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Feature

By David Cox

Why Chapter 7 Bifurcated Fee Agreements Are Problematic

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David Cox is the founding member of Cox Law Group and practices bankruptcy law throughout the Western District of Virginia. He co-authored ABI's Consumer Bankruptcy: Fundamentals of Chapter 7 and Chapter 13 of the U.S. Bankruptcy Code (4th ed.)*, and serves on ABI's Board of Directors.*

One of the most significant challenges facing potential clients seeking debt relief through chapter 7 is how to afford to pay for their legal representation. This is not a new challenge. The problem for both the clients and consumer bar is that courts have rightly concluded that any obligation owed to debtors' counsel under a pre-petition chapter 7 fee agreement is not only stayed upon the filing for bankruptcy but is also fully dischargeable.[1] Without question, the Bankruptcy Code provides no easy road map for consumer attorneys to be compensated by their chapter 7 debtor clients, who often do not have ready access to savings or other available funds to pay in advance for the legal work they need.[2]

The Compensation Conundrum

The ABI Commission on Consumer Bankruptcy recognized the conundrum that lawyers face when offering their services to potential chapter 7 debtors, and discussed the risks and benefits associated with the methods those lawyers employ in order to be paid by their clients.[3] This article focuses on one such method: Bifurcating of chapter 7 representation into pre- and post-petition contracts for services, particularly when the agreements involve the factoring or financing of attorneys' fees with third parties. This practice not only exposes debtors' counsel to undue risk, but also becomes a tax on those in the most financial need, adding to the truism that, in so many ways, "the poor pay more."[4]

The Bifurcation Model

In recent years, a small but growing number of attorneys have utilized an approach to attract clients that permits them to offer low or no-money-down chapter 7 representation by dividing the legal services necessary for the entire case into two primary bundles: (1) services that are rendered pre-petition, and (2) services that are rendered post-petition. Separating the work required for a bankruptcy into two parts like this is often referred to as "bifurcation," particularly if the client is provided the option to be represented for the full case, albeit in two parts.[5] At its core, the purpose of bifurcating the representation is to turn the attorney fee obligation into a post-petition, nondischargeable debt that can be collected from the client after the bankruptcy is filed.

Financing or Factoring Attorney Fees

Related to bifurcation is the emerging practice of some debtors' attorneys to contract with factoring companies or finance companies in order to ensure some amount of upfront compensation to the attorney even when he/she offers low or no-money-down chapter 7 bankruptcies. In factoring situations, the debtor's attorney sells to a factor the post-petition accounts receivable for the bifurcated services contracted under the post-petition attorney fee agreement. The factor then collects directly from the debtor these post-petition fees without fear of violating the automatic stay or discharge injunction.

Financing agreements work similarly, with the lender typically extending credit to the debtor's attorney secured by the receivables from the post-petition fee agreement, then providing the collections for those post-petition fees. The use of factoring companies and financing agreements adds significant costs to the representation that are typically borne by the debtors in the form of higher attorneys' fees and have come under scrutiny by certain courts and the Office of the U.S. Trustee, with complaints filed in various enforcement actions.[6]

Bifurcation Is Based on a Flawed Premise

To be financially attractive as a low- or no-money-down option, the bifurcated practice model relies on the premise that debtors' counsel may properly structure the case in such a way that the attorney completes the overwhelming majority of

1 *See Rittenhouse v. Eisen*, 404 F.3d 395 (6th Cir. 2005); *In re Fickling*, 361 F.3d 172 (2d Cir. 2004); *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir. 2003).

2 As one court has observed, a pre-petition attorney fee agreement requiring the debtor to make post-petition installment payments "runs afoul of the general rule that pre-petition debts are dischargeable." *In re Abdelhak*, 2012 Bankr. LEXIS 5393 (Bankr. E.D. Mich. 2012).

3 ABI Commission on Consumer Bankruptcy, 2017-19 Final Report and Recommendations, at p. 89-92, *available at* consumercommission.abi.org/commission-report (unless otherwise specified, all links in this article were last visited on April 26, 2021).

4 *See* DeNeen L. Brown, "The High Cost of Poverty: Why the Poor Pay More," *Washington Post* (May 18, 2009) (exploring high cost of services for those in financial need).

5 *In re Hazlett*, No. 16-30360, 2019 Bankr. LEXIS 1166, *17 (Bankr. D. Utah April 10, 2019).

6 *See, e.g.*, Adversary Proceeding No. 17-01271, filed in *In re Gilmore* in the U.S. Bankruptcy Court for the Central District of California, which resulted in a stipulated final judgment entered Aug. 16, 2019, providing for disgorgement, sanctions and injunctive relief. The enforcement action in *In re Neufville*, Case No. 17-24812, from the District of Maryland also resulted in a consent order entered April 12, 2019, with certain sanctions against the debtor's counsel. A more recent and still pending case example might be found in the Western District of Washington in the adversary proceeding *U.S. Trustee v. McAvity*, Case No. 20-00400.

legal work required in the case *after* filing the petition. If true, then the attorney is able to maximize the fees for that work that may be collected as a post-petition obligation, without violating the automatic stay or discharge injunction. Under such a scenario, a skeletal petition would be filed for little or no fees up front from the debtor in order to initiate the case, then the debtor would be offered the opportunity to contract post-petition for the remaining attorney services needed to complete the case.

However, the problem is not in the theory of the business model but in its application. In practice, attorneys using bifurcated fee agreements might claim that the bulk of their work on a chapter 7 occurs *post-petition*, but these attorneys have inverted the distribution of work needed to properly represent chapter 7 debtors. Nearly all of the work needed to advise and represent a chapter 7 client competently is done *before* the case is filed, not after. By filing a case without having completed a thorough and reasonable investigation of the client's facts and circumstances, counsel may unwittingly set in motion events out of the debtor's control, with potential dire consequences and no path to exit other than pleading "cause" under 11 U.S.C. § 707(a).[7] Following this method is akin to buckling your client into a dangerous rollercoaster at its highest point, with the tracks beneath him/her yet unfinished.

The court in *In re Wright* recognized this fallacy in a bifurcation case that also involved a factoring arrangement.[8] In reviewing counsel's fees upon the motion of the U.S. Trustee, the court questioned the designation of services allegedly provided post-petition, finding that if the bulk of the work were truly completed post-petition, counsel would not be adequately analyzing the case.[9] The court found that the actual time spent for pre-petition services was not consistent with the fee charged to pre- versus post-petition services. The effect was to turn an otherwise-dischargeable pre-petition claim into a nondischargeable claim, and "such a scheme works a fraud on both the debtor and the Court."[10]

The apparent misrepresentation of counsel's work as being completed post-petition was also evident in another action to review attorneys' fees initiated by the U.S. Trustee in a case filed in the U.S. Bankruptcy Court for the Eastern District of Missouri. In that case, *In re Allen*, the U.S. Trustee alleged that the debtor's attorney bifurcated his services and financed his attorney's fees with a third-party lender.[11] The petition and matrix were filed for $0 down, with a second fee agreement entered into post-petition for $2,000, to be paid at a rate of $167 per month for 12 months.[12]

Among the problems identified by the U.S. Trustee was the implausible timeline purporting to reflect counsel's work. A mere 49 minutes after the initial petition was filed, the debtor's counsel filed the full balance of the debtor's schedules, statement of financial affairs, statement of intention, Official Form B22A and disclosure of compensation of attorney for the debtor.[13] As counsel for the U.S. Trustee noted in her brief to the court, it is "nearly inconceivable" that counsel would be able to prepare all the schedules and statements for the case and then review them, along with a second fee agreement, with the client for signature and filing, as appropriate, with the court.[14]

The timing of events and accuracy of disclosures matter in bankruptcy and raise significant ethical concerns. If an attorney were to attempt to treat a case as bifurcated and have the client sign a post-petition fee agreement that purports to charge for work that was completed pre-petition, the attorney would not only be a party to an improper agreement requiring the payment of a discharged debt, but would also be violating the automatic stay and misrepresenting facts to the court. Ultimately, the *Allen* court did not directly address these issues but entered instead a limited summary order reducing the attorneys' fees based on the value of the work actually performed in the case without delving into the accuracy or merits of the bifurcation and financing arrangement.[15]

A Poverty Tax

Factoring and financing scenarios also typically result in the debtor paying a significantly higher amount in attorneys' fees simply because the debtor is unable to pay the fees in full prior to filing the case. Increasing attorneys' fees to compensate for the factoring or financing of fees runs afoul of the reasonableness-of-fees requirements of 11 U.S.C. § 329(b). The fact that the attorney is willing to accept an amount that is discounted from what he/she would otherwise be asking the debtor to pay due to factoring or financing arrangements supports the notion that the fees that the debtor is being charged are inflated. At least one state bar ethics committee acknowledged the issue by asking, "If the lawyer is willing to do the work with a [30] percent discount, we question (but do not resolve) whether the total fee is reasonable."[16]

For example, the *In re Milner* court[17] canceled the debtor's counsel's post-petition fee agreement, which required $2,700 in total payments, on the basis that the fees charged were unreasonable.[18] In that case, the court found that counsel offered debtors the option of paying $1,500 prior to the filing of the case if fees were paid up front.[19] Counsel also offered a bifurcated fee agreement option whereby the debtors would pay $300 down to get the case filed, then complete 12 payments of $200 per month post-petition. The debtor in *In re Milner* proceeded with the bifurcated fee option, notwithstanding the additional 80 percent cost over the upfront payment option of $1,500 that the attorney offered to many of his clients.[20]

7 In fairness to the debtor, would the "cause" be an admission that the debtor's counsel failed to complete the due diligence necessary to advise properly on whether the case should have been filed in the first place?
8 *In re Wright*, 591 B.R. 68 (N.D. Okla. Sept. 4, 2018).
9 *Id.* at 94.
10 *Id.* Notwithstanding these concerns, the court limited its ruling to matters under § 329 and ordered the disgorgement of fees based on improper disclosures. *Id.* at 99.
11 *See* Docket No. 15, U.S. Trustee's Motion for Examination of the Fees of Debtor's Attorney, filed Oct. 9, 2020, in the U.S. Bankruptcy Court for the Eastern District of Missouri case of *In re Allen*, Case No. 20-42663.
12 *Id.*
13 *Id.*
14 *Id.*
15 *See* Docket No. 25, Order Granting U.S. Trustee's Motion Concerning Attorney's Fees, entered Nov. 23, 2020, in the U.S. Bankruptcy Court for the Eastern District of Missouri case of *In re Allen*, Case No. 20-42663. This order has been appealed, and the appeal remains pending at the Eighth Circuit Bankruptcy Appellate Panel, Case No. 20-6023, at the time of the submission of this article in late April 2021.
16 Utah State Bar Ethics Committee Advisory Opinion No. 17-06 (Revised) at ¶ 19, Aug. 16, 2018.
17 612 B.R. 415 (Bankr. W.D. Okla. 2019) (currently on appeal). At the time of the submission of this article, no decision on the appeal at the district court has been issued.
18 *Id.* at 443.
19 *Id.* at 421.
20 *Id.* at 438.

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Why Chapter 7 Bifurcated Fee Agreements Are Problematic

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The bifurcated services in *In re Milner* also involved a financing arrangement.[21] The attorney, in order facilitate the payment and collection of the debtor's post-petition payments, entered into a line-of-credit agreement with a third-party lender. Under the line-of-credit terms for that attorney's cases, the lender would advance to the attorney 60 percent of the $2,400 that the debtor would be paying post-petition, then the lender would proceed to collect the full cost of the bankruptcy from the debtor according to the set payment terms. If the debtor made all required payments, the attorney would receive another 15 percent that had been held back.[22] Under the financing agreement, the lender would retain $600 of the $2,400 paid by the debtor. In the event that payments were not made by the debtor, the attorney remained liable for the total credit extended.[23]

Although the *Milner* court found that bifurcated contracts are not prohibited under the Bankruptcy Code and that each case must be analyzed for appropriateness, the court concluded that the debtor's attorney did not provide adequate disclosure of his fees and services as required under 11 U.S.C. §§ 526-528 and voided the pre- and post-petition contracts.[24] The court explained that the compensation terms of the disclosure statement were difficult to understand, the disclosure of matters covered by both contracts was unclear, the disclaimer of representation was both confusing and inappropriate, and the fee options were also confusing.[25]

A High Standard: The *Hazlett* Test

Notwithstanding these concerns, some bifurcation agreements have been approved by courts.[26] Hon. **Kevin R. Anderson**'s opinion in *In re Hazlett* has developed into one of the most influential and often-cited analyses of bifurcated fee agreements and concludes that such arrangements are not *per se* prohibited.[27] The opinion, however, sets forth a strict test to consider when analyzing bifurcation cases that has proven to be influential to other courts in subsequent cases.[28] In addition, the opinion acknowledges the inherent problems with certain factoring mechanisms and discourages factoring generally unless the arrangement meets strict ethical requirements.[29]

The *Hazlett* court concluded that there are four essential requirements that must be satisfied when using bifurcated fee agreements: (1) The use of two contracts must be in the best interests of the client (*e.g.*, the client could not otherwise afford to hire bankruptcy counsel); (2) the attorney must provide appropriate disclosures, options and explanations; (3) the client must give his/her informed consent in writing; and (4) the attorney's fees and costs must be reasonable and necessary.[30] Applying this analytical framework to the facts of the case, the court found that the attorney had met each of these requirements and did not strike down the bifurcated fee arrangement.[31]

Attorney fee financing lenders and other advocates might be quick to point to *Hazlett* as "approval" of their bifurcated arrangements with debtors' counsel. Such a summary conclusion, however, oversimplifies the holding in the case. As noted by Hon. **Terrence L. Michael** in his article reviewing the various methods by which chapter 7 attorneys are paid, *Hazlett* offers a very narrow opportunity or "window" for debtors' counsel to attempt to "squeeze through in order to provide legal services to debtors and be paid after the case is filed."[32] The *Hazlett* test may or may not be embraced by all courts, but where it is, the *Hazlett* test prongs set a very high bar. The *Hazlett* case also involved unique facts and circumstances, not the least of which was the existence of a recent legal ethics opinion specifically approving bifurcated fee arrangements that was issued by the Utah State Bar.

