for unsecured creditors.

About three years into the plan, the debtor was in an accident, resulting in a \$295,000 settlement in her favor. The net available to the debtor was about \$140,000.

The chapter 13 trustee filed a motion to modify the plan and divert \$20,000 from the settlement to pay unsecured claims in full. The debtor opposed. Pending the outcome of the dispute, \$20,000 was held in escrow.

To confirm the amended plan, the trustee contended that the best interests test should take the settlement into account.

In his July 21 opinion, Bankruptcy Judge Dale L. Somers of Topeka, Kan., ruled for the debtor. Judge Somers said that the other Kansas bankruptcy judges, Robert D. Berger and Mitchell L. Herren, agreed with his analysis.

The Applicable Statutes

The outcome entailed construction of four sections in the Bankruptcy Code.

To confirm an amended plan, Section 1329(b)(1) requires satisfaction of the Section 1325(a) confirmation standards.

The Section 1325(a)(4) best interests test requires that “the value, as of the effective date of the plan, [of property to be distributed to unsecured creditors] is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.”

Section 1306(a) provides that estate property in chapter 13 includes property acquired after filing but before the case is closed, dismissed or converted.

Finally, Section 348(f)(1)(A) provides that property of the estate in a chapter 7 case that was converted from chapter 13 includes “property of the estate, as of the date of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.”

The statutes do not tell us whether the effective date of the plan is the original confirmation date or the date of confirmation of the amended plan.

The Split Among the Lower Courts

The chapter 13 trustee primarily relied on *Barbosa*, and so did Judge Somers, up to a point. *See In re Barbosa*, 235 B.R. 540, 552 (Bankr. D. Mass. 1999), *aff'd*, *Barbosa v. Solomon*, 243 B.R. 562 (D. Mass. 2000), *aff'd*, 235 F.3d 31 (1st Cir. 2000).

In *Barbosa*, the chapter 13 debtor sold prepetition property for substantially more than the value ascribed to the property in the plan. The court held that the value as of the “effective date of the plan” in Section 1325(a)(4) is the value on confirmation of the amended plan, not the value as of the original chapter 13 filing.

If the measuring date was the original confirmation date, an increase in the value of property after confirmation wouldn’t matter, assuming that the original valuation as of filing was immutable.

Judge Somers cited “numerous” cases reaching the same result. Indeed, he cited a case precisely on point. In *In re Villegas*, 573 B.R. 844 (Bankr. W.D. Wa. 2017), the court allowed the chapter 13 trustee to modify the plan to take over proceeds from a post-petition settlement of a personal injury claim.

To the contrary, Judge Somers cited the Eighth Circuit Bankruptcy Appellate Panel and other cases “holding that postpetition postconfirmation assets are *not* included in the best interests test for purposes of approval of a modified plan.” [Emphasis in original.]

The Eighth Circuit BAP held that the “effective date of the plan” is not modified by an amendment. Therefore, settlement proceeds arising post-petition were not considered in the liquidation analysis under the best interests test.

Judge Somers admitted there was no easy answer to the question of whether proceeds from a post-petition personal injury claim are included among estate assets when applying the best interests test.

The Effective Date Is the Date of Amendment

Judge Somers reported how two of his predecessors on the Kansas bankruptcy bench had followed *Barbosa*, including recently retired Bankruptcy Judge Robert E. Nugent. Judge Somers agreed with his former colleagues that *Barbosa* has the correct answer about the testing date for an amended chapter 13 plan.

But that wasn’t the end of the story.

Although the testing date for the best interests test may be the date of confirmation of the amended plan, what property is included in the estate at the time of amendment?

Newly Acquired Property Isn’t Considered in Best Interests

On one hand, Section 1306 brings after-acquired property into the chapter 13 estate. But Section 348(f) seems to have another answer.

Judge Somers concluded that Section 348(f) controls, not Section 1306. Remember, on conversion from chapter 13 to chapter 7, Section 348(f) says that property of the estate in the converted chapter 7 case includes property of the estate as of the filing that remained in the debtor’s possession or control at the time of conversion.

In other words, Judge Somers said, the “converted estate excludes Section 1306 property.” In other words, “if Debtor’s case were converted to Chapter 7, unsecured creditors would not benefit from the settlement of Debtor’s postpetition personal injury claim.”

For the same reason, the estate on an amended plan should not include property with no connections to property on the original filing date.

