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2021 Consumer Practice Extravaganza

Judicial Roundtable

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U.S. Bankruptcy Court (E.D.N.Y.); Central Islip

The Ninth Circuit leaves the door open for a bankruptcy court to sanction a misbehaving chapter 13 debtor before granting the debtor's motion for voluntary dismissal.

Another Circuit Holds that Dismissal Is Mandatory Under Section 1307(b)

Concluding that *Law v. Siegel*, 571 U.S. 415 (2014), implicitly overruled its own precedent, the Ninth Circuit held on September 1 that a bankruptcy court must dismiss a chapter 13 case on motion by the debtor under Section 1307(b), regardless of the debtor's abusive conduct.

Significantly, the appeals court left the door open for the bankruptcy court to address the debtor's misconduct alongside dismissal.

The Sixth Circuit reached the same result less than three months ago. *See Smith v. U.S. Bank N.A. (In re Smith)*, 20-3150, 2021 BL 318517 (6th Cir. June 9, 2021). There, the Cincinnati-based appeals court held that the bankruptcy court must dismiss a chapter 13 petition, even when the latest repeat filing was in bad faith. To read ABI's report, click here.

Like the Ninth Circuit, the Sixth Circuit hinted that a debtor cannot dismiss to evade the consequences of misconduct.

The Facts

Husband and wife debtors filed a chapter 13 petition. Later, they were indicted in federal court for fraud.

According to the opinion by Circuit Judge Diarmuid F. O'Scannlain, the debtors refused to make disclosures in bankruptcy court for fear of compromising their defenses in the criminal action. They refused to hold a meeting of creditors, did not file tax returns, and did not propose a plan.

The creditor who was the victim of the alleged fraud filed a claim in the chapter 13 case, along with a motion for conversion to chapter 7 under Section 1307(c). The bankruptcy court decided that conversion would be proper under Section 1307(c) and (e), but the debtors asked for more time to cure their defaults.

The bankruptcy court gave them 30 days. The debtors did not comply but filed a motion for voluntary dismissal under Section 1307(b) before the 30 days ran out.

Relying on Ninth Circuit authority, *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008), the bankruptcy court denied the motion to dismiss and converted to chapter 7. The debtor appealed, but the Ninth Circuit Bankruptcy Appellate Panel affirmed.

The outcome in the Ninth Circuit turned on *Law* and Section 1307(c), which provides that, "On request of the debtor at any time, . . . the court shall dismiss a case under this chapter."

Law Overrules *Rosson*

In *Rosson*, the debtor had been directed to deposit proceeds from an arbitration award. When the debtor didn't, the bankruptcy court intended to convert the case to chapter 7 *sua sponte*. Before the bankruptcy court could convert, the debtor filed a motion to dismiss under Section 1307(b). The bankruptcy court converted and denied the motion to dismiss.

Noting a circuit split but upholding conversion, the Ninth Circuit in *Rosson* read *Marrama* to mean that an unqualified right to dismiss was subject to the bankruptcy court's powers under Section 105(a). *Id.* at 773.

Six years later, the Supreme Court handed down *Law*, reversing the Ninth Circuit. Judge O'Scannlain paraphrased *Law* as making clear "that a bankruptcy court may not use its equitable powers under § 105(a) to contravene express provisions of the Bankruptcy Code."

Judge O'Scannlain had "no doubt that *Law* undercuts the reasoning of *Rosson*." He therefore held that "*Rosson* has been effectively overruled by *Law* and is no longer binding precedent in this Circuit."

Freed from circuit precedent, Judge O'Scannlain held:

> Section 1307(b)'s text plainly requires the bankruptcy court to dismiss the case upon the debtor's request. There is no textual indication that the bankruptcy court has any discretion whatsoever.

Judge O'Scannlain acknowledged that the Fifth and Eighth Circuits had held to the contrary, but both decisions came down before *Law*. Those decisions, he said, both rely on a "now-discredited theory." He noted that no circuit has aligned itself with those two circuits after *Law*.

Judge O'Scannlain said that the "absolute right" to dismiss is "entirely consistent" with the policy of Section 303(a), designed to make chapter 13 a voluntary alternative to chapter 7. He thus held that the "debtor [has] an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception" in Section 1307(b) for debtors whose cases previously had been converted from chapters 7, 11 or 12.

Immediately before reversing and remanding, Judge O'Scannlain said:

> We are confident that the Bankruptcy Code provides ample alternative tools for bankruptcy courts to address debtor misconduct.

Observations

Can a chapter 13 debtor play fast and loose with the court and creditors, then lay down a get-out-of-jail-free card if it doesn't go well? Does the Ninth Circuit mean that a bankruptcy court must dismiss *immediately* when the debtor files a voluntary dismissal motion under Section 1307(b)?

In line with Judge O'Scannlain's reference to "ample alternative tools," perhaps a court could defer dismissal long enough for a creditor to obtain relief from the automatic stay.

Perhaps also, the bankruptcy court could defer dismissal for long enough to impose sanctions under Rule 11.

And most significantly, perhaps the bankruptcy court could dismiss, but dismiss with prejudice, and thereby render claims nondischargeable.

It is difficult to believe that Congress wrote a statute to mean that debtors can evade the consequences of their own misconduct.

The opinion is *Nichols v. Marana Stockyard & Livestock Market Inc. (In re Nichols)*, 20-60043, 2021 BL 330861 (9th Cir. Sept. 1, 2021).

Ninth Circuit BAP doesn't require a formal motion to dismiss with prejudice when a debtor files a voluntary motion to dismiss as of right under Section 1307(b).

A Motion to Dismiss as of Right Doesn't Bar the Court from Dismissing with Prejudice

A chapter 13 debtor filed a motion under Section 1307(b) for dismissal of right. Had he succeeded, the debtor would have been entitled to file again and attempt to discharge all his debts, because Section 349(a) says that dismissal does not bar discharging debts in a later case, unless the court orders otherwise for cause.

However, a creditor opposed the debtor's motion for dismissal without prejudice and asked for the dismissal to be made with prejudice. Significantly, the creditor never filed a cross motion seeking dismissal with prejudice under Section 1307(c).

Finding "egregious" conduct by the debtor, the Bankruptcy Judge Martin R. Barash of Woodland Hills, Calif., dismissed the chapter 13 case with prejudice. Dismissal with prejudice had the same effect as a denial of discharge of the debtor's then-existing debts.

Was there an error in dismissing with prejudice in the absence of a formal motion to that effect?

Writing for the Ninth Circuit Bankruptcy Appellate Panel on July 27, Bankruptcy Judge Christopher M. Klein found no error and upheld dismissal with prejudice.

Judge Klein's erudite opinion reads like a treatise, laying out everything there is to know about the proper procedures, standards, burdens of proof and burdens of persuasion when it comes to dismissal with or without prejudice.

The Misbehaving Debtor

The debtor had filed chapter 12 petitions in 2010 and 2012. The 2012 case converted to chapter 7 followed by the entry of discharge.