Conclusion

The German word *Schlimmbesserung* means, "to make things worse through an effort to improve."[33] At the end of the day, consumer attorneys simply want to be compensated in a fair manner without risk to their licenses or livelihood, and it is likely from this simple desire that all of the creative arrangements for the payment of fees have sprung. In fairness to those practitioners that have tried new approaches, Congress did not design the Bankruptcy Code with a clear and reasonable mechanism for a chapter 7 attorney's compensation. While some form of bifurcated fee agreements might be helpful in opening the doors of bankruptcy to clients in need, the use of such agreements that pass along the increased expense that results from attorneys' factoring or financing arrangements should not be the answer. Such an approach to the payment of attorney's fees would ultimately raise the cost of relief, exposing well-meaning practitioners to ethical risks and hurting the one party that can least afford it: the clients. abi

21 *Id.* at 422.
22 *Id.*
23 *Id.*
24 *Id.* at 443.
25 *Id.* at 442.
26 *See, e.g., Hazlett* at *22; *Walton v. Clark & Washington PC*, 469 B.R. 383 (Bankr. M.D. Fla. 2012); *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012).
27 *Hazlett* at *22.
28 *Id.*
29 Specifically, *In re Hazlett* references the Utah State Bar Ethics Committee Advisory Opinion No. 17-06 (revised), Aug. 16, 2018.
30 *Hazlett* at *22-23.
31 *Hazlett* is not alone in recent opinions approving bifurcated fee arrangements. *See, e.g., In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020). The *Carr* court, however, admonished counsel to be clearer in his fee disclosure that the debtor was proceeding under dual fee agreements.
32 Hon. Terrence L. Michael, "There's a Storm a Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform," 94 *Am. Bankr. L.J.* 387, 400 (Fall 2020).
33 *See* German Embassy in Washington's blog, *available at* germanyinusa.com/2017/12/22/word-of-the-week-schlimmbesserung.

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2021 Winter Leadership Conference

Attorney Fee Bifurcation

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CONCURRENT SESSION

2021

AMERICAN BANKRUPTCY INSTITUTE

American Bankruptcy Institute
Winter Leadership Conference
December 9-11, 2021

BIFURCATED CHAPTER 7 ATTORNEY FEE ARRANGEMENTS AND FACTORING OF ATTORNEY FEES: THE POTENTIAL PROBLEMS, PITFALLS, AND ALTERNATIVES[1]

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All debtors' attorneys likely share the experience of meeting someone new in a social setting, explaining the work they do, then immediately hearing the question, "If someone is broke, how do they pay you?" Without question, the bankruptcy code provides no easy roadmap for consumer attorneys to be compensated by their chapter 7 debtor clients who often do not have ready access to savings or other available funds to pay in advance for the legal work they need.[2] One of the most significant challenges facing potential clients seeking debt relief through chapter 7 bankruptcy is how to afford to pay for their legal representation. This is not a new challenge. The problem for both the clients and the consumer bar is that courts have rightly concluded that any obligation owed to debtors' counsel under a prepetition chapter 7 fee agreement is not only stayed upon the filing of the bankruptcy but is also fully dischargeable.[3]

[1] These materials are adapted from an article by H. David Cox as published in the ABI Journal, June 2021.
[2] As one court has observed, a prepetition attorney fee agreement requiring the debtor to make post-petition installment payments "runs afoul of the general rule that prepetition debts are dischargeable." *In re Abdel-Hak*, 2012 Bankr. LEXIS 5393 (Bankr. E.D. Mich. 2012).
[3] *See*, *Rittenhouse v. Eisen*, 404 F.3d 395 (6th Cir. 2005); *In re Fickling*, 361 F.3d 172 (2nd Cir. 2004); *Bethea v. Robert J. Adams & Assocs*., 352 F.3d 1125 (7th Cir. 2003).

The Challenge of Getting Paid as Debtors' Counsel

The ABI Consumer Commission recognized the conundrum that consumer lawyers face when offering their services to potential chapter 7 debtors. The Commission's Report identified four possible ways to be compensated, each with its own flaws and drawbacks.[4] In the most common and traditional method, lawyers simply delay the filing in order to collect the required fees for the representation prior to filing the case. While such a method assures compliance with the Code and ethical rules, the burden on the client is high as he or she must scrape together funds at a time when they are seeking relief from debt. A small subset of lawyers is willing to gamble more with their fees and file a case without full payment with the hope that the debtor will voluntarily pay the fees from non-estate assets thereafter. This might aptly be called the "file and pray" option. Still other lawyers look to chapter 13 as a means for getting the debtor the relief needed with little paid up front, but such a practice raises questions about the suitability and overall cost of bankruptcy for the client.

These materials focus on the final option referenced in the Commission's Report, the bifurcation of the chapter 7 legal services into prepetition and post-petition contracts for services. Few disagree that consumer debtors' counsel should be paid appropriately for their good work; however, it is the opinion of the authors that bifurcation schemes are not the answer, particularly when they involve the factoring or financing of attorney's fees with third party vendors. The Consumer Commission recognized the problems inherent in such arrangements and "expressly disapprove[d] of attorney fee factoring agreements between debtors' attorneys and third-party collectors."[5] As this article further explains, the manner in which bifurcated cases have developed in practice not only exposes debtors' counsel to undue risk, it also becomes yet another tax on those in the most financial need.[6]

The Bifurcation Model

In recent years, a small but growing number of attorneys have utilized an approach to attract clients that permits them to offer low or no-money-down chapter 7 representation by dividing the legal services necessary for the entire case into two primary bundles: one for services that are rendered prepetition and the second for services that are rendered post-petition. Separating the work required for a bankruptcy into two parts like this is often referred to as "bifurcation," particularly if the client is provided the option to be represented for the full case, albeit in two parts.[7] At its core, the purpose of the bifurcation is to turn the attorney fee

[4] ABI Commission on Consumer Bankruptcy, 2017-2019 Final Report and Recommendations, at pp. 89-92, available at https://consumercommission.abi.org/commission-report.
[5] Final Report of the ABI Commission on Consumer Bankruptcy § 3.01 at p. 91 (American Bankruptcy Institute 2017-2019 Report and Recommendations).
[6] Washington Post reporter, DeNeen L. Brown, opines that "[y]ou have to be rich to be poor…. Put it another way: The poorer you are, the more things cost." Ms. Brown's article explores the high cost of services for those in financial need. For example, "[p]ayday advance companies say they are providing an essential service to people who most need them. Their critics say they are preying on people who are the most 'economically vulnerable.'" The High Cost of Poverty: Why the Poor Pay More (washingtonpost.com) www.washingtonpost.com/wp-dyn/content/article/2009/05/17/AR2009051702053.html?sid=ST2009051801162. Monday, May 18, 2009.
[7] *In re Hazlett*, No. 16-30360, 2019 Bankr. LEXIS 1166, *17 (Bankr. D. Utah Apr. 10, 2019).

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obligation into a post-petition, nondischargeable debt that can be collected from the client after the bankruptcy is filed.

Financing or Factoring Attorney Fees

Related to bifurcation is the emerging practice of some debtors' attorneys to contract with factoring companies or finance companies in order to assure some amount of up-front compensation to the attorney even when he or she offers low or no-money-down chapter 7 bankruptcies. In factoring situations, the debtor's attorney sells to a factor the post-petition accounts receivable for the bifurcated services contracted under the post-petition attorney fee agreement. The factor then collects directly from the debtor these post-petition fees without fear of violating the automatic stay or discharge injunction. Financing agreements work similarly, with the lender typically extending credit to the debtor's attorney secured by the receivables from the post-petition fee agreement and then providing the collections for those post-petition fees. The use of factoring companies and financing agreements like these, however, adds significant costs to the representation that are typically borne by the debtors in the form of higher attorney's fees and have come under scrutiny by certain courts and the Office of the U. S. Trustee, with complaints filed in various enforcement actions.[8]

Bifurcation is Based on a Flawed Premise

To be financially attractive as a low or no-money-down option, the bifurcated practice model relies on the premise that debtors' counsel may properly structure the case in such a way that the attorney completes the overwhelming majority of legal work required in the case *after* the filing of the petition. If true, then the attorney is able to maximize the fees for that work that may be collected as a post-petition obligation, undeterred by the automatic stay or the discharge injunction. Under such a scenario, a skeletal petition would be filed for little or no fees up-front from the debtor in order to initiate the case, and then the debtor would be offered the opportunity to contract post-petition for the remaining services of the attorney needed to complete the case.

The problem, however, is not in the theory of the business model but in its application. In practice, attorneys using bifurcated fee agreements may claim that the bulk of their work on a chapter 7 occurs *post-petition* but these attorneys have, in fact, inverted the distribution of work needed to represent properly chapter 7 debtors. The overwhelming majority of work needed to advise and represent a chapter 7 client competently is done *before* the case is filed, not after. By filing a case without having completed a thorough and reasonable investigation of the facts and circumstances of the client, counsel may unwittingly set in motion events out of the control of the debtor, with potential dire consequences and no path to exit other than pleading "cause"

[8] *See*, *e.g.*, Adversary Proceeding No. 17-01271, filed in the case of *In re Gilmore*, in the U.S. Bankruptcy Court for the Central District of California which resulted in a stipulated final judgment entered 8/16/19 providing for disgorgement, sanctions and injunctive relief. The enforcement action in *In re Neufville*, Case No. 17-24812, from the District of Maryland also resulted in a consent order entered 4/12/19 with certain sanctions against the debtor's counsel. A more recent and still pending case example may be found in the Western District of Washington in the Adversary Proceeding, *United States Trustee v. McAvity*, Case No. 20-00400.

under 11 U.S.C. § 707(a).[9] Following this method is akin to buckling your client into a dangerous rollercoaster at its highest point with the tracks beneath him or her yet unfinished.

The Court in *In re Wright* recognized this fallacy in the bifurcation model.[10] In that case, counsel sought to bifurcate the legal services into prepetition and post-petition work, with the debtor's counsel also factoring the fees due under the second contract. Under the attorney's arrangement with the factoring company, the attorney would be paid 60% of the post-petition fee upon execution of the contract, with an additional 15% of those fees paid if the accounts were sufficiently paid by the debtors.

In reviewing counsel's fees upon the motion of the U.S. Trustee, the Court questioned the designation of services allegedly provided post-petition, finding that if the bulk of the work were truly completed post-petition, counsel would not be adequately analyzing the case.[11] The Court found that the actual time spent for prepetition services was not consistent with the fee charged to pre- versus post-petition services. The effect was to turn an otherwise dischargeable prepetition claim into a nondischargeable claim and that "such a scheme works a fraud on both the debtor and the Court."[12]

The Court also found that the attorney failed to disclose that he shared fees with any third party and that he conflated the total amount the debtor agreed to pay for his services with the amount that the attorney agreed to accept from the factoring company. The Court was troubled by the higher fees in the bifurcated cases, concluding that "BAPCA presents serious impediments to the legality of this kind of bifurcated services scheme…." Notwithstanding these stated concerns about the factoring and bifurcation arrangement, the Court limited its ruling to matters under § 329 and ordered the disgorgement of fees based on improper disclosures.

The apparent misrepresentation of counsel's work as being completed post-petition was also evident in another action to review attorney's fees initiated by the U.S. Trustee in a case filed in the Bankruptcy Court for the Eastern District of Missouri. In that case, *In re Allen*, the U.S. Trustee alleged that the debtor's attorney bifurcated his services and financed his attorney's fees with a third-party lender.[13] The petition and matrix were filed for $0.00 down, with a second fee agreement entered post-petition for $2,000.00 and to be paid $167.00 per month for 12 months.[14] The receivables under that second agreement were then pledged to the financing company in exchange for an advance of 75% of the value of the post-petition agreement.