Judge Somers stated the holding like this:

Debtor’s postpetition personal injury claim did not exist on the date of filing; its proceeds would not be available to a Chapter 7 trustee, and are excluded from the best interest test calculation.

Based on *Barbosa*, Judge Somers said that the majority include post-petition windfalls in the best interests calculation. However, he cited *Colliers* and two other treatises by judges or former judges who reject the majority’s holdings.

Judge Somers denied the trustee's motion to amend the plan, thus allowing the debtor to retain all of the net proceeds from the personal injury settlement. He stated his two holdings like this:

[T]he best interest test applies to a modified plan, and the effective date of the plan for calculation of the distribution to unsecured creditors in a hypothetical liquidation is the date of the amendment. However, in reliance on § 348(f), the Court holds that the postpetition personal injury claim is not included in the calculation.

In re Steen, 20-50042 (Bankr. N.D. Tex.
July 7, 2021)

July 15, 2021

Fees Benefiting Only the Debtor — and Not the Estate — Are Compensable in Chapter 13

Section 330(a)(4)(B) is an exception to the American Rule and the notion that administrative expenses must benefit the estate, not just the debtor.

Even though there was benefit only to the debtor and none to the estate, a chapter 13 debtor's lawyer was entitled to compensation under Section 330(a)(4)(B), an exception to the so-called American Rule and to standards for compensation generally in bankruptcy cases.

The debtor filed a chapter 13 petition and confirmed a plan in short order. In his July 8 opinion, Bankruptcy Judge Robert L. Jones of Lubbock, Texas, said the lawyer would be paid a \$3,700 “no look” fee for services in the case before confirmation.

After confirmation, the debtor's former wife filed a nondischargeability complaint. The debtor's counsel succeeded in persuading Judge Jones to dismiss the complaint on motion to dismiss. The debtor was never required to answer the complaint.

The debtor's counsel filed an application for allowance of an administrative claim totaling \$6,260 for services in the dischargeability adversary proceeding. The fees worked out to 15.65 hours at \$400 an hour.

The chapter 13 trustee objected to the fee application for the adversary proceeding, claiming there was no benefit to the estate. Alleging that the services benefited only the debtor, the trustee also contended that the American Rule should apply to bar a payment that would reduce the recovery by creditors.

Judge Jones disagreed.

The outcome turned on Section 330(a)(4)(B), which was added by the Bankruptcy Reform Act of 1994. It provides:

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

Judge Jones said that the subsection “essentially creates an exception to the general rule that fees are compensable from the estate only if the services benefit the estate.” He cited the *Collier* treatise for the idea that defending the debtor in a dischargeability action aids the debtor in completing a plan.

Judge Jones said the services would be compensable only if they provided benefit, were reasonable and were necessary.

Judge Jones said that dischargeability was a core issue and that the services benefited the debtor and were “necessary” to the completion of the case.

The services were reasonable, because counsel spent less than 16 hours on a “novel issue” concerning “an obscure Texas divorce remedy.” The case demanded “significant skill” provided by an “experienced consumer bankruptcy attorney” sporting an “excellent reputation.” The judge was referring to Sam C. Gregory of Lubbock.

The services therefore were reasonable and necessary and provided benefit to the debtor.

The chapter 13 trustee nonetheless argued that the American Rule barred compensation that would come out of the pockets of creditors. The American Rule means that clients pay their own fees, win or lose.

Reliance on the American Rule was “misguided,” Judges Jones said. It “does not apply when there is an explicit statutory provision providing for attorney fees,” and Section 330(a)(4)(B) “is an explicit statutory provision that provides for attorney fees to be paid by the bankruptcy estate.”

Judge Jones held that the “American Rule does not bar a fee application for attorney’s fees for services rendered on behalf of the debtor” in a chapter 13 case. He overruled the objection and directed payment of the fees as an administrative priority under the chapter 13 plan.

In re Smith, 18-23830 (Bankr. D.N.J. June 24, 2021)

July 9, 2021

Amended Chapter 13 Plan Allowed to Cure Post-Petition Mortgage Defaults

Courts are split on whether a debtor may amend a chapter 13 plan to cure post-petition defaults on a principal residence.

On a question where the courts are split, Bankruptcy Judge Jerrold N. Poslusny, Jr. of Camden, N.J., allowed a debtor to pay post-petition mortgage arrears through an amended chapter 13 plan.