The debtor filed a chapter 13 petition in 2018. A creditor, whom Judge Klein called the debtor's nemesis, opposed confirmation of the debtor's plan. In the objection, the creditor said that the case should be either dismissed or converted. The creditor did not file a motion to dismiss or convert.

The bankruptcy court heard witnesses and took evidence at a two-day confirmation trial. The issues included the debtor's good faith, or lack of it.

In post-trial briefing, the creditor urged the court to dismiss with prejudice for bad faith. Again, the creditor did not file a motion to convert or dismiss with prejudice under Section 1307(c).

Conceding that his plan could not be confirmed, the debtor filed a motion to dismiss under Section 1307(b). The creditor filed an opposition to the motion to dismiss and asked for dismissal with prejudice under Section 349(a) for egregious bad faith. Again, the creditor did not file a motion to dismiss under Section 1307(c).

Section 1307(c) allows the U.S. Trustee or a party in interest to move for conversion or dismissal by showing "cause."

The bankruptcy court held another hearing and considered the entire record. Technically speaking, the only motion before the court was the debtor's motion to dismiss under Section 1307(b) and the creditor's opposition with a request for dismissal with prejudice under Section 349(a).

In his decision, Bankruptcy Judge Barash cited the four-part test in *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999), *aff'g* 209 B.R. 935 (9th Cir. BAP 1997), as governing authority to determine whether the totality of the circumstances warranted dismissal with prejudice. Judge Barash dismissed with prejudice, after finding egregious and inequitable bad faith plus manipulation and abuse of the Bankruptcy Code.

The debtor appealed, to no avail.

Procedures for Dismissal with Prejudice Under Section 349(a)

For the BAP, Judge Klein surveyed the subtle differences about dismissal under Sections 1307(b), 1307(c) and 349. "The salient point," he said, "is that Section 349(a) is an independent question that applies to all forms of dismissal, including Section 1307(b)."

For example, Judge Klein explained how Section 349(a) and 1307(c) require "cause," while a debtor's motion under Section 1307(b) does not. "Unless the court, for cause, orders otherwise," Section 1307(b) says that "the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed. . . ."

There are different forms of dismissal with prejudice. The weak form, Judge Klein said, can contain a temporary refiling prohibition or provide that a new filing will not apply the automatic stay to a particular creditor. The strong form, he said, "is tantamount to denial of discharge" and is reserved "for egregious circumstances and necessitates that courts proceed with caution and pay attention to due process requirements consistent with denial of discharge."

The bankruptcy court properly applied *Leavitt*, Judge Klein said. Although *Leavitt* dealt with "cause" for dismissal under Section 1307(a), he saw "no principled reason" why it should not also apply to Section 1307(b) dismissals.

Procedurally speaking, Judge Klein ran into a problem. Although *Leavitt* may be the standard, the rules and the Code don't say when or how the Section 349(a) prejudice issue must be raised.

In the case on appeal, the procedures afforded due process consistent with complaints to deny discharge under Section 727. In addition, the creditor's opposition to the debtor's motion to dismiss without prejudice "was a correct procedure for presenting the Section 349(a) issue to the court."

Next, Judge Klein said that the bankruptcy court correctly treated the dispute as a Rule 9014 contested matter. He therefore found no error in the procedure leading to dismissal with prejudice.

Next, Judge Klein dealt with the burden of persuasion. The creditor, he said, has the burden because dismissal with prejudice is "tantamount to denying discharge."

With regard to how much evidence it takes to carry the burden of persuasion, Judge Klein said that the "quantum" required to overcome the presumption of discharge without prejudice "is likewise influenced by the emphasis on egregious circumstances and the similarity to the consequences of denial of discharge."

Even if the quantum for a strong form of dismissal with prejudice were more than the preponderance of the evidence, Judge Klein said that the creditor had proven "a 'huge' and egregious manipulation of bankruptcy process in bad faith." The evidence, he said, was "overwhelming."

The evidence and the findings were more than sufficient to justify dismissal with prejudice.

Given the findings, did the bankruptcy court abuse its discretion in dismissing with prejudice?

The bankruptcy court had employed the proper *Leavitt* standard and made findings supported by the record that were neither illogical nor implausible. Judge Klein thus concluded there was no abuse of discretion in dismissing with prejudice.

In short, "the debtor's 'right' to dismiss under §1307(b) does not immunize the debtor from the consequences of an adverse § 349(a) determination," Judge Klein said.

Observations

There is a split of circuit on the question of whether a court must dismiss when a debtor files a motion to dismiss under Section 1307(b).

Splitting with the Fifth and Ninth Circuits, the Sixth Circuit held in June that the bankruptcy court must dismiss a chapter 13 petition, even when the latest repeat filing was in bad faith. *See Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452 (6th Cir. June 9, 2021). To read ABI's report, click here.

Smith and Judge Klein's opinion are not necessarily incompatible. If importuned and if the evidence were sufficient, a court could respond to a debtor's motion under Section 1307(b) by dismissing, except with prejudice.

If that's true, a debtor's motion to dismiss isn't a get-out-of-jail-free card, nor should it be.

On Language — Old Word Resurrected

Near the end of the opinion, Judge Klein said that the debtor's "Nemesis was not willing to let [the debtor] absquatulate."

Quoting an academic, Judge Klein said that the word absquatulate was invented following the Panic of 1837:

> The newly independent Republic of Texas gained a reputation as a popular destination for dishonorable failures. . . . "Gone to Texas," abbreviated in "three ominous letters G.T.T.," became a shorthand symbol found on abandoned businesses. . . . Absconding to squat on western lands and perambulate from one property to another had become so common a practice that writers invented a new verb to describe this process: to absquatulate.

The opinion is *Duran v Gudino (In re Duran)*, 20-1045, 2021 BL 283667 (B.A.P. 9th Cir. July 27, 2021).

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

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

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. Hoggle (In re Hoggle)*, 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.

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

Courts are split on whether chapter 13 effectively prohibits debtors from making voluntary contributions to 401(k) plans.

Congress Must Decide: May Chapter 13 Debtors Contribute to 401(k) Plans?

Congress needs to fix the mess it made in Section 541(b)(7) and say clearly whether chapter 13 debtors are entitled to make voluntary contributions to 401(k) retirement plans. As it now stands, there are four interpretations of the section, typically giving three different results.

So far, only the Sixth Circuit has tackled the issue. It will be years before there is enough appellate authority for the Supreme Court to resolve what assuredly will be a split.

As a matter of public policy, it is imperative that Congress decide whether debtors are required to suffer the effects of bankruptcy years later in retirement, if they happen to live in districts and circuits that do not permit 401(k) contributions during chapter 13.

The New and Newer Sixth Circuit Opinions

In a 2/1 decision, the Sixth Circuit held last year that a chapter 13 debtor who was consistently making contributions to a 401(k) for six months before bankruptcy may continue contributions in the same amount by deducting the contributions from "disposable income" in Section 1325(b)(2).