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[9] In fairness to the debtor, would the "cause" be an admission that the debtor's counsel failed to complete the due diligence necessary to advise properly on whether the case should have been filed in the first place?

[10] *In re Wright*, 591 B.R. 68 (N.D. Ok., Sept. 4, 2018).

[11] *Id*., at 94.

[12] *Id*. Notwithstanding these concerns raised about the bifurcation arrangement and the factoring of fees, the Court limited its ruling to matters under § 329 and ordered the disgorgement of fees based on improper disclosures. *Id*., at 99.

[13] *See*, Docket No. 15, *United States Trustee's Motion for Examination of the Fees of Debtor's Attorney,* filed October 9, 2020, in the U.S. Bankruptcy Court for the Eastern District of Missouri case of *In re Allen*, Case No. 20-42663.

[14] *Id.*

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Among the problems identified by the U.S. Trustee was the glaring and somewhat inconvenient truth that a mere 49 minutes after the initial petition was filed, the debtor's counsel filed the full balance of the debtor's schedules, statement of financial affairs, statement of intention, Official Form B22A, and Disclosure of Compensation of Attorney for Debtor.[15] As counsel for the U.S. Trustee noted in her brief to the Court, it is "nearly inconceivable" that counsel would be able to prepare all the schedules and statements for the case and then review them, along with a second fee agreement, with the client for signature and filing, as appropriate, with the court.[16]

The timing of events and accuracy of disclosures matter in bankruptcy and raise significant ethical concerns. If an attorney were to attempt to treat a case as bifurcated and have the client sign a post-petition fee agreement that purports to charge for work that was, in fact, completed prepetition, the attorney would not only be a party to an improper agreement requiring the payment a discharged debt but would also be violating the automatic stay and misrepresenting facts to the court. Ultimately, the Court in the *Allen* case did not directly address these issues but entered instead a limited, summary order reducing the attorney's fees based on the value of the work actually performed in the case without delving into the accuracy or merits of the bifurcation and financing arrangement.[17]

The appeal of the *Allen* case was heard by the Eighth Circuit BAP and affirmed.[18] In its decision, the BAP limited its review to the issue of whether the bankruptcy court abused its discretion in finding the attorney's fees were excessive under the bifurcated arrangement and ultimately the BAP agreed that the bankruptcy court acted well within its authority.[19] While the BAP specifically declined to express an opinion on the validity of bifurcation agreements or the unbundling of services, it took note of the fact that the attorney provided the same services to clients regardless of whether they bifurcated their fees or paid in full, yet the fees charged were different.[20] The BAP affirmed the decision reducing attorney's fees that was based, in part, on the bankruptcy court's findings that the additional fees charged to the bifurcated clients were unreasonable.

Thereafter, on November 8, 2011, citing the *Allen* BAP opinion, the Bankruptcy Court for the District of Minnesota issued an *en banc* order requiring debtors' counsel practicing in its district to file a motion to review and seek approval of attorneys' fees in cases where any fees are unpaid or otherwise come due after the date of filing.[21] Failure to comply will result in a show cause being issued against the offending attorney.

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[15] *Id*.
[16] *Id*.
[17] *See*, Docket No. 25, *Order Granting United State Trustee's Motion Concerning Attorney's Fees,* entered November 23, 2020, in the U.S. Bankruptcy Court for the Eastern District of Missouri case of *In re Allen*, Case No. 20-42663.
[18] *In re: Allen*, 628 B.R. 641 (B.A.P. 8th Cir. 2021).
[19] *Id*., at 644.
[20] *Id*.
[21] *In re: Post-Petition Attorney's Fee Arrangements in Chapter 7 Case*, Case 21-00401, (Bankr. D. Mn., *en banc*, 11/08/21).

Higher Fees

Factoring and financing scenarios also typically result in the debtor paying a significantly higher amount in attorney's fees simply because the debtor is unable to pay the fees in full prior to filing the case. Increasing attorney's fees to compensate for the factoring or financing of fees runs afoul of the reasonableness of fees requirements of 11 USC § 329(b). The fact that the attorney is willing to accept an amount that is discounted from what he or she would otherwise be asking the debtor to pay due to factoring or financing arrangements supports the notion that the fees that the debtor is being charged are inflated. As at least one state bar ethics committee acknowledged the issue by asking, "[i]f the lawyer is willing to do the work with a thirty percent discount, we question (but do not resolve) whether the total fee is reasonable."[22]

As an example, the Court in *In re Milner*,[23] cancelled the debtor's counsel's post-petition fee agreement that required $2,700.00 in total payments on the basis that the fees charged were unreasonable.[24] In that case, the Court found that counsel offered debtors the option of paying $1,500.00 prior to the filing of the case if fees were paid up-front.[25] Counsel also offered a bifurcated fee agreement option whereby the debtors would pay just $300.00 down to get the case filed and then complete 12 payments of $200.00 per month post-petition. The debtor in the *In re Milner* case proceeded with the bifurcated fee option, notwithstanding the additional 80% cost over the up-front payment option of $1500.00 that the attorney offered to many of his clients.[26]

The bifurcated services in *In re Milner* also involved a financing arrangement.[27] The attorney, in order to facilitate the payment and collection of the debtor's post-petition payments, entered into a line of credit agreement with a third-party lender. Under the line of credit terms for that attorney's cases, the lender would advance to the attorney 60% of the $2,400.00 that the debtor would be paying post-petition and then the lender would proceed to collect the full cost of the bankruptcy from the debtor according to the set payment terms. If the debtor made all required payments, the attorney would receive another 15% that had been held back.[28] Under the financing agreement, the lender would retain $600.00 of the $2,400.00 paid by the debtor. In the event payments were not made by the debtor, the attorney remained liable for the total credit extended.[29]

Although the *Milner* Court found that bifurcated contracts are not prohibited under the Bankruptcy Code and that each case must be analyzed for appropriateness, the Court concluded that the debtor's attorney did not provide adequate disclosure of his fees and services as required under 11 U.S.C. §§ 526-528 and voided the prepetition and post-petition contracts.[30] The Court

[22] Utah State Bar Ethics Committee Advisory Opinion No. 17-06 (Revised), at ¶ 19, August 16, 2018.
[23] 612 B.R. 415 (Bankr. W.D.Ok. 2019) (currently on appeal). At the time of the submission of this article, no decision on the appeal at the District Court has been issued.
[24] *Wright* at 443.
[25] *Id.,* at 421.
[26] *Id*., at 438.
[27] *Id*., at 422.
[28] *Id*.
[29] *Id*.
[30] *Id*., at 443.

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explained that the compensation terms of the disclosure statement were difficult to understand, the disclosure of matters covered by both contracts was unclear, the disclaimer of representation was both confusing and inappropriate, and the fee options were also confusing.[31]

The court's concerns in *Milner* highlight many of concerns with bifurcated fee agreements in general. If a court is confused by the terms of a representation agreement, it is virtually certain that a consumer debtor will also be confused and uncertain as to the terms of representation. Does the debtor understand that the very person the debtor is trusting to help them eliminate all their debt could very well be the same person that is attempting to collect debt from the debtor post-petition? Does the debtor understand that in a factoring situation the attorney has agreed assign the right to collect the post-petition portion of the attorney fee to a non-attorney third-party that is unknown to the debtor, a third-party that is not governed by the same set of ethics guidelines that govern attorneys, a third-party that appears to simply play the role of collection agent?

Reasonable, Disclosed And Informed

Clear disclosure of the bifurcation of the legal services and the factoring or financing of the attorney's fees must be made both to the debtor and the Court. The American Bar Association's Model Rules of Professional Conduct Rule 1.2 (c) allows attorneys to limit the scope of their representations as long as the limitation is reasonable, and the client gives informed consent after full disclosure. Further, Bankruptcy Rule 2016(b) mandates disclosures for payments made "in a case under this title, or in connection with such a case."

The ABA's Model Rules of Professional Conduct 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Rule 1.0(e) then defines "informed consent," explaining that it "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Courts carefully consider the requirement of informed consent in the context of bifurcated fee arrangements, specifically questioning whether the debtor comprehends the risks associated with the withdrawal of the attorney should the post-petition payments not be completed.[32] It would be no easy task to explain to any layperson the risks of representing oneself at a meeting of creditors and the need to complete all tasks necessary for a discharge. Debtors should be advised of any options other than entering into a second fee agreement, including proceeding *pro se* or hiring another lawyer to complete his or her case.[33] Boilerplate agreements with legal disclosures may not be sufficient to meet the high burden of informed consent in these situations.

The U.S. Trustee initiated an enforcement action in a case in Maryland over the attorney's use of bifurcation along with the factoring of attorney's fees. The Trustee's allegations and the debtor's attorney in the *In re Neufville* matter included concerns related to the debtor's counsel's use of retainer documents, consent forms, and recurring payment forms

[31] *Id*., at 442.
[32] See e.g., *In re Grimmett*, 2017 Bankr. LEXIS 1492 (D. Idaho 2017) (affm'd on appeal).
[33] *See*, *Walton II*, at 386.

provided by the third-party factory company.[34] The U.S. Trustee alleged that the use of those forms of a third party by the debtor's attorney that had a financial arrangement with that third party impacted the attorney's independent professional judgment and created a conflict of interest.[35]

Local Rules Can Make Bifurcation Problematic

In a recent South Carolina case, a local attorney representing potential chapter 7 debtors offered the option to several clients to enter into bifurcated fee agreements.[36] The attorney also financed the attorney's fees with a third-party lender who would assist with the collection of accounts receivable. The U.S. Trustee filed motions in three such cases, challenging the use of bifurcated fee arrangements under §§ 329(a), 526, and 528, and the Court's local rules. The U.S. Trustee requested the Court order the attorney to return to the debtors all funds he received under the post-petition fee agreements.

The Court ordered return of all fees paid post-petition in the three cases and held that bifurcated agreements violated a Local Rule providing that, with the exception of appeals and adversary proceedings, "the law firm/attorney which files the bankruptcy petition for the debtor shall be deemed the responsible attorney of record for all purposes including the representation of the debtor at all hearings and in all matters arising in conjunction with the case."[37]

Cautious Approval of Some Bifurcation Arrangements

Notwithstanding these concerns, some bifurcation agreements have been approved by courts.[38] Judge Kevin Anderson's opinion in *In re Hazlett* has developed into one of the most influential and often cited analysis of bifurcated fee agreements and concludes that such arrangements are not per se prohibited.[39] The opinion, however, sets forth a strict test to consider when analyzing bifurcation cases that has proven influential to other courts in subsequent cases.[40] In addition, the opinion acknowledges the inherent problems with certain factoring mechanisms and discourages factoring generally unless the arrangement meets strict ethical requirements.[41]

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[34] Ultimately the *In re Neufville* matter was resolved by the entry of a consent order entered 4/12/19 cancelling the fee agreements between the debtor and the debtor's attorney and providing for the disgorgement of certain fees. *In re Neufville*, Case No. 17-24812, Docket Entry No. 104, April 12, 2019, U.S. Bankruptcy Court for the District of Maryland.

[35] The Trustee's pleading cited the Maryland Rules of Professional Conduct that correspond to the ABA Model Rules of Professional Conduct, including Rule 5.4(c) on maintaining the lawyer's professional independence, Rule 1.8(f) on receiving compensation from third parties, and Rule 1.7(a) on conflicts of interest.

[36] *In re Prophet*, 628 B.R. 788 (Bankr. D.S.C. Mar. 29, 2021) (appeal pending).

[37] *See*, SC LBR 9011-1(b).

[38] *See, e.g.*, *Hazlett* at *22; *Walton v. Clark & Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2012); *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012).

[39] *Hazlett* at *22.

[40] *Id*.

[41] Specifically, *In re Hazlett* references the Utah State Bar Ethics Committee Advisory Opinion No. 17-06 (Revised), August 16, 2018.

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In *Hazlett*, the debtor's attorney offered the debtor three payment options: (1) pay the attorney $2,400.00 prepetition which included the attorney's fees and court filing fee; (2) pay the attorney $500 prepetition for the preparation and filing of the bankruptcy petition, statement of social security number, and application to pay the court filing fees in installments and then (a) proceed *pro se*, (b) hire another attorney to complete the case, or (c) enter into a post-petition fee agreement with the attorney to complete the bankruptcy case; and (3) pay nothing prepetition and enter into a prepetition retainer agreement for the preparation and filing of the initial bankruptcy papers for $0 down, with the option to either proceed *pro se*, hire another attorney, or enter into a post-petition fee agreement of $2,400 (which included fees and costs) in 10 equal monthly payments for the prosecution of the case through the entry of a discharge. The debtor selected the third option.