Siding with the two circuits that ruled in favor of the debtors, Judge Poslusny decided that the amendment was in accord with the plain language of the statute, along with the legislative history and “the underlying principles of Chapter 13.”

Three Post-Petition Mortgage Defaults

The debtor confirmed a 36-month plan in 2018 that would cure mortgage arrears while the debtor made post-petition mortgage payments directly to the servicer. Twice after confirmation, the debtor defaulted on post-petition mortgage payments. After the lender moved for stay relief, Judge Poslusny entered a consent order both times requiring the debtor to cure the defaults.

Following the third default, the servicer again sought stay relief. The debtor opposed, saying that her husband lost his job as a result of the pandemic. In addition, the debtor sought to modify her plan to cure the post-petition defaults and to extend the duration of the plan to 73 months.

The servicer opposed plan modification, contending that a modified plan may not cure post-petition defaults on a home mortgage. Judge Poslusny disagreed in his June 24 opinion.

The Split

Judge Poslusny said that the courts are split. However, the Fifth and Eleventh Circuit both permit modified plans to cure post-petition home mortgage defaults.

The outcome turned largely on the language of Section 1322(b)(2) and (5). Subsection (2) bars a chapter 13 plan from modifying a mortgage on the debtor’s principal residence. However, subsection (5) allows a plan to cure “any default within a reasonable time.”

The two circuits found the answer in the plain language of subsection (5) that allows a plan to cure “any default,” notwithstanding the anti-modification language in subsection (2). According to Judge Poslusny, the two circuits emphasized the lack of language in subsection (5) limiting cures to prepetition defaults.

Judge Poslusny paraphrased the Eleventh Circuit by saying that an amendment would be “‘consistent’ with legislative intent, legislative history, and underlying principles of Chapter 13

to provide for flexible payments plans” while giving homeowners “continuing rights to cure default and preserve their primary assets.” *Green Tree Acceptance Inc. v. Hoggie (In re Hoggie)*, 12 F.3d 1008, 1010 (11th Cir. 1994).

Judge Poslusny found the circuits more persuasive than other courts “adopting a restrictive reading of the Code.” He noted how subsection (5) has no restrictive language and “makes no distinction between a pre-petition default and a post-petition default.”

A Plan Longer than 60 Months

Having decided that the debtor may cure a post-petition default, Judge Poslusny turned to the question of whether the debtor could extend the plan for a total of 73 months.

The debtor rested her proposition of a plan longer than 60 months on the Coronavirus Aid, Relief and Economic Security Act of 2020. It allows extending a chapter 13 plan up to 83 months if the debtor has incurred “material financial hardship” as a result of the pandemic.

No one contested the debtor’s claims that her husband lost his job as a result of the pandemic. Judge Poslusny therefore approved the amended plan, with a proviso that the debtor must remain current on mortgage payments.

In re Castleman, 19-12233 (Bankr. W.D. Wa.
June 4, 2021)

June 14, 2021

Chapter 13 Debtors Lost Appreciation in Property After Conversion to ‘7’

On an issue where the courts are split, a judge in Washington State says that the debtors lose the post-petition appreciation in the value of estate property when a chapter 13 case converts to chapter 7.

On an issue where the lower courts are divided, Bankruptcy Judge Marc Barreca of Seattle disagreed with the Tenth Circuit Bankruptcy Appellate Panel and a fellow bankruptcy judge in the Ninth Circuit.

In his June 4 opinion, Judge Barreca decided that the post-petition appreciation in the value of an asset belongs to the chapter 7 estate if the case converts from chapter 13.

The debtors confirmed a chapter 13 plan and converted the case to chapter 7 about 18 months after filing. They had scheduled their home as being worth \$500,000 at filing. Using a \$500,000 valuation, there was no equity in the property on filing in view of a \$375,000 mortgage and the debtor’s claimed homestead exemption of \$125,000.

After conversion, the chapter 7 trustee filed a motion for authority to sell the home, alleging that the home was worth \$700,000. The debtors contended that the valuation at conversion was of no import because appreciation after the chapter 13 filing belonged to them.

Judge Barreca was therefore confronted with taking sides on a split: Does post-petition appreciation in the value of an asset belong to the debtors when a case converts from chapter 13 to chapter 7?