The majority in *Davis* rejected the holding by some courts that contributions are never included in disposable income, whether or not the debtor was making contributions before bankruptcy. The dissenter would have held that a debtor cannot make contributions after bankruptcy, even if he or she was making them beforehand. *Davis v. Helbling (In re Davis)*, 960 F.3d 346 (6th Cir. 2020). To read ABI's report on *Davis*, click here.

In a unanimous opinion on August 10, the Sixth Circuit held that a chapter 13 debtor may not make 401(k) contributions if the debtor had not been making contributions before bankruptcy, even if (1) the debtor had a history of making contributions in prior years when he was able, and (2) the debtor was not eligible for a 401(k) plan in the months before bankruptcy.

The new opinion was authored by Circuit Judge Joan Larsen. She was also the writer of the majority opinion last year in *Davis*.

The Four-Way Split

Section 541(b)(7)(A) is one of the most poorly drafted provisions in the Bankruptcy Code. It was added in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act because courts were mostly holding that wages voluntarily withheld as 401(k) contributions were part of disposable income.

As amended, the section provides that property of the estate does not include contributions to 401(k) plans. The end of the subsection includes a so-called hanging paragraph that says, "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)."

There are four interpretations of the statute, with three results: (1) Retirement contributions can never be deducted from disposable income, even if the debtor was making contributions before bankruptcy; (2) a debtor may continue making contributions, but not more than the debtor was making before bankruptcy; and (3) a debtor may make contributions after bankruptcy up to the maximum allowed by the IRS, even if the debtor was making none before bankruptcy.

This writer respectfully submits that none of the interpretations inexorably flows from the statutory language.

Facts in the New Case

For most of his 17 years working for a former employer, the debtor had been making contributions to his 401(k) plan. In 2017, he took a new job with an employer that did not offer a 401(k) plan, so he could not make contributions.

Six weeks before filing a chapter 13 petition in June 2018, the debtor went to work for a different employer offering a 401(k) plan and began making contributions. Judge Larsen said the record was unclear about when the debtor began making the contributions.

Before *Davis* came down, the bankruptcy court ruled that the debtor could not deduct the contributions from his payments to creditors. Also before *Davis*, the district court affirmed. To read ABI's report on the district court opinion, click here. The appeal to the circuit was held in abeyance pending the outcome in *Davis*.

The new case presented facts not present in *Davis*. Although he had a history of making contributions, the debtor had made none consistently in the six months before bankruptcy.

Contributions Before Bankruptcy Are Required

The debtor argued that the circuit court should expand *Davis* by allowing the debtor to rely on his history of making voluntary contributions when he had been able to so do.

"Because neither the statute nor our caselaw supports" the argument, Judge Larsen upheld the lower courts.

Judge Larsen laid out the four interpretations of the statute and explained how *Davis* rejected the idea that a chapter 13 debtor may never make voluntary contributions. She cited the Sixth Circuit Bankruptcy Appellate Panel for having ruled that "to the extent a debtor is making recurring 401(k) contributions 'at the time' of filing, she may continue to do so post-petition." *Burden v. Seafort* (*In re Seafort*), 437 B.R. 204, 209-210 (B.A.P. 6th Cir. 2010).

"But that also means that a debtor may not begin, resume, or otherwise increase the amount of such contributions post-filing in an attempt to reduce payments to unsecured creditors," Judge Larsen said, again interpreting the BAP. *Id*. at 210.

Judge Larsen stated the circuit's holding as follows:

> We hold only that the bankruptcy code's text does not permit a Chapter 13 debtor to use a history of retirement contributions from years earlier as a basis for shielding voluntary post-petition contributions from unsecured creditors. This is true even if the debtor had no ability to make further contributions in the six months preceding filing; the code makes no exception for such circumstances.

Commentary

In years past, employers offered defined-benefit pension plans that were protected in employees' bankruptcies. Today, they are few and far between.

If a typical consumer is to provide for retirement, she or he must make contributions to 401(k)s and individual retirement accounts. Otherwise, a worker will be left with nothing more than Social Security benefits and retirement in abject poverty.

A financially struggling consumer may be unable to make 401(k) contributions, even if offered by the employer. Consequently, requiring consistent 401(k) contributions by chapter 13 debtors before bankruptcy flies in the face of reality. Furthermore, a consumer eligible for chapter 7 is not precluded from making contributions immediately after filing.

Typically, requiring a chapter 13 debtor to include 401(k) contributions in disposable income will not result in an additional major recovery by each unsecured creditor.

Congress needs to decide whether chapter 13 debtors must suffer the consequences of bankruptcy in retirement years later, when the benefit to each creditor was nominal.

Chapter 13 was designed not to be punitive when someone files a chapter 13 petition but does not succeed. Barring individuals from providing for retirement makes chapter 13 punitive for debtors who succeed.

The opinion is *Penfound v. Ruskin (In re Penfound)*, 19-2200, 2021 BL 300792 (6th Cir. Aug. 10, 2021).

A chapter 13 debtor was permitted to make a fraction of the pension contributions permitted by the IRS Code.

Chapter 13 Debtor May (Sometimes) Contribute to Retirement Plans

With qualifications implying that all chapter 13 debtors may not qualify, Chief Bankruptcy Judge Helen E. Burris of Spartanburg, S.C., sided with the majority and allowed the debtor to continue making voluntary contributions to her retirement account.

Before bankruptcy, the 36-year-old debtor had been making monthly contributions of some $470 to her retirement account, enough to qualify for her employer's maximum contribution. The debtor had been making the contributions for three years. The balance in her retirement account was $38,000, Judge Burris said in her May 20 opinion.

Originally, the debtor's chapter 13 plan called for $98,400 in payments over the five-year life of the plan. The chapter 13 trustee objected, leading to a compromise where the debtor upped the payments to $109,000.

A creditor objected to confirmation of the amended plan, contending that the debtor was not devoting all her disposable income to the plan and that the plan was not filed in good faith, given ongoing contributions to the retirement plan.

To the extent the statute provides an answer, several sections are pertinent. To confirm the plan, the debtor is required to devote all of her "projected disposable income" to unsecured creditors under Section 1325(b)(1).

Section 541(b)(7)(A), one of the most poorly drafted provisions added in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act, provides that property of the estate does not include contributions to 401(k) plans. The end of the subsection includes a so-called hanging paragraph that says, "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)."

Finally, Section 707(b) provides grounds for dismissal and uses the term "current monthly income." While charitable contributions are specifically excluded as grounds for dismissal, the statute is silent about contributions to a retirement plan.

There have been four interpretations of the statute, with three results: (1) Retirement contributions can never be deducted from disposable income, even if the debtor was making contributions before bankruptcy; (2) a debtor may continue making contributions, but not more

than the debtor was making before bankruptcy; and (3) a debtor may make contributions after bankruptcy up to the maximum allowed by the IRS, even if the debtor was making none before bankruptcy.

So far, only the Sixth Circuit has tackled the split. *See Davis v. Helbling (In re Davis)*, 960 F.3d 346 (6th Cir. 2020). In a 2/1 decision, the majority held that a debtor who was making contributions to a 401(k) before bankruptcy may continue making contributions in the same amount by deducting the contributions from "disposable income."