The *Hazlett* Court concluded that there are four essential requirements that must be satisfied when using bifurcated fee agreements: (1) the use of two contracts must be in the best interests of the client (*e.g*., the client could not otherwise afford to hire bankruptcy counsel); (2) the attorney must provide appropriate disclosures, options, and explanations; (3) the client must give his or her informed consent in writing; and (4) the attorney's fee and costs must be reasonable and necessary.[42] Applying this analytical framework to the facts of the case, the Court found that the attorney had met each of these requirements and did not strike down the bifurcated fee arrangement.[43]

Attorney fee financing lenders and other advocates may be quick to point to *Hazlett* as "approval" of their bifurcated arrangements with debtors' counsel. Such summary conclusion, however, oversimplifies the holding in the case. As noted by Northern District of Oklahoma Bankruptcy Judge Terrence Michael in his article reviewing the various methods chapter 7 attorneys are paid, *Hazlett* offers a very narrow opportunity or "window" for debtors' counsel to attempt to "squeeze through in order to provide legal services to debtors and be paid after the case is filed."[44] The *Hazlett* test may or may not be embraced by all courts, but where it is, the prongs of the test set a very high bar.

Hazlett is not alone in recent opinions approving bifurcated fee arrangements. In *In re Carr*, the Eastern District of Kentucky Bankruptcy Court analyzed the practices of a consumer practice that filed a number of chapter 7 cases receiving $300 from the debtors prepetition and then were paid $1,185 post-petition.[45] After the Court determined that debtor did not schedule any debt owed to the attorneys, the Court required the attorneys to file their written engagement agreement and related documents.

The Court made the following findings of fact. Under a single contract option, a Chapter 7 debtor could pay the attorneys $800.00 plus filing fees. Under a two-contract option, the debtor could pay the attorneys $300 prepetition for prepetition services rendered and $850.00 for

[42] *Hazlett* at *22-23.
[43] *Hazlett*, though, is not alone in recent opinions approving bifurcated fee arrangements. *See, e.g., In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020). The *Carr* Court, however, did admonish the attorney to be clearer in his fee disclosure that the debtor was proceeding under dual fee agreements.
[44] Terrence L. Michael, *There's A Storm A Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform*, 94 AM. BANKR. L.J. 387, 400 (Fall, 2020).
[45] *In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020).

post-petition services (plus $335.00 for the filing fee) to paid post-petition in 12 equal monthly payments of $98.75. The debtor had the option of continuing *pro se* or hiring another attorney for post-petition services. The Court noted that the payment scheme included a relatively modest internal interest rate of 7.55%, the attorney collected the payments from the debtor's bank account with consent, and no factoring agreements were involved.

Ultimately, the Court concluded that the attorneys' representation of debtors under dual contracts satisfied the requirements in the Code, the Bankruptcy Rules, and applicable ethical rules. The Court did offer one admonition, though. The attorneys should have been more clear in their fee disclosure regarding the fact that they were proceeding under a dual contract scheme of representation.

In re Brown, Judge Isicoff, also found that bifurcated fee arrangement that did not involve factoring may be permissible, but specifically stated in dicta that the Court would "not allow any attorney to factor its legal fees." [46] In determining whether a fee arrangement is permissible the Court looked at whether the arrangement was reasonable and whether counsel provided adequate disclosure of any limitation on the scope of representation as to the pre- and post-petition services to be rendered.

More recently, however, the Western District of Kentucky rejected bifurcated fee arrangements where factoring was involved.[47] In *In re Baldwin,* Judge Lloyd reviewed the fee arrangement of a single attorney in 11 cases. In each case, the attorney offered the Debtors a bifurcated fee arrangement, whereby he filed a skeletal Chapter 7 Petition and paid the filing fee. Seven to fourteen days after the skeletal Petition was filed the remaining schedules and statements were filed, including Form 2030, the attorney fee disclosure. In the disclosure, counsel indicated in response to Question 1, that the Debtor had agreed to pay $0.00 for legal services, that counsel had prior to the filing of the statement received $0.00, and that the balance due was $0.00.[48] In response to Question 4, counsel stated, "I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm." The disclosure went on to refer to the bifurcated fee agreement and explain the fee structure including counsel's line a credit from a third-party lender that was secured by the attorney fees due in connection with the cases. In each case, counsel was paid $0.00 in connection with the preparation and filing of the petition and he was to be paid $2,500.00 for work done after the petition was filed, including representation at the first meeting of creditors. The Debtors were allowed to pay the post-petition fees and costs in installments for up to 12 months.

The opinion contains an extensive overview of the fee agreement, filing process, and factoring arrangement, whereby the factoring company advanced 60% of the $2,500.00 attorney fee to the attorney soon after the second fee agreement was entered into, obtained a lien on the

[46] *In re Brown*, 2021 WL 2460973 at *27.
[47] *In re Baldwin,* 2021 Bankr. LEXIS 2753 (Bankr. W.D. Ky. Oct. 5, 2021).
[48] In ten of the eleven cases at issue in *Baldwin*, the attorney advanced the filing fee and then collected the advanced fee amount post-petition through the monthly installments. The Court specifically found that advancement of the filing fee by an attorney, with the expectation of repayment post-petition, violates 11 U.S.C. §526(a)(4). The court further found that advising a client to incur debt in order to pay for bankruptcy related legal services violates 11 U.S.C. § 362 and upon discharge violates 11 U.S.C. § 524. *25.

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account receivable along with the right to collect, and ultimately retained 25% of the attorney fees as compensation for its services. The court found that the "essential problem presented [by the factoring arrangement] is that [counsel] is using the post-petition contract to get the debtor/client to pay fees they could not pay quite literally the moment before the petition is filed, adding a complex nondischargeable contract and exorbitant expenses to a debtor/client instead of the promised 'fresh start.'"[49]

The court ultimately found that the bifurcated fee contracts and arrangements at issue lacked adequate disclosure to the debtors and the court and that the fees were not reasonable. It concluded "after exhaustive analysis…that the fee arrangements offered by [counsel] and accepted by his clients…violate the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the Kentucky Rules of Professional Conduct." In reaching his conclusion, Judge Lloyd consulted with all of the Judges in the Western District of Kentucky, each agreed with the Judge Lloyd's conclusions and the opinion specifically states that "the legal conclusions set forth in this Memorandum-Opinion represent the legal conclusions of all Judges of the Bankruptcy Court for the Western District of Kentucky."[50]

Alternatives

All courts addressing the issue of bifurcation and factoring have recognized the inherent dilemma facing debtors and debtors' counsel: how to be paid appropriately under the Code. However, short of Congress acting, solutions are few and most present their own risks.

The least fraught, and perhaps most obvious alternative involves the debtor recruiting help from family or friends to pay the legal fees prior to filing. Care must be taken to identify whether the advance by others is a loan or a gift. If it is a loan, it must be scheduled as such. The risk of non-payment is thereby shifted to those near and dear to the debtor. If it is a gift, it should be disclosed on the Statement of Affairs and the Rule 2016 disclosure.

"File and pray" encapsulates the practice of accepting partial payment of the fee before filing with the debtor's promise to pay the balance voluntarily after filing. The Code is explicit that nothing prevents the debtor from voluntarily repaying a debt for the balance of her attorney's fees following entry of the discharge. §524(f). The utility of this approach is utterly dependent on the client's ability and willingness to make payment post-filing. Any obligation to pay the balance of the fees is discharged and thus collection options in the case of nonpayment are limited and the attorney must be explicit in communication with the client that the client has no legal obligation to pay. This author's experience with "file and pray" over decades of practice is 100% negative.

A low payment Chapter 13 utilizes the statutory provisions for payment of attorneys in 13 to get the debtor relief from his debts despite the lack of prepetition cash. Courts have divided over whether a Chapter 13 that functionally pays no creditor other than the debtor's lawyer is proposed in good faith. In *Crager*[51], the 5th Circuit affirmed confirmation of a fee-only Chapter

[49] *Id.* at *18.
[50] *Id*., at * 4.
[51] 691 F.3d 671(5th Cir. 2012).

13 and cited the trial court for the proposition that, given the debtor's age and health, it would "border on malpractice" to suggest selecting Chapter 7. On similar facts, the 11th Circuit opined in *Brown* [52]that an elderly debtor merely had to stop paying creditors for seven months or so, and he'd be able to pay for a Chapter 7.

Since the issue of how the profoundly cash-strapped individual is to exercise his rights to seek bankruptcy relief is well-known to the bench, this author wonders if the provisions of 524 could be utilized to seek approval of the court for debtor's reaffirmation of a bifurcated fee arrangement. The most obvious issue is the conflict presented by the attorney's role as debtor's advocate while being the very creditor whose interest is being carved out of the discharge. Query whether the need for disclosure associated with prepetition bifurcation agreements is meaningfully different from the disclosures required by Section 524.

Whatever counsel's approach to the payment conundrum, compliance with FRBP 2016(b) remains essential. The Rule implements Bankruptcy Code S. 329(a) requires disclosure of compensation paid or agreed to be paid in connection with the bankruptcy case and the source of that compensation. Failure to timely comply with the required disclosures can result in reduction in allowed fees or disgorgement of those fees.

Conclusion

Although this paper argues that bifurcation arrangements are not the answer to the compensation conundrum that debtors and their attorneys face, the law continues to develop. Before treading into the waters of bifurcating fees, debtors counsel should be sure to carefully study the opinions across the country addressing this area of the law to understand the risks. The inquiry should not stop there as bifurcation arrangements have been attacked under state ethical rules and local rules as well. Of course, attorneys should also carefully consider the local practices and decisions relevant to their own districts and review the enforcement actions of the Assistant U.S. Trustees in their area.

The tension created by the requirement of the prepayment of chapter 7 attorney's fee in the face of the overwhelming need for relief of individuals burdened with collections has resulted in attorneys employing several different approaches to being paid for their work. At the end of the day, consumer attorneys simply want to be compensated in a fair manner without risk to their licenses or livelihood, and it is likely from this simple desire that all of the creative arrangements for the payment of fees have sprung. In fairness to those practitioners that have tried new approaches, Congress did not design the Bankruptcy Code with a clear and easy mechanism for a chapter 7 attorneys to be paid. Until that changes, though, debtors' attorneys should be mindful of the risks of deviating from the prepayment of their fees.

[52] 742 F.3d 1309 (11th Cir. 2014).

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Faculty

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BUSINESS SESSION

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The Effective Cross Examination of Expert Witnesses: An Art, Not a Science

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Cross-Examination of Experts in Bankruptcy Court

Based on two publications by Judge Michael G. Williamson:

"Practical Evidence Manual"

"*Daubert* in Bankruptcy Practice: Dispelling Some Common But Questionable Working Assumptions"

I. Admissibility of Expert Opinions Before *Daubert*.

A. **Cranks and Paid Advocates:** The case of ***Chaulk v. Volkswagen***[1] provides a good example of the historical difficulties faced by trial courts prior to *Daubert* in dealing with expert testimony of dubious soundness. In *Chaulk*, the **jury returned a verdict for the plaintiff on her theory that the defendant car manufacturer's door latch system was negligently designed and inherently dangerous.[2] The plaintiff's case rested on the testimony of one expert witness, an engineer whose last involvement with door latches ended 13 years before the trial.**[3] In the words of the dissenting Circuit Judge Richard A. Posner, the engineer later became "a professional expert witness against automobile companies in cases involving issues of door-latch design."[4]

B. **Following the jury verdict in favor of the plaintiff, the trial judge directed a verdict against the plaintiff based on the judge's conclusion that the expert's testimony amounted to a wholesale condemnation of the automobile industry for failing to adopt safety precautions that "would not have prevented a single accident in the history of transportation."**[5] The Seventh Circuit reversed the trial judge's directed verdict on the basis that it was "'clearly wrong'" because the expert's testimony was both "'credible'" and "substantially unopposed."[6]

C. It is apparent that **the trial judge was performing what has since become widely referred to as a "gatekeeping"[7] function by determining that the testimony upon which the jury founded its verdict was inherently not reliable and therefore not admissible.** As discussed by Judge Posner in his dissent, "no reasonable jury could have believed [the expert's] testimony that the design of the . . . door latch was defective in a sense relevant to products liability law."[8]

D. As aptly summarized by Judge Posner regarding the historical problem and abuse that results from admitting this type of expert testimony:

> [The expert's] was the testimony of a crank or, what is more likely, of a man who is making a career of testifying for plaintiffs in automobile accident cases....His testimony illustrates the age-old problem of expert witnesses who are often the mere advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot be proved by some so-called "experts."[9]

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[1] Chaulk v. Volkswagen of Am., Inc., 808 F.2d 639 (7th Cir. 1986).
[2] *Id*. at 640.
[3] *Id*. at 644 (Posner dissenting).
[4] *Id*.
[5] *Id*. at 645 (Posner dissenting).
[6] *Id*. at 643.
[7] The term "gatekeeping," as used in the context of expert testimony, can be traced back to a 1985 case decided by the noted author on the topic of evidence (and then Chief Judge), Hon. Jack B. Weinstein. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1260 (E.D.N.Y. 1985) ("The uncertainty of the evidence in [toxic tort] cases, dependent as it is upon speculative scientific hypotheses and epidemiological studies, creates a special need for robust screening of experts and *gatekeeping* under Rules 403 and 703 by the court." (emphasis added)). As support for this proposition, he cites the February 1985 draft version of the "Manual for Complex Litigation 2d § 21.4.8 at 21-60-61 & nn. 117-20."
[8] *Chaulk*, 808 F.2d at 644.
[9] *Id*. at 644 (citing *Keegan v. Minneapolis & St. Louis R.R.*, 76 Minn. 90, 95, 78 N.W. 965, 966 (1899)).