The case turned on the interpretation of Section 348(f)(1), which was amended in 1994 to clear up a split on a different but related issue. At the time, some courts held that property acquired during a chapter 13 case belonged to the chapter 7 trustee on conversion. Others held that chapter 13 debtors were entitled to keep property acquired after a chapter 13 filing but before conversion.

Congress amended Section 348(f)(1)(A) to say that debtors keep property acquired during chapter 13. As amended, the section now provides that “property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the [chapter 13] petition, that remains in the possession of or is under the control of the debtor on the date of conversion.”

Although the amendment allowed debtors to retain newly acquired property, the amendment didn’t explicit address appreciation in the value of an asset that was in the estate at the time of the chapter 13 filing.

Judge Barreca cited the courts finding the statute ambiguous with respect to appreciation in the value of an estate asset between the chapter 13 filing and conversion to chapter 7. They allowed

the debtors to retain the uptick, on the theory that depriving them of appreciation would penalize debtors who filed chapter 13 petitions. Among others, he cited *In re Barrera*, 620 B.R. 645 (Bankr. D. Colo. 2020), *aff'd*, BAP No. CO-20-003, 2020 WL 5869458 (B.A.P. 10th Cir. (Colo.) Oct. 2, 2020); and *In re Cofer*, 625 B.R. 194 (Bankr. D. Idaho 2021).

To read ABI's reports on *Barrera* and *Cofer*, click [here](#) and [here](#).

On the other side of the fence, Judge Barreca cited cases finding no ambiguity in the statute and awarding appreciation to the chapter 7 trustee. *See, e.g., In re Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015). In *Goins*, the court gave appreciation to the trustee, but the parties had stipulated that the debtor would have credit for payments reducing the secured debt during the chapter 13 case.

The *Goins* approach is “the correct interpretation of Section 348(f)(1),” Judge Barreca said. The amendment to the section is not ambiguous, he said, and “does not at all address the effect of conversion on payoff of secured debt during the Chapter 13 case or changes in the value of pre-petition assets.”

Judge Barreca said he does not believe that post-petition appreciation is “treated as a separate asset from pre-petition property and inures to the bankruptcy estate, not the debtor.” Quoting *Goins*, he said that the “equity is inseparable from the real estate, which was always property of the estate under Section 541(a).”

Judge Barreca therefore held that “the full value of the Real Property is property of the Chapter 7 estate including any post-petition appreciation.”

Observations

In cases like this, isn't the issue really about valuation and the point in time when valuation is made? Perhaps issues like waiver and estoppel also matter.

In Judge Barreca's case, there was no “real” \$500,000 valuation at the time of filing. Neither the chapter 13 trustee nor any creditor objected to the debtor's scheduled value. Perhaps the home was really worth \$700,000 at filing, had someone objected to the debtor's valuation.

When it comes to valuation in a converted case, perhaps waiver and estoppel compel everyone to accept the \$500,000 valuation as of filing.

Now, let's assume that the property was really worth \$700,000 on conversion. The question still remains: At what point in time is the valuation made? At filing or on conversion?

True, Section 348(f)(1) doesn't give us the answer explicitly. The same question often arises in other contexts in bankruptcy cases, and we are told that the time of valuation depends on the purpose of valuation. On a motion to modify the stay, for instance, it's valuation at the time of the motion, not the value of the property at filing.

So, what about chapter 13 conversions? What's the purpose of valuation? What policies underlay the selection of a time for valuation?

We do know that debtors aren't supposed to be penalized for filing in chapter 13. Is that the answer?

Had the debtors filed originally in chapter 7, they would have kept their home because there was no equity, assuming no one objected to the scheduled \$500,000 valuation.

If there ever was a question where the answer should come from policy, this is one. Answers should be based on sound policy not teased from the language of a statute that does not provide a straightforward answer.

In other words, let judges be judges.

In re Gosch, 20-13871 (Bankr. D. Colo.
March 26, 2021

April 2, 2021

Personal Injury Settlement Not Included in Calculating Projected Disposable Income

Judge McNamara of Denver allowed chapter 13 debtors to keep all of a \$46,500 personal injury settlement received before filing.

The debtors were entitled to retain a \$46,500 personal injury settlement they received in the “gap” period before filing their chapter 13 petition, according to Bankruptcy Judge Thomas B. McNamara of Denver.

Even if the settlement proceeds had not been exempt under Colorado law, and even if the money had not arrived in the gap period before filing, Judge McNamara still would not have given the \$46,500 to creditors under the debtors’ chapter 13 plan.

