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cdcbaa

Central District Consumer Bankruptcy Attorney Association

President's Message
by Roksana D. Moradi-Brovia

Dear Members and Friends of the *cdcbaa*,

As you may know, the Central District Consumer Bankruptcy Attorneys Association's ("*cdcbaa*") most prestigious Calvin Ashland Award alternates between judges, trustees and attorneys, each of equal importance in our bankruptcy system of justice.

The award is presented to an individual who exemplifies in the course of their profession compassion, understanding and concern for the individual consumer debtor. Each recipient has upheld these values that were found in the heart and courtroom of the Hon. Calvin K. Ashland.

For the 2019 Calvin Ashland Award, the *cdcbaa* wanted to recognize and acknowledge a trustee who exemplifies these qualities and to show the deep appreciation of the consumer bar of the Central District of California – I am pleased to announce that Howard Ehrenberg is this trustee!

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Does the Bankruptcy Code Allow Tiered Chapter 13 Plans?
by Timothy J. Anzenberger & Richard P. Carmody

Under 11 U.S.C. §1325, a chapter 13 plan must pay secured creditors the value of their claims. If a plan proposes to pay those claims in periodic payments — as most do — §1325(a)(5)(b)(iii)(II) requires that those payments be in equal monthly amounts. However, the Bankruptcy Code is silent on when those payments begin. Section 1326(b)(1) requires that debtors pay priority administrative claims (such as attorneys' fees to debtors' counsel) before or at the time that general creditors are paid. As a result, many debtors propose "tiered" plans. These plans pay small adequate-protection payments to secured creditors while debtor's counsel is paid in full, with larger equal monthly payments to secured creditors later.[1]

This trend is significant. Only 38.8% of chapter 13 debtors complete repayment plans.[2] While the Code requires debtors to pay secured creditors equal monthly payments sufficient to pay off secured claims, it is likely that a chapter 13 case will be dismissed or converted before those equal monthly payments begin or are satisfied.

Does the Code permit tiered plans? Bankruptcy courts are divided,[3] and even courts within the same federal

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1 There are other uses of tiered plans, such as allowing a debtor to reduce payments to secured creditors to pay off multiple secured debts before the maturity of one or more of them. In re Shelton, 2018 Bankr. LEXIS 2815, at *38-42 (Bankr. N.D. Ill. Sept. 14, 2018). However, debtors often propose tiered plans to ensure prompt payment to debtor's counsel. Id.

2 See Ed Flynn, "Success Rates in Chapter 13," XXXVI ABI Journal 8, 38-39, 56-57, August 2017, available at abi.org/abi-journal.

3 Confirming tiered plans: In re Carr, 583 B.R. 458 (Bankr. N.D. Ill. 2018); In re Amaya, 585 B.R. 403 (Bankr. S.D. Tex. 2018); In re White, 564 B.R. 883 (Bankr. W.D. La. 2017); In re Brennan, 455 B.R. 237 (Bankr. M.D. Fla. 2009); In re Butler, 403 B.R. 5 (Bankr. W.D. Ark. 2009); In re Hernandez, 2009 Bankr. LEXIS 982, 2009 WL 1024621 (Bankr. N.D. Ill. April 14, 2009); In re Marks, 394 B.R. 198 (Bankr. N.D. Ill. 2008); In re Chavez, 2008 Bankr. LEXIS 592, 2008 WL 624566 (Bankr. S.D. Tex. March 5, 2008); In re Hill, 397 B.R. 259 (Bankr. M.D.N.C. 2007); In re Erwin, 376 B.R. 897 (Bankr. C.D. Ill. 2007); In re DeSardi, 340 B.R. 790 (Bankr. S.D. Tex. 2006); In re Blevins, 2006 Bankr. LEXIS 2422, 2006 WL 2724153 (Bankr. E.D. Cal. 2006). Sustaining objections to tiered plans: In re Shelton, 2018 Bankr. LEXIS 2815 (Bankr. N.D. Ill. Sept. 14, 2018); In re Miceli, 2018 Bankr. LEXIS 2068 (Bankr. N.D. Ill. July 9, 2018); In re Williams, 583 B.R. 453 (Bankr. N.D. Ill. 2018); In re Cochran, 555 B.R. 892 (Bankr. M.D. Ga. 2016); In re Romero, 539 B.R. 557 (Bankr. E.D. Wis. 2015); In re Kirk, 465 B.R. 300 (Bankr. N.D. Ala. 2012); In re Willis, 460 B.R. 784 (Bankr. D. Kan. 2011); In re Bollinger, 2011 Bankr. LEXIS 3339, 2011 WL 388275 (Bankr. D. Ore. Sept. 2, 2011); In re Espinosa, 2008 Bankr. LEXIS 2121, 2008 WL 2954282 (Bankr. D. Utah Aug. 1, 2008); In re Williams, 385 B.R. 468 (Bankr. S.D. Ga. 2008); In re Sanchez, 384 B.R. 574 (Bankr. D. Ore. 2008); In re Denton, 370 B.R. 441 (Bankr. S.D. Ga. 2007).

President's Message
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Roksana D. Moradi-Brovia
Partner with
Resnik Hayes Moradi LLP

She practices extensively in debtor representation in Chapter 11 Bankruptcy and related matters.

Certified Bankruptcy Specialist, State Bar of California, Board of Legal Specialization

The Calvin Ashland Award dinner will be held on November 7, 2019 and more details will soon follow.