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II. Admissibility of Expert Opinions After *Daubert.*[10]

A. Opinion testimony arises in bankruptcy courts in numerous circumstances ranging from a chapter 13 debtor's testimony on the value of the debtor's furniture and appliances in a contested plan confirmation hearing to an accountant's testimony on the sufficiency of a fund to cover future personal injury claims in the context of confirmation of a chapter 11 plan of reorganization resolving mass tort claims.

B. One of the most important tools available to bankruptcy practitioners faced with the introduction of such opinion testimony is an objection under *Daubert*, as implemented through Rule 702 of the Federal Rules of Evidence. Unfortunately, this tool is often neglected based on a misconception that it has little application to the routine types of opinion testimony that regularly occur within the context of a bankruptcy case.

C. *Daubert* rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence."[11] It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue. **As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate."**[12]

D. Experts must "show" their work. Fed. R. Evid. 705; Fed. R. Civ. P. 26(a). As the Seventh Circuit explained:

> "[An] opinion has a significance proportioned to the sources that sustain it.[13] An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."[14]

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, **an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data**. But the expert may be required to disclose those facts or data on cross-examination.

FED. R. CIV. P. 26(a)(2)—Disclosure of Expert Testimony.

(A) In General. [A] party must disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

[10] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).
[11] *Id*. at 589.
[12] *Id*. at 595.
[13] *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 34, 170 N.E. 479, 483 (1930) (Cardozo, J.).
[14] *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)(citing *Richardson v. Richardson-Merrell, Inc*., 857 F.2d 823, 829-32 (D.C. Cir. 1988)).

> **(B) Witnesses Who Must Provide a Written Report.** [U]nless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness…. The report must contain:
>
> (i) **a complete statement of all opinions the witness will express and the basis and reasons for them**;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

III. *Daubert* Is Not Limited to Jury Trials.

A. Lawyers erroneously assume that because the judge is the trier of fact in the typical bankruptcy evidentiary hearing, the Daubert "gatekeeping" function of a trial judge has no practical applicability. That is, because bankruptcy cases do not typically involve juries, the approach ought to be "let it all in," and then the court (as the trier of fact) can give appropriate weight, if any, to otherwise unreliable opinion testimony.

B. Contrary to this working assumption, **the gatekeeper function of a trial court does not depend on whether the case will be tried before a jury.** In many instances, the issue may arise in a pre-trial procedural posture. In fact, the *Daubert* case itself was decided on summary judgment.

IV. Rule 702 incorporates *Daubert.*

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) **the testimony is the product of reliable principles and methods**; and
>
> (d) **the expert has reliably applied the principles and methods to the facts of the case**.

V. Application of Rule 702.

A. In determining whether a proffered expert is qualified under Rule 702, trial courts must consider whether:

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1. the expert is **qualified** to testify competently regarding the matters he or she intends to address;

2. the **methodology** by which the expert reaches his or her conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and

3. the testimony **assists the trier of fact**, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.[15]

B. **"If the [expert] witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."**[16]

C. Thus, **Rule 702** permits that a witness who is qualified as an expert by knowledge, skill, experience, training or education to give opinion testimony provided the testimony satisfies **three reliability requirements**:

1. The testimony must be based on **sufficient facts or data**. This is a quantitative rather than qualitative test, *i.e.*, the issue is sufficiency of data relied upon by the expert. For example, what data in the form of comparable sales did the automobile appraiser rely upon?

2. The testimony must be the product of **reliable principles and methods**. This is a qualitative analysis. The principles must be reliable. Turning to the common example of an automobile appraiser—the principle generally relied upon by such appraisers is that comparable sales are a good predictor of what a willing buyer will pay a willing seller, thereby indicating the fair market value of an automobile.

3. Finally, the **witness must have applied the principles and methods reliably to the facts of the case**. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they must have been reliably applied to the particular facts relied upon by the expert. For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent comparables invalid as predictors of value as of the date of the petition?

D. ***Daubert* listed several factors to be considered**: (1) Can the theory or technique be tested? (2) Has the theory or technique been subject to peer review and publication? (3) What is the known or potential rate of error? (4) Is the theory generally accepted?[17]

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[15] *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).
[16] *Id*. at 1261 (emphasis omitted).
[17] *Id.* at 593-595.

VI. Expert Qualification Is Not *Daubert's* Focus.

A. While clearly only qualified witnesses may give expert opinion testimony under Rule 702, the focus of *Daubert* is on the judge's role as a gatekeeper for the admission of the opinion rather than on the judge's role in passing on the qualification of the expert. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.*,[18] "[u]nder the regime of *Daubert* . . . **a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.**"[19] Put another way, "[j]udges should not be buffaloed by unreasoned expert opinions,"[20] even from the most qualified of experts.

B. In fact, **the qualification of the experts in *Daubert* and *Kumho Tire Company v. Carmichael*,[21] was not at issue**. In *Daubert*, the Supreme Court noted that **all the experts "possessed impressive credentials."**[22] In *Kumho*, the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications . . . ."[23]

C. A case particularly illustrative of this point is ***In re Brand Name Prescription Drugs Antitrust Litigation*.[24] At trial, the plaintiffs called as their expert a witness who had "eminent and distinguished credentials," who was a past recipient of the Nobel Prize in Economics,** "an award without equal in recognition of scholarship and contributions in his chosen discipline," and who was affiliated with "indisputably one of the finest educational institutions in the world."[25] However, as the court noted, the expert's "eminent credentials cannot serve to lessen or eliminate that settled requirement of admissibility."[26]

D. **In concluding that the expert's opinions "failed every test of admissibility"[27] the court found that the witness was ignorant of material testimony and other evidence and that his opinions were offered without any scientific basis or having been the subject of economic methodological testing.**[28] The court directed a judgment in favor of the defendants at the conclusion of the plaintiffs' case.[29]

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[18] *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir. 1996).
[19] *Id.* at 318.
[20] *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) (citing Paul Meier, *Damned Liars and Expert Witnesses,* 81 J. Am. Statistical Ass'n 269 (1986)).
[21] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. 1999).
[22] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 583 (1993).
[23] *Kumho,* 526 U.S. at 153.
[24] 1999 U.S. Dist. Lexis 550 (N.D. Ill. 1999). In *Brand Names*, the plaintiff alleged a price-fixing conspiracy in which the defendants agreed to eliminate price competition and to keep prices of brand name prescription drugs artificially high to retail pharmacies, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.
[25] 1999 U.S. Dist. Lexis 550, at *28.
[26] *Id.* at *33.
[27] *Id.* at *34.
[28] *Id.* at *29.
[29] *Id.* at *48.

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VII. *Daubert* in Practice.

A. The following is an all too common example of the direct examination of an expert on automobile value. (The context is the **debtor's motion to determine the secured status of a creditor's claim that is secured by a lien on the debtor's automobile**.) Here's how the testimony goes:

> *Debtor's Counsel: "Your Honor, I call Joseph Perrilli to the witness stand."*
>
> *Debtor's Counsel: "Mr. Perrilli, what experience do you have in the valuation of automobiles?"*
>
> *Witness: "I've been in the car business for 40 years. During that time, I've bought and sold in the neighborhood of 10,000 cars."*
>
> *Debtor's Counsel: "At my request, did you perform an appraisal of the Debtor's 1997 Ford Taurus?"*
>
> *Witness: "Yes, I did."*
>
> *Debtor's Counsel: "Based on your years of experience in buying and selling automobiles, were you able to form an opinion as to its value?"*
>
> *Witness: "Yes, I was. In my opinion it has a fair market value of $9,700."*
>
> *Debtor's Counsel: "Thank you, Mr. Pirrelli. Your Honor, no further questions."*

B. This scenario unfortunately arises frequently in bankruptcy courts. It is clear, however, that no matter how qualified Mr. Perrilli is, the testimony he has given fails to meet the criteria of Rule 702. Specifically, there is **no evidence as to the types of data Mr. Perrilli relied upon for his opinion. Examples of such data may include: anecdotal experience of the witness or others that the witness has consulted with concerning sales of similar automobiles,[30] market reports and commercial publications generally used and relied upon by the persons in the business of buying and selling used cars,[31] local auto auction reports, and advertisements.**

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[30] These examples may be derived by the expert from discussions with other dealers:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted . . . .

FED. R. EVID. 703.

[31] FED. R. EVID. 803(17) excludes from the hearsay rule market reports and commercial publications generally used and relied upon by the public or by persons in particular occupations (*e.g.*, N.A.D.A., Kelley Blue Book, Edmunds.com).

C. The advisory committee note to Rule 702 references that **the types of witnesses who may provide expert testimony under Rule 702 are** not limited to experts in the "strictest sense of the word, e.g., physicians, physicists, and architects, but **also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values.**"[32]

D. In ***Kumho Tire Company v. Carmichael,***[33] the Supreme Court concluded that ***Daubert's*** **"general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."**[34] Recognizing that there are many kinds of experts,[35] the Court concluded that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[36]

E. While ***Kumho*** clarifies *Daubert,* making clear that all expert testimony should be subject to the trial judge's gatekeeping function, it **gives little practical guidance on how the reliability of expert testimony should be tested in the context of routine expert testimony heard in the bankruptcy courts. This guidance finally came in the form of the recent revisions to Rule 702.**[37]

VIII. *Daubert* and Summary Judgment.

A. The trial court's gatekeeping function under ***Daubert*** **and Rule 702 has contributed to an effective litigation technique useful against a party whose case depends on expert testimony**. The case of *Downs v. Perstorp Components, Inc.*[38] is an example of this technique. Following the exchange of expert witness reports as required by Federal Rule of Civil Procedure 26(a)(2)[39] and the passing of the deadline for such reports to be obtained and furnished, the defendant moved to exclude the plaintiff's expert testimony under *Daubert.* The defendant also moved for summary judgment on the basis that once the expert witness's opinion was excluded, the plaintiff lacked evidence of a material element of its claim for relief.[40] The district court granted both motions and entered judgment for the defendant. The Sixth Circuit affirmed on appeal.[41]

B. This approach -- where the trial judge enters **summary judgment based on the exclusion of an expert opinion essential to a party's case** -- has been upheld in at least one case by every

[32] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).
[33] *Kumho*, 526 U.S. 137.
[34] *Id.* at 141.
[35] The Court referenced "experts in drug terms, handwriting analysis, criminal *modus operandi,* land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others." *Id.* at 150.
[36] *Id.* at 152.
[37] *Supra,* n. 7.
[38] *Downs v. Perstorp Components, Inc*., 2002 WL 22000 (6th Cir. Tenn.)(unpublished opinion).
[39] Effective December 1, 2000, bankruptcy courts may no longer opt out of the applicability of the disclosure requirements set forth in Federal Civil Procedure Rule 26 in adversary proceedings. Rule 26 is also applicable to contested matters "unless the court orders otherwise." Fed. R. Bankr. P. 9014.
[40] *Downs,* 2002 WL 22000, *1.
[41] *Id.*

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circuit court of appeals considering the issue over approximately the last three years.[42] Thus, it is no less applicable to a bankruptcy court -- whether it be on summary judgment or in the conduct of a contested evidentiary hearing (such as in *Dow Corning*[43] where a "*Daubert*" objection was made to the introduction of expert testimony in the context of an objection to confirmation under the "best interest" requirement of section 1129(a)(7) of the Bankruptcy Code).

IX. Appellate Courts Give Trial Judges Considerable Leeway on *Daubert* Objections.

A. **Lawyers erroneously assume that** the prudent approach for a trial judge (in anticipation of an appellate review or to preserve the record for appellate review) is to admit the proffered testimony once the expert is qualified. **Objections to the methodology of the expert in arriving at the opinion must then necessarily go to the weight to be given to the expert opinion evidence rather than its admissibility.** Attorneys appearing before bankruptcy courts often accept this final working assumption with little, or no, argument.