The Settlement

The debtors received \$46,500 in settlement of a personal injury claim on June 1. Four days later, June 5, they filed a chapter 13 petition.

The debtors calculated that their projected disposable income was \$582 a month, requiring them to pay some \$35,000 under their 60-month chapter 13 plan. Were they obliged to include the settlement proceeds in the calculation of projected disposable income, the debtors would have been required to pay about \$7,800 a month and could not have confirmed a plan.

The personal injury settlement was exempt under Colorado law.

The chapter 13 trustee objected to the debtors’ exemption claim and argued against confirming the plan unless some of the settlement proceeds were paid to creditors. One by one, Judge McNamara knocked down the trustee’s arguments, mostly based on the language of the statutes and *Hamilton v. Lanning*, 560 U.S. 505 (2010).

Messy Statutory Drafting

For those “uninitiated to the world of bankruptcy,” Judge McNamara said, “current monthly income” in Section 1325(b)(2) is “a bit misleading,” because it refers only to monthly income in the six months before bankruptcy. He also pointed out how the six-month measuring period preceding bankruptcy does not run from the filing date backwards.

Rather, as Judge McNamara said in his March 26 opinion, the six-month measuring period ends on the last day of the month preceding filing. He referred to the interval between the last day of the prior month and the filing date as the “gap” period. The case at hand was a “gap” case.

The Settlement Funds Weren’t Part of ‘PDI’

The trustee contended that the settlement funds should be included in the calculation of projected disposable income under Sections 1325(b)(1)(b) and 1325(b)(2). Those sections use the terms “current monthly income” and “disposable income.”

Because the trustee had objected to confirmation, Section 1325(b)(1) came into play. It requires applying “projected disposable income” to payments under the plan. For Judge McNamara, the meaning of projected disposable income was the “key to unlocking the confirmation puzzle.”

The words are not defined in the statute, but Judge McNamara said that the Supreme Court “solved the statutory Rubik’s cube” in *Lanning*. There, the Court took a “forward-looking approach” in calculating disposable income. The Court went on to say that “other known or virtually certain information about the debtor’s future income or expenses” should be taken into account, but “only in unusual cases.” *Lanning*, *id.* at 519.

Significantly, Congress did not end the “currently monthly income” period on the filing date. Because the settlement fell in the gap, Judge McNamara ruled that the debtors had correctly calculated disposable income at \$582 a month by excluding the \$46,500 from pre-filing income.

Given the “plain meaning” of “currently monthly income” in Section 101(10A), Judge McNamara said that the settlement funds were neither part of currently monthly income nor disposable income. He therefore held that the debtors were “not obligated to commit the Personal Injury Funds as ‘projected disposable income’ in order to confirm.” The result, he said, was “mandated” by the statute that uses the word “future” twice.

Next, Judge McNamara asked what would have happened if the settlement had arrived on the last day of the month before filing, not in the gap. In that event, the settlement would have been included in disposable income. But that wasn’t the end of the story.

The Supreme Court came to the rescue in *Lanning* and its focus on the future. Because the facts in the case before him were so similar to *Lanning*, Judge McNamara said that the personal injury settlement “still should not be included” in projected disposable income.

Nevertheless, the trustee argued that the plan was not filed in good faith because the debtors planned on keeping the \$46,500, which was more than they would pay under their plan.

The Tenth Circuit was on the debtors’ side. See *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314 (10th Cir. 2012). After the BAPCPA amendments, the appeals court said that the good faith analysis took on a more narrow focus by asking whether the debtor listed debts and income accurately or made any fraudulent misrepresentations. *Id.* at 1319, n.5.

The debtors had been “forthcoming and honest” and had not “manipulated” the Bankruptcy Code, Judge McNamara said. He therefore confirmed the plan and overruled the trustee’s objection aiming for creditors to receive some of the personal injury settlement. He said that the “Debtors simply are not required to pay more . . . than what the Bankruptcy Code mandates.”

Note: On an issue where courts are divided, Judge McNamara did not decide whether the state-law exemption would have excluded the settlement from the calculation of disposable income. He bypassed the issue in view of his opinion that the settlement proceeds were not part of disposable income as a matter of statutory interpretation.