The majority in *Davis* rejected the holding by some courts that contributions are never included in disposable income, whether or not the debtor was making contributions before bankruptcy. The dissenter would have held that a debtor cannot make contributions after bankruptcy, even if he or she was making them beforehand. To read ABI's report on *Davis*, click here.

The Fourth Circuit ducked the split on statutory interpretation in 2017. *See Gorman v. Cantu (In re Cantu)*, 713 F. App'x 200, 202 (4th Cir. 2017). To read ABI's report, click here.

Two of the circuit judges in *Cantu* believed that the trustee had only appealed the bankruptcy court's good faith finding and not a second question of statutory interpretation. The appeals court decided that the bankruptcy court's finding of good faith was not clearly erroneous because the debtor was only planning to contribute $3,200 a year when the maximum permissible contribution under tax law would have been $18,000.

The creditor wanted Judge Burris to adopt the approach of the dissenter in *Davis* and bar contributions to retirement plans, even if the debtor was making contributions before bankruptcy.

Tackling the question herself, Judge Burris noted that neither Section 1325 nor Section 707 "explicitly authorizes" deduction of retirement contributions from disposable income.

Judge Burris declined to follow the *Davis* dissent and "instead joins the majority and other courts within the Fourth Circuit that have held that post-petition voluntary retirement contributions are not considered disposable income, so long as such contributions are made in good faith." She interpreted the hanging paragraph to show the intent of Congress "to exclude retirement contributions from available disposable income under Section 1325(b)."

Turning to the question of good faith, Judge Burris saw the Fourth Circuit as calling for an examination of the totality of the circumstances.

First, Judge Burris refused to infer bad faith solely because the debtor would continue making retirement plan contributions.

The creditor had defeated the debtor regarding good faith when the original plan came on for confirmation. The amended plan, Judge Burris said, "is significantly different and provides far more" for creditors.

In addition, the debtor had been making contributions for several years "and in amounts consistent with what she intends post-petition," Judge Burris said. Although she was only 36 years of age, "her monthly contribution is well within the allowable limit" of $19,500.

Furthermore, Judge Burris said that a "substantial portion" of unsecured debts would be paid by the plan. She therefore overruled the objection regarding good faith and directed entry of an order confirming the plan.

Observations

The issue raises questions of policy and statutory interpretation. Given that the statutory muddle has been on the books for 16 years, the prospect of a congressional fix is remote. "It is more likely that the issue will continue to be left to the judiciary to clean up," Jamie Olinto told ABI.

Mr. Olinto is a partner in the Jacksonville, Fla., office of Adams & Reese LLP. He saw this newest case as showing a tendency for courts to "settle on a standard which allows for flexibility in balancing the oft-competing interests of debtors and their creditors to reach what the jurist reasons to be a fair and equitable result rooted in whether the debtor is acting in good faith."

In other words, debtors in different parts of the country will live under different regimes until Congress or the Supreme Court resolves the split.

Given the lack of clarity in the statute itself, this writer submits that courts are entitled to use their common sense and notions of fairness to divine an answer.

Fewer and fewer Americans have defined benefit pension plans funded altogether by their employers. If a worker is lucky enough to have any retirement plan, it likely will be a defined contribution plan where the employer may only make matching contributions.

Barring or limiting pension contributions precludes chapter 13 debtors from cashing in on significant tax advantages available to other Americans and means they will have lower incomes in retirement. When retirees may have nothing more than meager Social Security benefits and whatever they have been able to contribute to 401(k)s or IRAs, preventing chapter 13 debtors from providing for their retirements is bad policy, in this writer's view.

Courts should not make policy choices preventing some Americans from taking advantage of tax benefits, unless the result is clearly commanded by the Bankruptcy Code, in this writer's view.

The opinion is *In re Pizzo*, 20-01758, 2021 BL 188943, 2021 Bankr Lexis 1393 (Bankr. D.S.C. May 20, 2021).

Curiously, bifurcated fee arrangements are sometimes permitted in the Eastern District of Kentucky.

Bifurcated Fee Arrangements Barred in Western District of Kentucky

The bankruptcy judges in the Western District of Kentucky have effectively banned so-called bifurcated fee arrangements where chapter 7 debtors pay counsel fees after filing. The October 5 opinion by Bankruptcy Judge Joan A. Lloyd of Louisville, Ky., also bars lawyers from advancing the filing fee before filing and collecting the filing fee after filing.

Although the decision by Judge Lloyd largely follows holdings by Bankruptcy Judge Laurel M. Isicoff of Miami, Judge Lloyd declined to adopt Judge Isicoff's decision to allow bifurcated fee arrangements so long as disclosures are up to snuff. *See In re Brown*, 631 B.R. 77 (Bankr. S.D. Fla. June 16, 2021). To read ABI's report on *Brown*, click here.

Judge Lloyd declined to follow one of her sister judges from the Eastern District of Kentucky who allowed the use of bifurcated fee arrangements in certain delineated circumstances. *See In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020). To read ABI's report on *Carr*, click here.

Judge Lloyd discussed the issue with the other judges in her district, who agreed that her legal conclusions would be the opinion of all judges in the district.

The Arrangement to Pay Fees After Filing

The fee bifurcated arrangement on review by Judge Lloyd was the most aggressive that a debtor's lawyer could employ. The arrangement was designed as an end run on *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004), where the Supreme Court held that a chapter 7 lawyer cannot require the debtor to pay for post-petition services after filing if the obligation arose pre-petition.

Judge Lloyd was reviewing a dozen chapter 7 cases filed by the same lawyer. The debtor-clients paid nothing before filing. The lawyer even advanced the filing fee before filing.

The client signed two engagement agreements, one before filing and one afterward. Under the prefiling agreement, the client paid nothing. However, the lawyer interviewed the client, prepared and filed the petition, paid the filing fee and filed a list of creditors. The client was not obligated to sign a post-filing engagement agreement.

When the client signed the post-filing agreement, the lawyer became obligated to prepare and file the other required documents and attend the meeting of creditors. The post-filing agreement did not require the lawyer to appear in adversary proceedings.

Under the post-filing agreement, the client became obligated to pay a total of $2,500 in monthly installments in the first year after filing. In addition to the lawyer's services, the payments covered the $335 filing fee paid by the lawyer before filing.

Unknown to the client, the lawyer had a factoring agreement with a secured lender. Immediately after filing, the lender would pay the lawyer 60% of the $2,500 fee. The lender collected the client's monthly payments and had a security interest in the lawyer's receivables.

For its services, the lender was entitled to retain 25% of collections from the client. The lender retained another 15% of the fee to cover its advances under the $50,000 line of credit with the lawyer.

In her opinion, Judge Lloyd said that the same lawyer "consistently charged" a $1,250 flat fee for clients who paid the entire fee before filing.

After an initial hearing about the fee arrangements, Judge Lloyd required the lawyer to seek an ethics opinion from the Kentucky Bar Association. The bar group declined to offer an opinion, for a variety of reasons.