B. Rather than accepting the status quo, **practitioners should make *Daubert* objections, seeking the outright exclusion of the testimony.** If successful, there is then no evidence in the record whatsoever on the issue for which the opinion testimony is offered. While a party may certainly appeal the ruling on admissibility of the opinion under *Daubert* -- the burden for an appellant in such an appeal is a high one. **As the Supreme Court stated in *Kumho,* the "law grants the trial judge broad latitude to determine" whether the *Daubert* factors are, or are not, reasonable measures of reliability in a particular case.**[44] In applying an abuse of discretion standard on appeal, appellate courts give trial courts "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[45]

C. **Abuse of discretion was first definitively held to be the proper standard by which to review a trial court's decision to admit or exclude scientific evidence in the Supreme Court case of *General Electric Company v. Joiner.*[46]** In *Joiner,* the Supreme Court disagreed with the Eleventh Circuit's conclusion that a trial court should limit its role to determining the legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing, expert opinions.[47]

D. **In the context of a *Daubert* objection, the Supreme Court referred to long-standing precedent for the proposition that an appellate court should not reverse a trial court's**

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[42] *See* Downs*,* 2002 WL 22000; Provident Life & Accident Ins. Co., 18 Fed. Appx. 554 (9th Cir. 2001); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001); *Glastetter v. Novartis Pharm. Corp*., 252 F.3d 986 (8th Cir. 2001); *Pride v. BIC Corp*., 218 F.3d 566 (6th Cir. 2000); *Washburn v. Merck & Co., Inc*., 213 F.3d 627 (2nd Cir. 2000); *Cipollone v. Yale Indus. Products, Inc*., 202 F.3d 376 (5th Cir. 2000); *Nat'l Bank of Commerce v. Associated Milk Producers, Inc.,* 191 F.3d 858 (8th Cir. 1999); *Jaurequi v. Carter Mfg. Co., Inc*., 173 F.3d 1076 (8th Cir. 1999); *Heller v. Shaw Indus., Inc*., 167 F.3d 146 (3d Cir. 1999); *Mitchell v. Gencorp, Inc*., 165 F.3d 778 (10th Cir. 1999).

[43] S*upra*, n. 5.

[44] *Kumho,* 526 U.S. at 153.

[45] *Id. See also Wilson v. Woods,* 163 F.3d 935, 936 (5th Cir. 1999)(district courts are given wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge will not be disturbed on appeal unless manifestly erroneous).

[46] *General Electric Company v. Joiner,* 522 U.S. 136, 146 (1997).

[47] *Id.* at 141.

exercise of this discretion unless the ruling is "manifestly erroneous."[48] The Eleventh Circuit had erred in *Joiner* when it applied an "overly 'stringent' review to that ruling [and] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."[49] The Court went on to state that:

> [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit*[50] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[51]

E. Consistent with this mandate from the Supreme Court, a review of the approximately 43 circuit courts decisions **over the last three years** reviewing a trial court's exclusion of opinion testimony based on a *Daubert* analysis reflects great deference being given to trial courts on this issue. In these cases, **the affirmance rate was approximately 74 percent**,[52] with reversal occurring in 26 percent[53] of the cases reviewed.

X. Expert Reports are not Admissible.

A. Invariably, after qualifying an expert witness to testify in the form of an opinion, the attorney calling the expert will move for introduction into evidence of the expert's written report. There is a misconception that because the witness is qualified to give the opinion set forth in the expert report, that the expert's written report is admissible. To the contrary, **opposing counsel should object to the admission of the expert report on the following grounds:**

1. **The facts or data contained in the expert's written report need not be admissible in evidence in order for the expert's opinion testimony to be**

[48] *Id.* at 142 (citing *Spring Co. v. Edgar,* 99 U.S. 645, 658 (1879)).
[49] *Id.* at 143 (citing *Koon v. United States,* 518 U.S. 81, 98-99).
[50] The term "i*pse dixit"* is latin for "he himself said it." It means something asserted but not proved. Black's Law Dictionary 833 (7th ed. 1999).
[51] *Joiner,* 522 U.S. at 146 (citing *Turpin v. Merrell Dow Pharmaceuticals, Inc*., 959 F.2d 1349, 1360 (6th Cir. 1992) *cert. denied*, 506 U.S. 826 (1992)).
[52] *Downs,* 2002 WL 22000; *Black v. M & W Gear Co*., 269 F.3d 1220 (10th Cir. 2001); *Dhillon v. Crown Controls Corp*., 269 F.3d 865 (7th Cir. 2001); *U.S. v. Langan,* 263 F.3d 613 (6th Cir. 2001); *Provident*, 18 Fed. Appx. 554; *Saldana v. Kmart Corp.*, 260 F.3d 228 (3d Cir. 2001); *Glastetter,* 252 F.3d 986; *J.B. Hunt Transp., Inc. v. Gen. Motors Corp*., 243 F.3d 441 (8th Cir. 2001); *Nelson v. Tenn. Gas Pipeline Co*., 243 F.3d 244 (6th Cir. 2001); *Oddi v. Ford Motor Co*., 234 F.3d 136 (3rd Cir. 2000); *Bowe v. Consol. Rail Corp*., 230 F.3d 1357 (6th Cir. 2000); *U.S. v. Allerheiligen*, 221 F.3d 1353 (10th Cir. 2000); *Pride,* 218 F.3d 566; *Washburn*, 213 F.3d 627; *Gates v. City of Memphis,* 210 F.3d 371 (6th Cir. 2000); *Cipollone,* 202 F.3d 376; *Moisenko v. Volkswagenwerk Aktiengesellschaft,* 198 F.3d 246 (6th Cir. 1999); *In re TMI Litigation,* 193 F.3d 613 (3rd Cir. 1999); *Nat'l Bank of Commerce v. Associated Milk Producers, Inc.,* 191 F.3d 858; *Allison v. McGhan Medical Corp*., 184 F.3d 1300 (11th Cir. 1999)*; Thomas v. Washington Indus. Med. Ctr., Inc*., 187 F.3d 631 (4th Cir. 1999); *U.S. v. Salimonu,* 182 F.3d 63 (1st Cir. 1999); *Norris v. Ford Motor Co*., 182 F.3d 909 (4th Cir. 1999); *U.S. v. Paul,* 175 F.3d 906 (11th Cir. 1999); *Jaurequi,* 173 F.3d 1076; *In re Unisys Sav. Plan Litig.,* 173 F.3d 145 (3rd Cir. 1999); *Heller,* 167 F.3d 146; *U.S. v. Hall,* 165 F.3d 1095 (7th Cir. 1999); *Wilson v. Woods*, 163 F.3d 935 (5th Cir. 1999); *Mitchell,* 165 F.3d 778; *In re Barnes,* 266 B.R. 397 (8th Cir. 2001).
[53] *Lauzon v. Senco Prod., Inc.,* 270 F.3d 681 (8th Cir. 2001); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001); *U.S. v. Mathis*, 264 F.3d 321 (3rd Cir. 2001); *Alfred v. Caterpillar, Inc*., 262 F.3d 1083 (10th Cir. 2001); *Hardyman v. Norfolk & Western Ry. Co.,* 243 F.3d 255 (6th Cir. 2001); *U.S. v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001); *Jahn v. Equine Services, PSC.,* 233 F.3d 382 (6th Cir. 2000); *Smith v. Ford Motor Co*., 215 F.3d 713 (7th Cir. 2000); *Walker v. Soo Line R.R. Co.,* 208 F.3d 581 (7th Cir. 2000); *Curtis v. M&S Petroleum, Inc.,* 174 F.3d 661 (5th Cir. 1999); *Nemir v. Mitsubishi Motor Sales of Am*., 6 Fed. Appx. 266 (6th Cir. 2001).

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admissible.[54] Consequently, the expert's written report will contain inadmissible evidence. If the written report is admitted into evidence without any reservations, then inadmissible evidence relied upon by the expert will then become part of the record.

2. As with self-serving letters, written reports prepared by experts fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is **no exception to the hearsay rule contained in either Rule 803 or 804 for expert reports.**

B. The opposing attorney should also be vigilant in objecting to the expert's testimony to ensure that it does not go beyond the opinions set forth in the written report. In this respect, **the written report must contain a complete statement of all opinions the witness will express, the basis for the reasons for the opinions, and the data or other information considered by the witness in forming them.**[55] **Any testimony beyond the areas covered in the expert's written report should be objected to.**

C. Even though the expert written report should not be admitted into evidence, it is nevertheless **useful to have the report marked as an exhibit and received as a demonstrative aid to assist in following the expert's testimony.** In this fashion, the inadmissible evidence contained in the report does not come into evidence. However, the report will be part of the record for reference purposes when considering the expert's testimony.

XI. Defusing the Expert's Opinions at Trial.

A. Bias and Interest.[56]

1. Bring out terms of compensation with respect to paid witnesses.

2. The witness's meeting with opposing counsel and possible "coaching" received by witness by opposing counsel in connection with the witness's testimony may show bias.

B. Expose weaknesses in expert's credentials. Perhaps show that expert spends more time theorizing than doing.[57]

C. Investigate whether expert's credentials are real.[58]

D. Have the expert admit material facts favorable to your client's case.[59]

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[54] FED. R. EVID. 703.
[55] FED. R. CIV. P. 26(a)(2)(B).
[56] ROBERT E. OLIPHANT, YOUNGER ON EVIDENCE (WITH FEDERAL RULES OF EVIDENCE) 36 (self-published 1978) ("*Younger"*).
[57] Thomas C. O'Brien and David D. O'Brien*, Effective Strategies for Cross Examining an Expert Witness*, 44 Litigation (No 1) at p. 26 (Fall 2017).
[58] *Id.*
[59] *Id*. at 28.

E. Did the expert follow established protocol?[60]

F. Did the expert fail to consider material facts favorable to your client's case?[61]

G. Learned Treatise Exception to Hearsay Rule. Fed. R. Evid. 803 (18):

> (18) **Statements in Learned Treatises, Periodicals, or Pamphlets**. A statement contained in a treatise, periodical or pamphlet if:
>
> > (A) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> >
> > (B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
> >
> > If admitted, the statement may be read into evidence but not received as an exhibit.

H. Use of expert depositions at trial in lieu of live testimony. *Compare* Fed. R. Civ. P. 32(a)(4) *with* Fla. R. Civ. P. 1.330(a)(3)(F).

XII. Should You Cross-Examine at Trial? [62]

A. Before rising to cross-examine a witness, the advocate should first consider the following questions. **Has the witness given any testimony that is harmful to the advocate's case? Are the facts testified to by the witness subject to reasonable dispute? Most importantly, is it necessary for the advocate to cross examine the witness at all?**

B. In the words of one of the great trial lawyers of all times:

> "Most young lawyers seem to think it is necessary to cross-examine every witness called against their side of the case. Being conscious of their own capacity as trial lawyers, they are afraid of being criticized by their clients or associates if they lose the opportunity for cross examining. At the very threshold of this discussion let me denounce this idea as most erroneous. Almost daily, even now, lawyers associated with me in my cases expostulate with me for allowing witnesses to leave the stand without any cross-examination, until the excited whisper in my

[60] *Id*. at 28.
[61] *Id*. at 29.
[62] For an informative and entertaining lecture on this topic *see* Irving Younger, The Ten Commandments of Cross-Examination (National Institute for Trial Advocacy 1975) (video recording available from Stetson University College of Law, Law Library) ("Younger's Ten Commandments").

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ear, 'Are you going to ask this witness any questions at all?' has become so familiar that I should almost miss its absence in my daily work."[63]

C. **More damage is done by attorneys to their clients' cases in the area of cross-examination than any other area.** All too often, gaps in an opposing party's prima facie case are filled by the other party on cross-examination. "An advocate should remember that 'he is the greatest cross examiner who makes the fewest blunders,' and a single mistake may make an opening for a flood of testimony that may overwhelm him."[64]

XIII. Ten Rules of Cross-Examination.

Here are Ten Rules to follow when considering whether and how to conduct cross-examination:[65]

Rule #1: Be brief, short, and succinct. Use short questions with plain words. Avoid long complicated sentences containing clauses with subordinate clauses on subordinate clauses. On a good day, you may have three points to make. Make them and sit down. Remember—the shorter the time you're on your feet, the less damage you'll do.

Rule #2: Never ask anything but a leading question. (Go ahead, put words in the witness's mouth—make the witness say what you want.)

Rule #3: Never ask a question to which you do not already know the answer. "[I]t should be remembered that fishing questions are very apt to catch the wrong answers."[66] Cross-examination is not a deposition—the time for discovery has passed! An exception to this is where it doesn't matter what the answer is.

Rule #4: Listen to the answer!

Rule #5: Do not quarrel with the witness. Avoid the one question too many. If you get a stupid answer, STOP. (See Rule #6 below.)

Rule #6: Never permit a witness to explain anything. They will.

Rule #7: Do not give the witness an opportunity to repeat what the witness said on direct examination. All too often the advocate takes the witness over the same story that the witness has already given his adversary in the absurd hope that the witness is going to change the story in the repetition and not retell it with double effect upon the trier of fact.[67] This only reinforces the other party's case.