Barragan-Flores v. Evolve Federal Credit Union (In re Barragan-Flores), 18-50420 (5th Cir. Jan. 14, 2021)

January 19, 2021

Cross-Collateralization Turns Two Loans into One Claim in the Fifth Circuit

When personal property loans are cross-collateralized, a chapter 13 plan must use the same option for cramming down both loans, the Fifth Circuit says.

If a chapter 13 debtor has two secured claims that are collateralized with personal property, and if the loans are cross-collateralized, a chapter 13 plan may not surrender the collateral for one loan and cram down the other, according to the Fifth Circuit.

In other words, the Fifth Circuit believes that cross-collateralizing two personal property loans converts two claims into one claim, with the result that the debtor may employ only one of the options for dealing with secured claims under Section 1325(a)(5).

Apparently at different times, the debtor purchased two cars. He financed both with secured loans from the same lender. The security agreements cross-collateralized the loans.

The debtor filed a chapter 13 plan, cramming down on the lender. The plan called for surrendering one car and cramming down the loan on the other to the value of the car that the debtor was keeping. The bankruptcy court overruled the lender's objection and confirmed the plan. The district court reversed.

The outcome turned on the two options for dealing with (*i.e.*, cramming down) a secured creditor that does not accept the plan. Under Section 1325(a)(5)(B) and (C), the debtor may pay the allowed amount of the secured claim (that is, the value of the collateral) "or" surrender the collateral.

The debtor focused on the statutory language allowing the debtor to select an option "with respect to each allowed secured claim." The lender countered, contending that the use of "or" in Section 1325(a)(5) means that a debtor may use only one of the options.

The appeal was *sub judice* in the circuit for almost two years. In an opinion on January 14, Circuit Judge Priscilla R. Owen agreed with the lender.

Judge Owen relied heavily on Fifth Circuit precedent, *Williams v. Tower Loan of Mississippi (In re Williams)*, 168 F.3d 845 (5th Cir. 1999). She characterized *Williams* as involving a chapter 13 debtor who "sought to address one secured claim by surrendering some of the collateral securing the claim and paying the cram down value of the remaining collateral."

In *Williams*, Judge Owen said the circuit "held that the debtor's plan could not be approved because '[t]he plain language of [§ 1325(a)(5)] does not give the debtor the right to adopt a combination of the options offered in (B) and (C).'" She characterized *Williams* as holding "that debtors must select the same § 1325(a)(5) option for all of the collateral securing a single claim."

The Second Circuit reached the same result in a chapter 12 case, Judge Owen said, citing *First Brandon National Bank v. Kerwin (In re Kerwin)*, 996 F.2d 552 (2d Cir. 1993).

Applying the facts to the law, Judge Owen held that the plan “must select the same § 1325(a)(5) option for both items of collateral.”

Judge Owen affirmed the district court and set aside confirmation, saying that the debtor’s argument was “contrary to the plain language of § 1325(a)(5).”

Observation

Williams was not controlling. Influential, yes, but not on point and distinguishable. *Williams* dealt with one claim having several elements of collateral. The case before Judge Owen arguably dealt with two claims.

One may wish to question where the statute converts two secured notes into one claim, when each has different primary capital. Although there is one creditor who could file one proof of claim, aren’t there two claims? Judge Owen seems to have expanded *Williams* substantially.

The loans did not entail purchase money security interests in their entirety. In other respects, the Bankruptcy Code gives fewer rights to holders of non-purchase money security interests.

Another court might find that the plain language of the statute supports the debtor, not the creditor.

In re Cofer, 19-40361 (D. Idaho Jan. 8, 2021)

January 13, 2021

Another Court Lets the Debtor Keep Appreciation in a Home on Conversion from 13 to 7

Where the courts are split, Idaho judge sides with the Tenth Circuit BAP and allows a chapter 13 debtor to retain post-petition appreciation in the value of a homestead following conversion to chapter 7.

On an issue where courts are split, Chief Bankruptcy Judge Joseph M. Meier of Boise, Idaho, followed the Tenth Circuit Bankruptcy Appellate Panel by holding that post-petition appreciation in the value of a homestead belongs to the debtor when a case converts from chapter 13 to chapter 7.

On filing her chapter 13 petition, the debtor valued her homestead at about \$100,000. It was subject to a mortgage for about \$62,000. At the time, the Idaho homestead exemption was \$100,000.

The bankruptcy court entered an order limiting the debtor's exemption in the home to \$32,000.