The fee and factoring arrangements failed on many levels. Judge Lloyd found multiple violations of the Bankruptcy Code, the Bankruptcy Rules and the Kentucky Rules of Professional Conduct.

Lawyer Can't Walk Away After Filing the Petition

Judge Lloyd said that the factoring agreement was "clearly designed to defeat existing bankruptcy law and rules enacted over at least a century ago to protect debtors, and all the machinations inherent in its processes will not save it from review and censure. Further, the Kentucky Rules of Professional Conduct are no less forgiving to counsel."

Judge Lloyd was no less critical about the notion that the lawyer has no obligations after filing if the client declines to sign a post-filing engagement agreement. Under the local rules, she said that filing the petition obligated the lawyer to perform all services in the ensuing chapter 7 case. In other words, the client's failure to sign the post-petition engagement agreement could not relieve the lawyer from the obligation to prepare and file the remaining required papers and represent the client in the chapter 7 case, other than in adversary proceedings.

Furthermore, the client's obligation to repay the $335 filing fee after filing was a discharged debt that the lawyer could not collect after filing.

More particularly, Judge Lloyd held that advancing the filing fee and the concomitant repayment obligation in the post-filing agreement violated both the Bankruptcy Code and the Kentucky ethics rules. In addition to violating the automatic stay and the discharge injunction, advancing the filing fee violated Section 526(a)(4), because the lawyer was advising the client to incur more debt in advance of bankruptcy.

Judge Lloyd saw a "serious conflict of interest" when the lawyer asked the client to sign the post-petition agreement although the lawyer was already obligated to perform the post-filing services and was barred from collecting the filing fee.

Judge Lloyd concluded that the lawyer made inadequate disclosure about the bifurcated agreement and none regarding the factoring arrangement. She said, among other things, that the client was paying far more for representation and had no role in negotiating the factoring costs that raised the price for the debtor. The failure to disclose the factoring agreement was "[p]articularly troublesome," Judge Lloyd said.

Judge Lloyd concluded that the factoring agreement violated the Bankruptcy Code, the Bankruptcy Rules, the local rules, and the state's ethics rules. With regard to the factoring agreement, Judge Lloyd said "it is doubtful that any amount of disclosure can remedy the problem."

Judge Lloyd also identified undisclosed fee-splitting as a consequence of the factoring agreement, a failure of disclosure in the lawyer's Rule 2016 disclosure, and a violation of Section 329. She said that the failure to disclose was "particularly troubling" because the client was being charged "a higher fee" than someone who paid in advance of filing.

Finally, Judge Lloyd held that the fee was not "reasonable," given the $1,250 flat fee the same lawyer would charge clients who paid in advance of filing.

Judge Lloyd said that similar arrangements may not be used "by any attorney" in the district.

For a client who can't pay the filing fee in advance of filing, Judge Lloyd noted at the end of her opinion that debtors may pay the filing fee in installments or ask for a waiver of the fee. To pay counsel fees after filing, she said that debtors can use chapter 13.

The opinion is *In re Baldwin*, 20-10009 (W.D. Ky. Oct. 5, 2021).

The Ninth Circuit BAP joins the minority on an issue that's headed for the court of appeals.

Chapter 13 Trustees Are Paid Even if Dismissal Comes Before Confirmation, BAP Says

In a split decision, the two judges on the Ninth Circuit Bankruptcy Appellate Panel took sides with the minority of courts around the country by ruling in a nonprecedential opinion that a standing chapter 13 trustee is entitled to retain her fee if the case is dismissed before confirmation.

All three judges on the panel offered their opinions. Bankruptcy Judge Gary A. Spraker wrote a concurring opinion to support the majority opinion by Bankruptcy Judge Scott Gan. Bankruptcy Judge William J. Lafferty penned a dissent. The three opinions consume 53 pages.

Combined, the opinions are the best exposé so far on both sides of the question. The opinions are a particularly fine discussion of the plain meaning doctrine, and when or whether it should be the end of the discussion. The opinions on both sides also analyze every conceivable canon of statutory construction applicable to the issue.

Typical Facts

A couple filed a chapter 13 petition in December 2019. Four months later, the court granted their voluntary motion to dismiss. On dismissal, the trustee was holding about $2,200. No one objected to the allowance and payment of the debtors' counsel fee of some $1,800.

The bankruptcy court struck language in the proposed dismissal order that would have allowed the standing chapter 13 trustee to take her fee from the remaining $400. Instead, the bankruptcy judge ruled in substance that the trustee was not entitled to her fee because the case was dismissed before confirmation.

As authority, the bankruptcy court cited *In re Evans*, 615 B.R. 290 (Bankr. D. Idaho Feb. 13, 2020), by Chief Bankruptcy Judge Joseph M. Meier of Boise, Idaho. To read ABI's report on *Evans*, click here. *Evans* was appealed, but there is no decision as yet.

Likely more concerned about the precedent than the $400, the chapter 13 trustee appealed and won in a 2/1 decision.

The Dueling Statutes

28 U.S.C. § 586(e) says that a standing trustee "shall *collect* such percentage fee from all payments . . . under [chapter 13] plans. . . ." [Emphasis added.]

Section 1326(a)(1) requires a chapter 13 debtor to commence making payments to the trustee within 30 days of filing. Subsection (a)(2) provides that payments made by the debtor "shall be retained by the trustee until confirmation or denial of confirmation. . . . If a plan is not confirmed, the trustee shall return any such payments not previously paid . . . to creditors . . . , after deducting any unpaid claim allowed under section 503(b)." The subsection says nothing explicitly about the standing trustee's fee.

To add further confusion, chapter 12 and Subchapter V of chapter 11 explicitly say what happens when dismissal precedes confirmation. Section 1226(a)(2) specifically allows the trustee to retain the statutory fee if a plan is not confirmed, and Section 1194(a) allows a Subchapter V trustee to be paid if the case is dismissed before confirmation.

What's to be taken from chapter 13's failure to say explicitly whether a trustee is paid if the case is dismissed before confirmation?

The Majority Opinion – No Ambiguity – 28 U.S.C. § 586(e) Controls

Judge Gan found no ambiguity in the statutes. He held that "a standing trustee is entitled to collect the statutory fee under § 586(e) upon receipt of each payment under the plan and is not required to disgorge the fee if the case is dismissed prior to confirmation." He also held that the standing trustee "obtains ownership of her percentage fee" when the debtor makes a payment under the plan.

In addition to what he said was the "common sense" and controlling meaning of "collect," Judge Gan pointed out how a standing trustee's compensation is controlled entirely by Section 586(e). The court has no control over the amount or payment via Section 330.

Simply stated, Judge Gan said "that the plain meaning of 'shall collect such percentage fee' means that a standing trustee obtains the fee upon receipt of each plan payment."

Judge Gan reversed and remanded, devoting much of his opinion to explaining why Section 1326(a)(2) was not pertinent.

Concurring, Judge Spraker said that a chapter 13 trustee's fee is akin to a "user fee," where "payment does not depend upon the success of the endeavor that generates the fee." Mirroring Judge Gan and disagreeing with *Evans*, he said that "the trustee is entitled to her fee as she receives the debtor's plan payments whether that plan is confirmed or not."