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[63] FRANCIS L WELLMAN, DAY IN COURT OR THE SUBTLE ARTS OF GREAT ADVOCATES 182 (The Macmillan Company 1910).
[64] *Id.* at 183.
[65] Rules one through seven are adapted from Younger's Ten Commandments.
[66] *WELLMAN*, *supra* note 15, at 185.
[67] *Id.* at 187.

Rule #8: When in doubt, stick to safe areas for cross, e.g., areas of impeachment (discussed below) such as bias or lack of sincerity, faulty perception, faulty memory, and prior inconsistent statements.

Rule #9: Don't make a mountain out of a mole hill. "The mistake should be avoided, so common among the inexperienced, of making much of **trifling discrepancies**. It has been aptly said that juries have no respect for small triumphs over a witness's self-possession or memory."[68]

Rule #10: Don't be a jerk. "The sympathies of the jury [or judge] are invariably on the side of the witness, and they are quick to resent any discourtesy toward him."[69] "It is marvelous how much may be accomplished with the most difficult witness simply by good humor, a smile, and tone of friendliness."[70] "An advocate should exhibit plainly his belief in the integrity of the witness and a desire to be fair with him, and try to induce him into being candid."[71]

[68] *Id.* at 195.
[69] *Id.* at 189.
[70] *Id.*
[71] *Id.* at 194.

Consumer Corner

BY DONALD R. LASSMAN

A Debtor's Dilemma: Undisclosed Claims

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Undisclosed claims — rights to payment that a debtor becomes aware of after a bankruptcy case is filed and that were not included on Schedule A/B as originally filed[1] — can present many challenges for debtor's counsel. The increasing prevalence of medical procedures whose consequences might be unknown or unknowable until many years after the procedure is performed, as evidenced by the proliferation of mass tort claims, is requiring debtor's counsel to confront the problems posed by undisclosed claims with increasing frequency. Moreover, many debtors are understandably confused by solicitations from law firms seeking to represent their interests in pending complex litigation.

The better practice is to avoid the problems posed by undisclosed claims by carefully questioning the debtor prior to the case filing about any injuries or accidents that they have suffered, any medical procedures that they have undergone, any claims that they have against third parties, or any correspondence that they have received referencing claims that might be brought on their behalf. Debtor's counsel should also remind debtors that after a case is filed, they must immediately notify counsel regarding any correspondence or offers of payment that they may receive relating to a claim.[2] However, these precautionary steps will not always work. This article identifies the issues that debtor's counsel must consider when determining how to address undisclosed claims, and presents a guide for resolving those issues designed to minimize harmful consequences to debtors.

Is the Claim Property of the Estate?

When analyzing how to address an undisclosed claim, the first step must be to determine whether the claim is property of the bankruptcy estate. Section 541 of the Bankruptcy Code broadly defines "property of the estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case." Bankruptcy trustees typically assert that any connection with the pre-filing period is sufficient to bring the claim within the ambit of estate property. Because a debtor's property interests are determined by reference to state law,[3] the correct analysis focuses on whether the claim is "sufficiently rooted in the prebankruptcy past, and so little entangled with the bankrupts' ability to make an unencumbered fresh start, that it should be regarded as property of the estate."[4] In *Segal*, the U.S. Supreme Court held that a tax refund received by the debtor after its bankruptcy case was filed was property of the bankruptcy estate because the debtor had an interest in the refund when the case was filed, and a postponement of payment of the refund until after the bankruptcy case was filed does not change the result.

When determining whether a claim is property of the estate, courts examine whether all of the elements of a viable claim are present on the petition filing date. In *In re Ross*,[5] a chapter 7 trustee filed a motion to re-open a closed case in order to administer a post-closing settlement offered to the debtor in connection with a device implanted prior to the petition filing date. The trustee asserted that any cause of action relating to the device that accrued *at any time* after the bankruptcy case was filed was property of the estate.[6] The debtor opposed the motion, asserting that she had yet to suffer any injury from the device and that the settlement proceeds therefore did not constitute property of the estate. The *Ross* court found in the debtor's favor and denied the trustee's motion to reopen, finding that the tort settlement proceeds were not property of the estate because the debtor had not yet been harmed; therefore, all the elements of the tort claim were not yet present at the time of the filing.[7] Debtor's counsel must carefully analyze whether an undisclosed claim is property of the estate and not assume that because an element of a claim might have accrued pre-petition, the claim is property of the bankruptcy estate subject to administration by the case trustee.

1 The scope of this article extends to cases in which the debtor becomes aware of a claim and/or its value after the bankruptcy petition has been filed. This article does not address cases in which the debtor has refused or otherwise willfully failed to disclose assets.

2 In many cases, debtor's counsel will first learn of a claim from the case trustee, who in turn was most likely alerted to the claim by counsel prosecuting the claim on the debtor's behalf and seeking to determine whether the claim was listed on the debtor's Schedule A/B and abandoned by the trustee or, if the claim was not listed, whether the trustee is going to assert an interest in the claim.

3 *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

4 *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966).

5 *In re Ross*, 548 B.R. 632, 635 (Bankr. E.D.N.Y. 2016).

6 The settlement was offered in exchange for a release of all present and future claims in connection with the device.

7 *See also Ostrander v. Van Dam (In re Mateer)*, 559 B.R. 1 (Bankr. D. Mass. 2016) (malpractice claims asserted against debtor's counsel do not constitute property of bankruptcy estate because although act alleged to be malpractice occurred prefiling, debtor suffered no harm from that act until after bankruptcy case was filed); *Sikirica v. Harber (In re Harber)*, 553 B.R. 552 (Bankr. W.D. Pa. 2016) (personal-injury claim payment was not property of estate where debtor had suffered no injury until after bankruptcy case had been closed).

Addressing Undisclosed Claims in Open Cases

Assuming that a claim is property of the bankruptcy estate, when the claim is discovered *prior* to case closing, the debtor should promptly file amended schedules[8] in accordance with Bankruptcy Rule 1009[9] in order to add the claim as an asset on Schedule A/B and add the appropriate exemption(s) on Schedule C to preserve and retain the value of the claim for the debtor. Voluntarily amending the schedules should substantially minimize the risk of challenges to the debtor's discharge under § 727 (*i.e.*, § 727(a)(2) (concealed property) or § 727(a)(4) (false oath)), and the imposition of criminal sanctions (*i.e.*, 18 U.S.C. § 152 ("Concealment of assets; false oaths and claims; bribery")). Once the schedule amendments are allowed, parties-in-interest and the case trustee have 30 days to object to new exemption claims on Schedule C. However, as a practical matter, *Law v. Siegel*[10] has substantially narrowed the range of challenges to exemption claims absent express statutory support for the challenge, or an exemption that is fictitious or not legitimately available (or subject to limitation) under the applicable exemption statute.[11]

Addressing Undisclosed Claims in Closed Cases

When a claim is first discovered *after* the case has been closed, next steps are more complicated and perilous. First, counsel must locate the client, advise the client of the issues presented and possible outcomes, and determine whether the client is interested in retaining counsel to pursue the matter. In the absence of a provision in the original fee agreement pertaining to case reopening, it might be necessary to negotiate new terms and conditions for retention and file an amended Rule 2016(b) statement disclosing the new terms of retention to the court.[12]

Sorting out the issue of what must be disclosed, to whom and when can present a vexing problem for counsel. While disclosure is always the best practice in a bankruptcy case, the debtor may have a very different view and request that no disclosure be made to the case trustee, particularly if a compelling argument can be made that the claim is not even property of the estate. Counsel must have a careful discussion with the debtor about the critical importance of full disclosure to minimize the risk of discharge revocation under 11 U.S.C. § 727(d)(2),[13] and explain the likelihood that the case trustee will find out about the claim in any event from the lawyers handling the claim. If counsel and the debtor are unable to come to an agreement on the proper approach, counsel may have to decline or withdraw from further representation of the debtor.

Assuming that an agreement is reached on the issue of disclosure and the debtor wants counsel to continue representation, the debtor may file a motion requesting that the case be re-opened[14] and pay the reopening filing fee of $260. Alternatively, the debtor could avoid the filing fee by alerting the case trustee to the existence of the undisclosed claim and requesting that the case trustee (in conjunction with the Office of the U.S. Trustee) seek reopening to administer the claim.

Case reopening is within the bankruptcy court's sound discretion.[15] Once the case has been reopened, the debtor should promptly amend its schedules in order to disclose the claim. However, depending on the law of the jurisdiction in which the case is pending, the process for amending schedules after a case is reopened might be radically different from the amendment process in cases that have not yet been closed. This difference is perhaps best illustrated by *In re Awan*.[16]

In *Awan*, the U.S. Trustee filed a motion to reopen the bankruptcy proceeding in February 2017 to administer an undisclosed personal-injury claim. After the case was reopened, the chapter 7 trustee promptly moved to hire counsel to pursue the claim and filed a motion to approve a settlement of the claim shortly thereafter. After the court had approved the settlement, the debtor filed amended Schedules A/B and C disclosing the personal-injury claim, seeking to exempt the settlement proceeds. The Trustee objected to the exemption claim as untimely under Rule 9006(b)(1), and because the debtor had not shown "excusable neglect"[17] for enlarging the amendment time period as required by that rule.

The court held a hearing on the trustee's exemption objection and directed the debtor to file a motion for an extension of time that set forth the circumstances of excusable neglect. The debtor never filed the motion to extend time and instead filed a motion to withdraw the amended Schedule C. The trustee asserted that the debtor's liberal right to amend schedules contained in Rule 1009(a) did not apply in a closed case and that in a closed case, a schedule amendment is only permissible upon a showing of excusable neglect pursuant to Rule 9006(b).

Case law interpreting the application of Rule 1009 to schedule amendments in reopened cases have thus far adopted one of three approaches: (1) Rule 1009 applies in both open and reopened cases (the "broad approach"); (2) Rule 1009 prohibits amendments in reopened cases (the "narrow approach"); or (3) Rule 1009 does not apply in reopened cases, but a schedule amendment might be accomplished under Rule 9006(b)(1) (the "middle

8 The proper manner for amending schedules and whether leave of court is necessary (*i.e.*, schedule amendment by notice or motion) is usually subject to local rules and typically depends on when the amendment is being made during the case.

9 Pursuant to Fed. R. Bankr. P. 1009(a), the debtor may amend schedules "as a matter of course at any time before the case is closed."

10 *Law v. Siegel*, 134 S. Ct. 1188 (2014).

11 *In re Hoover*, 574 B.R. 413 (Bankr. D. Mass. 2017).

12 Local rules for the bankruptcy court should also be consulted in the event that there is a rule addressing the scope of debtor's counsel's obligation to provide representation throughout the course of a bankruptcy case.

13 The question to ask here is whether the time period for bringing a discharge revocation action under § 727(e)(2)(B) runs out when a case is first closed or is resurrected by the reopening until such time as the reopened case is closed.

14 Section 350 provides for case reopening to "administer assets, to accord relief to the debtor or for other cause."

15 *Mendelsohn v. Ozer*, 241 B.R. 502, 506 (E.D.N.Y. 1997).

16 *In re Awan*, 2017 Bankr. Lexis 3177 (Bankr. C.D. Ill. 2017).

17 Determining excusable neglect is a two-step process. The first step is to determine whether the failure was due to neglect, which, in turn, is defined as inadvertence, mistake or carelessness, or intervening circumstances beyond the party's control. The second consideration is whether the neglect is excusable. Courts make this determination through a consideration of all circumstances surrounding the failure to timely act, including a danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether the delay was within the reasonable control of the party seeking the extension, and whether the party seeking the extension has acted in good faith. *See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993); *In re Dollman*, 2017 Bankr. Lexis 3304 (Bankr. D.N.M. 2017).

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approach"). The court adopted the middle approach, finding that the debtor's right to amend as a matter of course ended when the case was closed. Further, the court sustained the trustee's exemption objection because the debtor had not requested an extension of time for filing an amended Schedule C, nor attempted to make a showing of excusable neglect as required under Rule 9006(b).[18]

The lesson for debtors is plain. In reopened cases, debtors should face few obstacles to schedule amendments in jurisdictions adopting the broad approach, but should expect to have little success in obtaining approval of schedule amendments in jurisdictions adopting the narrow approach. In courts adopting the middle approach, the burden placed on the debtor to obtain the approval of schedule amendments might be quite substantial and costly, most likely requiring an evidentiary hearing in order to establish the necessary elements of cause and excusable neglect — a proceeding that a debtor might be wholly unable to afford.

18 Although not discussed in *Awan*, in addition to requiring excusable neglect, Rule 9006(b) also requires the party seeking the time extension to "show cause" as to why the extension should be granted. *See Moretti v. Bergeron (In re Moretti)*, 260 B.R. 602, 610 (B.A.P. 1st Cir. 2001) ("In addition to excusable neglect, the Debtor must establish that there is cause to amend. In other words, he must demonstrate that amending the schedules would serve a significant purpose and not be inconsequential.").