A few months after confirming her chapter 13 plan, the debtor converted the case to chapter 7. The chapter 7 trustee evidently believed that the home was worth more than \$100,000. Surmising that the home was actually worth \$140,000, the trustee wanted to sell the home out from under the debtor and limit her exemption in the proceeds to \$32,000.

In his January 8 opinion, Judge Meier decided that post-petition appreciation in the home belongs to the debtor.

The debtor's first argument failed to persuade Judge Meier. She contended that the chapter 7 estate did not include her homestead because it vested in her on confirmation of the chapter 13 plan under Section 1327(b).

The outcome of the debtor's first argument turned on statutory language. When a chapter 13 case converts to chapter 7, Section 348(f)(1)(A) now provides that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the [chapter 13] petition, that remains in the possession of or is under the control of the debtor on the date of conversion."

Judge Meier held that the plain language of the statute brought the home into the chapter 7 estate because the debtor owned the home on filing her chapter 13 petition.

The next question was this: Did the debtor's homestead exemption of \$32,000 become immutably fixed on the chapter 13 filing date?

Again, the debtor lost, but the loss was not fatal.

“Under the ‘snapshot rule,’” Judge Meier said, “the exemptions that can be claimed and the amount of such exemptions are frozen as of the date of the petition. [Citing Ninth Circuit authority.] The conversion of this case does not change the value of the Home or the exemption against it as they existed at the time of the petition.”

Judge Meier thus held that the debtor’s “homestead exemption remains limited to [\$32,000] — the amount this Court previously determined Debtor could claim as an exemption based on the date of the petition.”

The debtor was left with a final argument: Even though she was stuck with a \$32,000 homestead exemption, was the debtor entitled to retain post-petition appreciation in the value of the home after conversion to chapter 7?

Here, courts are divided and the statute has no clear answer. Aside from caselaw in her favor, the debtor’s best argument was based on the legislative history regarding Section 348(f)(1)(A), which Judge Meier quoted.

Judge Meier was persuaded by the analysis by Bankruptcy Judge Elizabeth E. Brown of Denver in *In re Barrera*, 620 B.R. 645 (Bankr. D. Colo. 2020). Judge Brown was affirmed by the Tenth Circuit Bankruptcy Appellate Panel in *Rodriguez v. Barrera (In re Barrera)*, 20-003, 2020 BL 381720, 2020 WL 5869458 (B.A.P. 10th Cir. Oct. 2, 2020) (appeal pending). To read ABI’s report on the BAP’s *Barrera* opinion, [click here](#).

Judge Meier said that *Barrera* “better reflects the legislative intent of § 348.”

“Based on the comments in the House Report,” Judge Meier decided that “Congress took issue with the remedy Trustee seeks in this motion.” He noted that the debtor “had equity in the Home on the date of the petition, [and] the home would likely have been abandoned to the Debtor if this case had proceeded under chapter 7 from its commencement.”

Judge Meier held that “the appreciation should not belong to the estate now merely because the case began as a chapter 13 case and was converted to a chapter 7 case.” He held that “the appreciation in the Home inured to the Debtor upon conversion.”

Faculty

Joyce Bradley Babin is the Chapter 13 Standing Trustee for the Eastern and Western Districts of Arkansas in the Fayetteville, Fort Smith, Harrison and Central Divisions. Prior to her appointment, she was attorney in private practice in Little Rock, where she concentrated her practice primarily in the areas of bankruptcy and commercial litigation. Ms. Babin previously served as president of the National Association of Chapter 13 Trustees (NACTT) and in other leadership positions for the organization. She is a past-president of the Debtor/Creditor Bar Association of Central Arkansas and past-chair of the Arkansas Bar Association Debtor/Creditor Law Section. Ms. Babin is a Fellow of the American College of Bankruptcy and Arkansas Bar Foundation. She also is a member of the Overton Inn of Court, Arkansas Bar Association, Arkansas Bar Foundation, Pulaski County Bar Association and the Pulaski County Law Library Board. Ms. Babin served as editor of the two *Arkansas Bankruptcy Handbooks*, published by the Arkansas Bar Association. She has been recognized for numerous years by the Arkansas Bar Association as a Best of Continuing Legal Education presenter and has received special awards for planning and presenting continuing legal education programs for the Arkansas Bar Association. Ms. Babin is a former clerk to the late Hon. Robert F. Fussell, U.S. Bankruptcy Judge. She received her J.D. from the William H. Bowen School of Law, where she served as executive editor of the *UALR Law Journal*.