Judge Spraker said he did not base his conclusion on the idea that a standing chapter 13 trustee should be paid for her services regardless of whether the plan is confirmed. Rather, he agreed with Judge Gan "because I find [his] reasoning more natural and less damaging statutorily to give effect to the plain and ordinary meaning of § 586(e)."

The Dissent

From a "purely policy standpoint," Judge Lafferty said in his dissent that he would agree with the majority and pay the chapter 13 trustee. However, he gave weight to the different result that Congress has mandated for chapter 12 and Subchapter V cases.

Judge Lafferty said he disagreed "vigorously" with the idea that the conclusion is found in the "'unambiguous' language in one provision of what [the majority] believes to be the only relevant statute."

Judge Lafferty was not inclined to ignore legislative history. The House Report said that the fee is "fixed" by Section 586(e) but is payable under Section 1326(a)(2). Judge Lafferty's dissent is an admirable survey of theories about when the plain meaning doctrine should or should not be invoked.

Recommendation and Observations

For anyone confronting the issue, the BAP opinion and *Evans* have everything there is to say.

There likely will be no appeal to the Ninth Circuit from the BAP opinion because the debtor was not motivated to appear on the first level of appeal. With only $400 in the balance, the debtor is not likely to appeal to the circuit.

However, *Evans* is *sub judice* in district court. Odds are, there will be an appeal to the circuit regardless of the outcome.

We salute the BAP for making its decision nonprecedential. Although BAP opinion are not binding except in the case on appeal, making the opinion nonprecedential signals to bankruptcy judges throughout the Ninth Circuit that they are at liberty to rule on the issue as they see fit.

The opinion is *McCallister v. Harmon (In re Harmon)*, 20-1168, 2021 BL 276666, 2021 Bankr Lexis 1960 (B.A.P. 9th Cir. July 20, 2021).

Long Island judge finds no ambiguity in two statutes that other courts have found ambiguous when read together.

Courts Split on Paying Chapter 13 Trustee Fees in Cases Dismissed Before Confirmation

Taking sides on an issue where the courts are divided, Bankruptcy Judge Robert E. Grossman of Central Islip, N.Y., decided that a chapter 13 trustee is entitled to retain his or her statutory fee even if the case is dismissed before plan confirmation.

The debtor appealed the same day the decision came down.

Judge Grossman found the result in the plain language of the statute but carefully parsed decisions coming out the other way, including a contrary opinion in February by Chief Bankruptcy Judge Joseph M. Meier of Boise, Idaho. *In re Evans*, 19-40193, 2020 BL 53269, 2020 WL 739258 (Bankr. D. Idaho Feb. 13, 2020). To read ABI's report on *Evans*, click here.

The debtor in Judge Grossman's case filed a chapter 13 plan where he paid the trustee $362,000 in a lump sum. Soon after, the debtor decided to dismiss the case. After dismissal, the trustee returned about $341,500 to the debtor but retained some $20,500 as his fee.

The debtor filed a motion asking the court to require the trustee to disgorge the fee. Technically speaking, the debtor was not objecting to the trustee's final report. The debtor lost on every argument he raised.

Two statutes informed Judge Grossman on the outcome.

28 U.S.C. § 586(e) says that a trustee "shall *collect* such percentage fee from all payments . . . under [chapter 13] plans . . . ." [Emphasis added.]

Section 1326(a)(1) requires a chapter 13 debtor to commence making payments to the trustee within 30 days of filing. Subsection (a)(2) provides that payments made by the debtor "shall be retained by the trustee until confirmation or denial of confirmation. . . . If a plan is not confirmed, the trustee shall return any such payments not previously paid . . . to creditors . . . , after deducting any unpaid claim allowed under section 503(b)." The subsection says nothing explicitly about the trustee's fee.

As Judge Meier said in the *Evans* case, the two statutes "appear to conflict" and "are ambiguous" when "construed together." Unlike chapter 13, where the statute does not address the

issue directly, Judge Meier also pointed out how Section 1226(a)(2) specifically allows the trustee to retain the statutory fee if a plan is not confirmed.

Before addressing the two statutes, Judge Grossman first examined his power to provide a remedy. He ruled in his November 12 opinion that he lacked the equitable power to require disgorgement of part or all of the fee. Because the fee is fixed by statute, he said that "the Court has no authority to fix the dollar amount of the fee the Trustee receives in each Chapter 13 case."

Next, Judge Grossman said that the proper procedure called for objecting to the trustee's final report, as opposed to moving for disgorgement. He then examined the two statutes as though the debtor had objected to the final report.

Finding no ambiguity, Judge Grossman said that the "plain meaning" of Section 586(e) "reveals that the Trustee collects his percentage fee regardless of whether the plan is confirmed." He emphasized the statutory language which provides that the trustee "shall collect [his fee] from all payments received by [the trustee] under the plan. . . ."

Judge Grossman went on to say that the word "plan" is not limited to confirmed plans. He found no ambiguity in the word even taking Section 1326(a)(1) into consideration. He said that Section 1326(a)(1) requires returning payments to the debtor that are "not yet due and owing to creditors."

Judge Grossman interpreted the sections to mean that "the Debtor is only entitled to a return of the funds earmarked for creditors."

The policy underlying the system of standing chapter 13 trustees also influenced the decision by Judge Grossman. Congress designed the system to be self-funding.

"To permit debtors to evade payment of these fees solely on the basis of the success of their plans," Judge Grossman said, "would result in an outcome inconsistent with Congressional intent and would ultimately hinder the abilities of the Trustee Program to fund itself."

Judge Grossman held that "the Trustee's fee is a user fee, directed by statute, that must be universally paid by all chapter 13 debtors regardless of the outcome of each case."

The opinion is *In re Soussis*, 19-73686, 2020 BL 439963 (Bankr. E.D.N.Y. Nov. 12, 2020).

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.

Court Lets the Debtor Keep Appreciation in a Home on Conversion from 13 to 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."

The opinion is *In re Cofer*, 19-40361 (D. Idaho Jan. 8, 2021).

Faculty

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18. Previously, he was a shareholder with the law firm of Collins, May, Potenza, Baran & Gillespie, P.C. in downtown Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. Judge Collins serves on the Ninth Circuit's Bankruptcy Education Committee, is the education chair for the National Conference of Bankruptcy Judges, will be NCBJ's president in 2022-23, is a member of ABI's Board of Directors, sits on ABI's Education Committee and Diversity Committee, is on the Board of the Phoenix Chapter of the Federal Bar Association, is a Fellow of the American College of Bankruptcy and is a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the sole the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." She serves on the board of the Federal Bar Association Bankruptcy Section, is a former board member of the International Women's Insolvency & Restructuring Confederation, is a former committee chair of ABI's Consumer and Litigation Committees, and is an Associate Editor of the *ABI Journal*. Judge Gunn is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

Hon. Beth E. Hanan is a U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee and Green Bay, appointed in May 2015. Previously, she was an appellate lawyer and litigator in Wisconsin, and served several terms as managing member of a trial practice boutique, Gass Weber Mullins. Judge Hanan was chair of the Wisconsin Judicial Council and president of the Milwaukee Bar Association, and she remains a Fellow in the American Academy of Appellate Lawyers. Since joining the bench, she has been the judicial co-chair of ABI's annual Wedoff Consumer Conference (in 2020 renamed the Consumer Summit) and has served as the bankruptcy representative to the Seventh Circuit Judicial Council (2019-2021). She also chairs the Public Outreach committee of the National Conference of Bankruptcy Judges (NCBJ) and is a member of NCBJ's International Judicial Relations committee Judge Hanan received her undergraduate degree from Marquette University and her J.D. in 1996 from the University of Wisconsin Law School.