Conclusion

Managing undisclosed claims in open and reopened cases is fraught with complexity. Debtor's counsel must carefully think through available options and develop a sound strategy that will preserve the debtor's ability to exempt undisclosed claims, and avoid the possibility of criminal sanctions and jeopardizing the debtor's discharge. abi

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Faculty

Hon. James R. Ahler is a U.S. Bankruptcy Judge for the Northern District of Indiana in Hammond, appointed in June 2017. Previously, he served as the judge of the Jasper Superior Court in Jasper County, Ind., from 2007-17. During his tenure as a state trial judge, Judge Ahler presided over hundreds of significant criminal and civil trials, including many jury trials. By appointment of the Indiana Supreme Court, he also served as a hearing officer to preside over attorney misconduct allegations prosecuted by the Indiana Disciplinary Commission. Prior to his judicial service, Judge Ahler was a litigation attorney for approximately 10 years. He also completed two separate federal judicial clerkships, the first for Hon. Michael S. Kanne and the second for Hon. William J. Bauer, both of the U.S. Court of Appeals for the Seventh Circuit. Judge Ahler received his Bachelor's degree from Indiana University-Bloomington and his J.D. from Saint Louis University School of Law.

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. She also acts on a regular basis as the presiding judge in the Northern District of Illinois for naturalization ceremonies. Previously, Judge Baer was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is a member of the ABI Board of Directors, the CARE National and Chicago Advisory Boards, and the Chicago IWIRC Network Board, as well as several committees. She also is chair of the NCBJ 2023 Education Committee and a frequent speaker for ABI, the ABA, the Chicago Bar Association, IWIRC and NCBJ, and she regularly acts as the presiding judge for the Northern District of Illinois in naturalization ceremonies. Judge Baer earned her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Hon. James W. Boyd is a U.S. Bankruptcy Judge for the Western District of Michigan in Grand Rapids, appointed in May 2014, and presides over bankruptcy matters in Grand Rapids and Traverse City. Prior to his appointment, he was a partner in the law firm of Kuhn, Darling, Boyd and Quandt PLC in Traverse City, Mich., where he practiced in the areas of bankruptcy law and commercial litigation. From 1988-2014, he served as a chapter 7 panel trustee and as a chapter 11 operating and liquidation trustee in many cases. While a trustee, he served on the board of directors of the National Association of Bankruptcy Trustees from 1999-2013 and was its president in 2010. He has also served as an operating and liquidating receiver under Michigan law for numerous entities. Judge Boyd is a contributing author to ICLE's *Handling Consumer and Small Business Bankruptcies* and is a member of the Federal Bar Association and ABI, as well as a frequent speaker. He received his J.D. from the Thomas M. Cooley Law School**.**

Hon. David D. Cleary is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed in December 2019. Previously, he chaired Greenberg Traurig LLP's Business Reorga-

nization & Financial Restructuring Practice in Phoenix, where he focused his practice on business restructuring and reorganizations, distressed-asset dispositions and financings, debt restructurings and workouts, and litigation. He regularly represented distressed companies, financial institutions, secured and significant creditors, noteholders and bondholders, hotel/resort owner/operators, boards of directors, debtors, official and ad hoc committees, and insurance and surety portfolios. Judge Cleary is a Master with the Arizona Inns of Court, past co-chair of the American Bar Association's Litigation Section of its Bankruptcy and Insolvency Committee, past chair of the Chicago Bar Association's Rules Sub-Committee of its Bankruptcy Committee, and past co-chair of ABI's Asset Sales and Health Care Committees. He was listed in *The Best Lawyers in America* and in *Southwest Super Lawyers*, and he was a member of the winning team for The M&A Advisor's "Restructuring of the Year (Over $500mm to $1 Billion)" award in 2015 for the restructuring of FriendFinder Networks. He is also rated AV-Preeminent by Martindale-Hubbell. Judge Cleary was admitted to practice in Arizona and Illinois, before the U.S. Courts of Appeals for the Ninth and Seventh Circuits, and before the U.S. District Courts for the District of Arizona and the Northern District of Illinois. He received his B.A. *cum laude* from Arizona State University in 1984 and his J.D. with honors from DePaul University College of Law in 1987, where he was an article and note editor for the *DePaul Law Review*.

Hon. Catherine J. Furay is Chief Bankruptcy Judge for the Western District of Wisconsin in Madison. Prior to her appointment, she practiced bankruptcy, commercial law and business litigation. Judge Furay is a frequent lecturer on bankruptcy, commercial law, ethics, marital property and litigation skills. She served as an adjunct faculty member at the University of Wisconsin Law School teaching lawyering skills for 21 years and guest lectures for its bankruptcy course. Judge Furay is a member of the Bankruptcy Judges Advisory Group of the Administrative Office of the U.S. Courts, the bankruptcy judge member of the Advisory Process Review Working Group, and a member of the Advisory Group for the AO's Bankruptcy Case Weighting Study. In 2020, she became a Fellow of the American College of Bankruptcy. Judge Furay is a contributing author of *Construction Law*, Chapter 16, "Bankruptcy," and is the author of several articles on various bankruptcy, collection, marital property and litigation topics. In 2019, Judge Furay became the editor-in-chief of *Ginsberg & Martin on Bankruptcy*. She is a member of the National Conference of Bankruptcy Judges, for which she serves as a member of its Elections, Finance, and Online Learning Committees. She has also served as the Seventh Circuit representative on the NCBJ Board of Governors and on the Next-Gen and Technology Committees of NCBJ. Judge Furay is a member of ABI and currently serves on the Education Advisory Committees for the Central States Bankruptcy Workshop and the Hon. Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference. In addition, she is a member of the Turnaround Management Association, a member of the Board of Trustees, past chairman of the board, and past president of the Certification Oversight Committee. Judge Furay has served on the board of governors and various committees of the State Bar of Wisconsin, including its Executive and Finance Committees. In addition to being co-author of *Wisconsin Business Advisors Series: Collections & Bankruptcy Vol. 4* (Pinnacle Books), she co-authored the *Wisconsin Civil Litigation Forms Manual* (Pinnacle Books). Judge Furay received her J.D. from the University of Wisconsin-Madison Law School.

Hon. Laura K. Grandy is Chief Judge of the U.S. Bankruptcy Court for the Southern District of Illinois in East St. Louis, appointed in 2010. Previously, she was a principal with the law firm of Mathis, Marifian, Richter & Grandy, where she concentrated her practice in corporate reorganiza-

tions, bankruptcy and banking. She also served as a chapter 7 panel trustee for 18 years. While in private practice, she successfully argued a case before the U.S. Supreme Court. Judge Grandy serves as the bankruptcy representative to the Seventh Circuit Judicial Council. She also serves on the Seventh Circuit Judicial Council Space and Facilities Committee and on the Bankruptcy Judges Advisory Group to the Administrative Office of the U.S. Courts. Judge Grandy is a member of the National Conference of Bankruptcy Judges, the Illinois State Bar Association, the Missouri Bar, the St. Clair County Bar Association, BASIL and the National Association of Bankruptcy Trustees. She also was a co-producer of a Broadway show that was nominated for a Tony Award. Judge Grandy received her B.A. from Eastern Illinois University and her J.D. from St. Louis University.

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 (2019-21). She also chairs the Public Outreach committee of the National Conference of Bankruptcy Judges (NCBJ) and is a member of NCBJ's Ethics and International Judicial Relations committees. Judge Hanan received her undergraduate degree from Marquette University and her J.D. in 1996 from the University of Wisconsin Law School.

Hon. Brett H. Ludwig is a U.S. District Judge for the Eastern District of Wisconsin in Milwaukee, sworn in on Sept. 10, 2020, and a former U.S. Bankruptcy Judge for the Eastern District of Wisconsin, sworn in on Feb. 27, 2017. He previously was a commercial litigation partner at Foley & Lardner LLP in Milwaukee, where he focused on commercial litigation and dispute resolution and chaired the firm's *pro bono* practice. He has also taught at the Marquette University Law School. Upon graduation from law school, Judge Ludwig clerked for Hon. George G. Fagg on the U.S. Court of Appeals for the Eighth Circuit. He received his B.A. from the University of Wisconsin – Stevens Point in 1991 and his J.D. *magna cum laude* from the University of Minnesota Law School in 1994.

Hon. Margaret Dee McGarity is a retired U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee, appointed in 1987, reappointed in 2001 and retired in 2016. She served as Chief Judge from 2003-10. Prior to her appointment, she was in private practice, concentrating primarily in the areas of bankruptcy, family law and marital property, and she served on the panel of chapter 7 trustees. Judge McGarity has been a frequent lecturer on various marital property and bankruptcy-related topics, especially on the interrelationships between family law and the Bankruptcy Code, having participated in seminars sponsored by the Federal Judicial Center, National Conference of Bankruptcy Judges, National Association of Bankruptcy Trustees, National Association of Chapter 13 Trustees, ABI, State Bar of Wisconsin, Supreme Court of Wisconsin (Judicial Education Division), National Child Support Enforcement Association, National Judicial College, National Association of Consumer Bankruptcy Attorneys, National Association of Juvenile and Family Court Judges, and various bar associations, among others. She is a co-author of *Marital Property Law in Wisconsin*, published by the State Bar of Wisconsin; a co-author of *Collier Family Law and the Bankruptcy Code*, published by Matthew Bender/LexisNexis; and a contributing author of *Collier*

on Bankruptcy, also published by Matthew Bender/LexisNexis. She has also authored numerous articles dealing with the practical aspects of bankruptcy practice. Judge McGarity is a Fellow of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges, ABI, the National Association of Women Judges and the Thomas E. Fairchild Inn, AIC. She received her undergraduate degree Phi Beta Kappa from Emory University and her J.D. in 1974 from the University of Wisconsin Law School.

Hon. Paul E. Singleton is a U.S. Bankruptcy Judge for the Northern District of Indiana in South Bend. After graduating from law school in 2009, he worked at Indiana Legal Services, where he practiced family and landlord/tenant law. He then joined the Family Justice Center of St. Joseph County, where he handled cases involving civil protective orders. Judge Singleton's professional experience includes private practice in employment law at Faegre Baker Daniels (now Faegre Drinker Biddle & Reath LLP) and serving as assistant city attorney for the City of South Bend. He also served as Magistrate Judge for the St. Joseph Superior Court, where he presided over criminal and civil cases. Judge Singleton received his Bachelor's degree with honors from Wake Forest University and his J.D. with *Pro Bono* Distinction from the Sandra Day O'Connor College of Law at Arizona State University. Before attending law school, he taught social studies for Teach for America at National Academy Foundation High School in Baltimore.

Hon. Kesha L. Tanabe is a U.S. Bankruptcy Judge for the District of Minnesota in St. Paul, appointed on Jan. 7, 2022, and the first Asian-American woman on the federal bench in Minnesota. She previously was a bankruptcy attorney with Tanabe Law in Minneapolis and is licensed in North Dakota, Minnesota and New York. Judge Tanabe started her career as an assistant attorney general in New York. Prior to starting her own firm, she was a partner at ASK LLP, Maslon LLP and Faegre Baker Daniels. Additionally, she was a subchapter V trustee in Region 12 and taught bankruptcy law at the University of St. Thomas School of Law. Judge Tanabe is a board-certified business bankruptcy specialist, a former member of the Bankruptcy Practice Committee for the District of Minnesota and a former co-editor in chief of the *MSBA Bankruptcy Bulletin*. She is a frequent lecturer on bankruptcy topics nationwide, and she is a member of several legal and community organizations, including the International Women's Insolvency & Restructuring Confederation, Minnesota Asian Pacific American Bar Association and Minnesota Lavender Bar Association. She also served as a Special Projects Leader for ABI's Bankruptcy Litigation Committee. Judge Tanabe is a graduate of the London School of Economics and received her J.D. from Cardozo School of Law.

Hon. Mary Ann Whipple is Chief U.S. Bankruptcy Judge for the Northern District of Ohio in Toledo, appointed as bankruptcy judge in 2001 and serving her second term. She also served a term on the Sixth Circuit Bankruptcy Appellate Panel. Before her appointment as a bankruptcy judge, she practiced law for 20 years as a commercial, bankruptcy and employment litigator with Fuller & Henry Ltd. in Toledo. Judge Whipple is admitted to practice in Ohio and Michigan and before the U.S. Supreme Court, U.S. Court of Appeals for the Sixth Circuit and the U.S. District Courts for the Northern District of Ohio and the Eastern District of Michigan. In addition, she taught creditor/debtor law as a part-time faculty member at the University of Toledo College of Law for 20 years. Judge Whipple received the 2008 Toledo Bar Association Community Service Award and the Toledo Women's Bar Association's Arabella Babb Mansfield Award in 2016, and is also a master and past president of The Morrison R. Waite Chapter of the American Inns of Court Foundation. She received

her A.B. in Russian studies from the University of Michigan in 1977 and her J.D. from Stanford Law School in 1981.