January M. Bailey is a partner at Prelle Eron & Bailey in Wichita, Kan., where she focuses primarily on consumer bankruptcy cases. She obtained her first job after law school by talking about the movie *Office Space* and the red stapler that her future boss had on his desk; the job involved bankruptcy practice, and since that time, she has been actively involved in the local and state bankruptcy communities. Ms. Bailey currently serves on the District of Kansas Bankruptcy Bench Bar Committee and as chair for the local (Wichita) bankruptcy practice committee, both of which she has done for the last five years. She was named a “Rising Star” in bankruptcy by *Super Lawyers* in 2019 and was selected to participate in NCBJ’s NextGen program in 2018. Ms. Bailey received her B.S. in business administration and B.A. in French from the University of Kansas, and her M.B.A. and J.D. from the University of Cincinnati.

Hon. Dennis R. Dow is a U.S. Bankruptcy Judge for the Western District of Missouri in Kansas City, appointed on Nov. 10, 2003, by the Eighth Circuit Court of Appeals. Prior to taking the bench, he was a partner with the firm of Shook, Hardy & Bacon LLP, where he represented trustees in chapter 7 cases involving significant assets, individual and corporate debtors in proceedings under chapters 7 and 11, and secured, unsecured and priority creditors and lessors in chapter 7, 11, 12 and 13 cases, and had been listed in *The Best Lawyers in America* in the area of bankruptcy law every year since 1995. He also tried numerous adversary proceedings and contested matters, including preference actions, objections to discharge, dischargeability complaints and objections to confirmation of chapter 11 plans. Judge Dow is a member of ABI, the Missouri Bar and the Kansas City Metropolitan Bar Association. He is a Fellow of the American College of Bankruptcy, inducted in March 2013, and was selected in November 2014 to become a conferee of the National Bankruptcy Conference. He also is a member of the National Conference of Bankruptcy Judges. Judge Dow is a member of the Bankruptcy Appellate Panel and was appointed in October 2014 to the Judicial Conference Advisory Committee on Bankruptcy Rules, then appointed in 2018 to chair the committee. He received his

B.A. with honors from the University of Wyoming and his J.D. from Washburn University School of Law, where he was notes editor of the *Washburn Law Journal*.

Jeffrey S. Fraser is a partner at Albertelli Law in Lake Worth, Fla., and focuses his representation on secured creditors and ensuring that their interests are protected in chapters 7, 11 and 13. He handles contested litigation, including valuation hearings, adversary proceedings, sanction hearings, and any and all other disputed matters in bankruptcy court. As partner over his firm's national bankruptcy department, Mr. Fraser works closely with each state's managing attorneys as it relates to training, legal strategy, and all facets of the firm's bankruptcy practice. He is an active participant in the Southern District of Florida's bankruptcy bar and was the 2019 chair of the Local Rule Committee and an inaugural member the district's Lawyer Advisory Committee (LAC), serving as the committee's chair in 2020 and 2021. Through these roles, he has worked closely with South Florida bankruptcy judges and lawyers in reviewing local practices and rules; participating as a panelist for various district programs; assisting with the drafting of the district's Model Chapter 13 Plan and Mortgage Modification Mediation procedures and guidelines; and addressing other matters or concerns for the South Florida bankruptcy community. Mr. Fraser is a past president of the Jamaican-American Bar Association and has helped the organization create mentorship relationships with local law students. He also served as a panelist at a commercial law seminar in Kingston, Jamaica, discussing the 2014 Jamaican Insolvency Act, and he has organized foreclosure and bankruptcy workshops, spoken on numerous CLE panels, and guest-appeared on South Florida radio. Mr. Fraser was selected by *Super Lawyers* as one of its "Florida Rising Stars" for 2019, 2020 and 2021. In addition, he was named a 2017 Blackshear Fellow by the National Conference of Bankruptcy Judges (NCBJ) and a 2020 ABI "40 Under 40" honoree, and he has published articles on consumer bankruptcy issues in the *American Legal & Finance Network* and *Default Servicing News*. Mr. Fraser has the highest rating by Martindale-Hubbell. He received his B.A. in 2007 from the University of Miami and his J.D. in 2010 from the University of Miami School of Law.