Hon. Mary Jo Heston is a U.S. Bankruptcy Judge for the Western District of Washington in Tacoma, appointed on Jan. 31, 2017. Previously, she was a shareholder in the Seattle and Portland, Ore., offices of Lane Powell PC, where her practice involved commercial litigation and transactional matters with an emphasis on business reorganizations, international insolvency and the acquisition of

troubled businesses and assets. Between 1988 and 1993, Judge Heston served as the first Region 18 U.S. Trustee, overseeing bankruptcy cases and fiduciaries in Washington, Oregon, Idaho, Alaska and Montana. She also is a former law clerk to a federal district court judge and a bankruptcy judge and a former estate administrator of the federal bankruptcy court. Judge Heston taught bankruptcy courses for more than 20 years at both Seattle University School of Law and University of Washington Law School. She is a 2001 Fellow of the American College of Bankruptcy and an active participant in both professional organizations and community service organizations, and she currently serves or has served in leadership positions for the National Conference of Bankruptcy Judges, ABI, INSOL International, the Washington State Bar Association's Debtor Creditor Section, the Turnaround Management Association, CARE and CENTS. Judge Heston is a frequent international, national and regional speaker and author on topics including international insolvency issues, creditors' rights issues, and commercial and consumer insolvency issues. Her recent community service efforts have focused on military and veterans' financial and bankruptcy-related issues through her service on the *Pro Bono* Committee of ABI's Veterans and Servicemembers Affairs Task Force. Judge Heston received her undergraduate degree *cum laude* from the University of Washington in 1975 and her J.D. *cum laude* from the Seattle University School of Law in 1980.

Hon. Guy R. Humphrey is a U.S. Bankruptcy Judge for the Southern District of Ohio in Dayton, appointed in 2007. Prior to his appointment, he practiced in the areas of debtor/creditor law, bankruptcy representation, receivership and litigation, representing a broad spectrum of clients, including individual debtors, business debtors, secured creditors, unsecured creditors, committees, and purchasers of assets from financial institutions and bankruptcy estates. That representation spanned many industries, including manufacturing, real estate, lodging, retail, construction, restaurant and food service, transportation, utilities, financial institutions, and equipment sales and leasing. Judge Humphrey is a member of the National Conference of Bankruptcy Judges, ABI, the Thomas F. Waldron American Bankruptcy Law Forum, the American Bar Association, the Dayton Bar Association (Foundation Fellow) and the Federal Bar Association, and he served on the Bankruptcy Appellate Panel for the Sixth Circuit from 2013-18. In addition, he has served as a member of the Local Bankruptcy Rules Committee, the Bankruptcy Bench-Bar Conference Committee (Chair 2015-19) and the Complex Chapter 11 Procedures working group for the district. Both as a practitioner and as a judge, Judge Humphrey has been a presenter at numerous legal education seminars and conferences. Since being appointed, he has participated in the University of Dayton School of Law's externship program, as a presenter at the Law and Leadership Institute operated through the University of Dayton, and as a judge for the high school Robert N. Farquhar District Mock Trial Competition. Judge Humphrey received his undergraduate degree from Kent State University and his J.D. from The Ohio State University Moritz College of Law.

Hon. Karen S. Jennemann is a U.S. Bankruptcy Court Judge for the Middle District of Florida in Orlando. She was initially appointed in November 1993 and served as chief judge from Oct. 1, 2011, to Sept. 30, 2015. Prior to her judicial appointment, Judge Jennemann was a shareholder in the law firm of Mahoney Adams & Criser, P.A. in Jacksonville, Fla., where she specialized in bankruptcy law. Prior to that, she was an associate at Smith Hulsey & Busey in Jacksonville, Fla., and also served as a law clerk to Hon. Robert Doumar of the U.S. District Court for the Eastern District of Virginia in Norfolk. Judge Jennemann received her J.D. from the Marshall Wythe School of Law at the College of William and Mary, her Masters in Liberal Studies from Rollins College and her undergraduate degree from Northern Arizona University in Flagstaff.

Hon. Sandra R. Klein is a U.S. Bankruptcy Judge for the Central District of California in Los Angeles, appointed in April 2011. Prior to her appointment to the bench, she worked for more than 13 years for the U.S. Department of Justice, most recently as the acting assistant director of the Office of Criminal Enforcement of the U.S. Trustee Program, where she focused nationally on increasing detection and prosecution of criminal conduct in the bankruptcy system. From 2003-09, Judge Klein was a bankruptcy fraud criminal coordinator with the U.S. Trustee Program, responsible for assisting federal law enforcement agents and assistant U.S. attorneys with bankruptcy-related investigations and prosecutions. From 1997-2003, she was a special assistant U.S. attorney in the Central District of California (on permanent detail from the U.S. Trustee Program), where she focused on complex white collar crime cases and bankruptcy fraud cases in particular. Before joining the DOJ, Judge Klein served as a litigation associate with O'Melveny & Myers LLP and began her legal career clerking for Hon. Arthur L. Alarcón of the Ninth Circuit Court of Appeals and Hon. Lourdes G. Baird of the Central District of California. Judge Klein is a member of the Board of Directors of the Federal Bar Association, Los Angeles Chapter, a member of the Board of Governors of Loyola Law School, and a community member of the Girl Scouts of Greater Los Angeles Board Development Committee. From 2010-20, she was a member of the Women Lawyers Association of Los Angeles (WLALA) Board of Governors. Judge Klein has received numerous awards, including the 2018 National Conference of Bankruptcy Judges Public Outreach Award, the 2018 WLALA Distinguished Service Award, and the 2019 Girl Scouts of Greater Los Angeles Woman of Distinction Award. She received her Bachelor's degree *magna cum laude* in music education from the University of Lowell in Massachusetts, her J.D. *magna cum laude* from Loyola Law School in Los Angeles, where she was admitted to the Order of the Coif and served as a senior note and comment editor for the *Loyola International and Comparative Law Journal*, and her M.B.A. with honors from UCLA's Anderson School of Management in Los Angeles.

Hon. Catherine P. McEwen is a U.S. Bankruptcy Judge for the Middle District of Florida in Tampa, appointed by the Eleventh Circuit Court of Appeals on Aug. 22, 2005, and an adjunct professor at Western Michigan University Cooley Law School. She is the first female judge appointed in her district. Prior to becoming a judge, she was in private practice for almost 23 years in Tampa and was a solo practitioner from 2001 until the date of her appointment to the bench. Before opening her solo practice, she was a shareholder of Akerman Senterfitt & Eidson, P.A., formerly known as Moffitt, Hart & Herron, P.A., where she practiced law from 1982-2001 in its Tampa office, concentrating on commercial litigation with an emphasis on representing parties in bankruptcy cases. Judge McEwen was elected into the American Law Institute in 2012. Among her other honors are the Stetson University College of Law Distinguished Alumnus Award (2007), Hillsborough County Bar Association Jimmy Kynes Pro Bono Service Award (2008), the Stetson University College of Law J. Ben Watkins Award (2009), the Florida Association for Women Lawyers Leaders in the Law inaugural class designation (2010), the Tampa Bay Hispanic Bar Association's Luis "Tony" Cabassa Award (2012), the George Edgecomb Bar Association's Delano S. Stewart Diversity Award (2015), the inaugural Florida Supreme Court Chief Justice's Distinguished Federal Judicial Service Award (2016), the Stetson Lawyers Alumni Association Ben C. Willard Award (2016), the University of South Florida Distinguished Alumna Award (2016) and the Bay Area Legal Services Inc. Judge Don Castor Justice Award (2016). In 2017, Judge McEwen was appointed by Chief Justice John Roberts, Jr. to serve a two-year term as the nonvoting bankruptcy judge observer to the Judicial Conference of the United States, which ended on Sept. 30, 2019. Prior to becoming a lawyer, she was a sportswriter from 1975-79 for the *Tampa Tribune* and the *Tampa Times*. Judge McEwen received her B.A. in political

science from the University of South Florida in 1979 and her J.D. *cum laude* from Stetson University in 1982.

Hon. Elizabeth S. Stong has served as a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn since 2003. Prior to her appointment the bench, she was a litigation partner and associate at Willkie Farr & Gallagher in New York, an associate at Cravath, Swaine & Moore, and law clerk to Hon. A. David Mazzone, U.S. District Judge in the District of Massachusetts. Judge Stong is a member of the Council on Foreign Relations, the Advisory Committee to Columbia University's Committee on Global Thought and the Advisory Board of the ABA Center for Human Rights, and she holds leadership roles in the Practising Law Institute, PRIME Finance, the New York City Bar Association, the New York County Lawyers Association, and the ABA's Business Law Section, International Law Section and Judicial Division, among other organizations. Judge Stong's past positions include president of the Harvard Law School Association, chair of the NCBJ International Judicial Relations Committee, and chair of the New York City Bar's ADR Committee. She also served on the ABA's Standing Committee on *Pro Bono* and Public Service, Standing Committee on the American Judicial System, Standing Committee on Continuing Legal Education, Commission on Women in the Profession, and Commission on Homelessness and Poverty. Judge Stong has trained judges in Central Europe, North, Central and West Africa, the Middle East and the Arabian Peninsula with the U.S. Commerce Department, the World Bank and INSOL. She also has consulted with the Supreme Court of China and People's High Courts in Beijing and Guangzhou, and led judicial workshops in Cambodia, Argentina, Brazil and Chile. She received the ABA Glass Cutter Award, the NYIC Hon. Cecelia Goetz Award, the Brooklyn Bar Association's Freda Nisnewitz Award for Pro Bono Service, and the MFY Legal Services Scales of Justice Award. Judge Stong is an adjunct professor at Brooklyn Law School. She received her A.B. *magna cum laude* from Harvard University and her J.D. from Harvard Law School, where she received the Williston Prize, and she studied at the Université des Sciences Sociales in Toulouse, France, as a Rotary Foundation Graduate Fellow.

Hon. Kathy A. Surratt-States is Chief Bankruptcy Judge for the Eastern District of Missouri in St. Louis, initially appointed on March 17, 2003, and named Chief Judge on Feb. 1, 2013. She began her legal career as law clerk to now-retired Bankruptcy Judge James J. Barta. In 1993, Judge Surratt-States was an associate at Campbell & Coyne, P.C., where her work focused on bankruptcy, commercial litigation and foreclosures. She then moved to Ziercher & Hocker, P.C. in 1998, where she became partner. The firm later merged with Husch Blackwell, where she was a partner in its insolvency practice group until her appointment to the bankruptcy court. In 1997, Judge Surratt-States was appointed to the Panel of Bankruptcy Trustees for the Eastern District of Missouri, and in 1999, she served as the chapter 7 trustee for Family Company of America, then the third-largest grocery store chain in St. Louis. Judge Surratt-States serves on the Board of Catholic Charities of St. Louis and is a member of Altrusa International, Inc. of St. Louis, an international association of professionals dedicated to serving their community. She also is a member of the Missouri Bar, the Bar Association of Metropolitan St. Louis, the Mound City Bar Association, the National Conference of Bankruptcy Judges, ABI and the International Women's Insolvency & Restructuring Confederation (IWIRC). Judge Surratt-States received her B.A. *cum laude* from Oklahoma City University in 1988 and her J.D. from Washington University School of Law in 1991.

Hon. Alan S. Trust is Chief U.S. Bankruptcy Judge for the Eastern District of New York in Central Islip, initially appointed on April 2, 2008, and named Chief Judge on Oct. 1, 2020. He has been an adjunct professor of law at the St. John's University School of Law since 2009. Judge Trust served a two-year term as president of the Eastern District of New York Chapter of the Federal Bar Association, and serves as CLE Committee co-chair. He is a past chair of the Bankruptcy Law Section of the Federal Bar Association and a member of the board of directors of that Section, and has served as the CLE Committee chair. Judge Trust is a member of the *ABI Journal*'s Editorial Board and is a coordinating editor for the *Journal*, and for several years has had responsibility for its Dicta column. He is a member ABI and the National Conference of Bankruptcy Judges. Judge Trust had been previously designated by the Second Circuit Court of Appeals to mediate cases in the Southern District of New York and to sit in the District of Connecticut bankruptcy court. He has continued to serve as a judge mediator in the Eastern District of New York. Judge Trust has been selected by the Federal Judicial Center on several occasions to serve as a faculty member for national bankruptcy judge workshops, and he has spoken on issues such as evidence and the power of the bankruptcy courts to regulate its proceedings through sanctions and contempt. He also serves on the Judiciary Data Working Group under the auspices of the Administrative Offices of the U.S. Courts. Judge Trust is a frequent speaker and contributor for numerous CLE events and seminars, addressing bankruptcy, mediation, trial practice and ethics issues, and has participated in a number of civics programs. He was instrumental in the creation of the *Pro Bono* Mediation Program and the formation of the Consumer Lawyer Advisory Committee adopted by the Eastern District of New York Bankruptcy Court. Judge Trust received his undergraduate degree *summa cum laude* from Syracuse University in 1981, where he was a member of Phi Beta Kappa, and his J.D. *cum laude* from New York University School of Law in 1984, having served on its law review from 1982-83.