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Does the Bankruptcy Code Allow Tiered Chapter 13 Plans?
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districts have reached different results.[4] Given this uncertainty and split of authority, there is an obvious problem in §1325 that Congress must resolve.

Background of §§ 1325 and 1326

Before 2005, chapter 13 plans could propose creative payment structures to secured creditors, but this caused two perceived abuses.[5] First, chapter 13 had no express requirement that secured creditors receive adequate-protection payments.[6] This permitted debtors to propose plans with payment moratoriums, allowing debtors to use collateral for months without payment.[7] These debtors could then convert their cases to chapter 7 or modify their plans to surrender the now-devalued collateral before payments began.[8] Second, chapter 13 plans could propose small payments over the plan's life with large balloon payments at the end.[9] Debtors could even propose quarterly or semi-annual payments or reduce payments during certain months of the year.[10]

When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), it amended two provisions of chapter 13 to solve these issues.[11] First, BAPCPA amended §1325(a)(5)(B) to require that debtors pay secured creditors equal monthly payments.[12] Second, BAPCPA amended §1326(a) to require debtors to pay adequate protection payments to secured creditors holding liens on personal property, with those payments starting no later than 30 days after the petition date.[13] Congress intended these amendments to eliminate fluctuating payment schemes and protect secured creditors from the threat of devalued collateral and early plan termination.

However, these amendments created a new problem. While BAPCPA required equal monthly payments to secured creditors, Congress failed to identify when those payments begin. For example, may a plan pay a secured creditor in full over the course of 12 months, but provide that monthly payments begin in year two of the plan after debtor's counsel is paid, or does the Code require that payments begin right after confirmation? Some bankruptcy courts have confirmed

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4 Compare In re Shelton, 2018 Bankr. LEXIS 2815 (Bankr. N.D. Ill. Sept. 14, 2018), with In re Carr, 583 B.R. 458 (Bankr. N.D. Ill. 2018).
5 In re Hill, 397 B.R. 259, 270 (Bankr. M.D.N.C. 2007).
6 Id.
7 Id.
8 Id. (citing In re DeSardi, 340 B.R. 790, 809-811 (Bankr. S.D. Tex. 2006); Richardo I. Kilpatrick and Marla A. Zain, "Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," 79 Am. Bankr. L.J. 817, 836 (Summer 2005)); In re Marks, 394 B.R. 198, 202 (Bankr. N.D. Ill. 2008) (citing In re Robson, 369 B.R. 377, 379 (Bankr. N.D. Ill. 2007)).
9 In re Butler, 403 B.R. 5, 13 (Bankr. W.D. Ark. 2009) (citing In re Erwin, 376 B.R. 897, 901 (Bankr. C.D. Ill. 2007)).
10 Id. at 13.
11 Id. at 10.
12 Id.
13 Id.

cdcbaa Programs
Upcoming Calendar

July 13, 2019
Fraudulent Transfers
Nicholas Gebelt; Rob Aronson

September 7, 2019
Taggert Case Analysis

October 19, 2019
Chapter 13 Plan; Rule 3002.1;
Payment Change Notices; etc.

November 7, 2019
Calvin Ashland Award Dinner

Annual James T. King Symposium (no date)

New Chapter 13 Plan (no date)

Meetings to be held at Southwestern Law School,
Westmoreland Building
3050 Wilshire Boulevard, Los Angeles, CA 90010

Registration: 10:00 a.m. - 11:00 a.m.
cdcbaa Membership Meeting: 10:30 a.m. - 11:00 a.m.
Program: 11:00 a.m. - 1:00 p.m.
2 Hours of MCLE Credit to be Provided

On Site Parking: $10 - Cash Only
Please check www.bklawyers.org for up to
date MCLE meeting information.

cdcbaa
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Does the Bankruptcy Code Allow Tiered Chapter 13 Plans?
Continued

tiered plans, holding that payments may begin at any time, but other courts have rejected tiered plans, holding that equal monthly payments must begin just after confirmation.

Argument for Tiered Chapter 13 Plans

Bankruptcy courts that have confirmed tiered chapter 13 plans have generally done so for three reasons. First, the Bankruptcy Code contains no express requirement that equal monthly payments begin at confirmation.[14] Some courts reason that these payments may begin at any time, so long as the payments are in equal monthly amounts when they begin, and so long as these payments continue until secured claims are paid in full.[15]

Second, §1326(a)(1)(C) requires that debtors make adequate protection payments to creditors with claims secured by personal property starting 30 days after the petition date, so any delay in paying equal monthly payments will not harm these creditors. Adequate protection payments must equal the amount of depreciation to a creditor's collateral so that these creditors "will not be left holding the bag for any loss in value of [their] collateral if the plan should later fail or become converted to a chapter 7 case."[16]

Section 1325(a)(5)(b)(iii)(II) does not specifically require debtors to make adequate-protection payments to creditors with claims secured by real property.[17] This is likely because the BAPCPA amendments to §§1325 and 1326 were targeted at "perceived abuses of car lessors and purchase money secured creditors."[18] However, courts have noted that creditors with claims secured by real property might still protect themselves by seeking adequate protection under §§ 362 or 363.[19] At least one court has confirmed a tiered plan over a mortgagee's objection.[20]

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14 Id. (citing In re DeSardi, 340 B.R. at 805; In re Marks, 394 B.R. at 204; In re Hill, 397 B.R. at 268-69; 8 Collier on Bankruptcy ¶ 1325.06 [3] [b] [ii] [A] (15th ed. rev'd 2008)).
15 In re Hill, 397 B.R. at 268-69.
16 In re Marks, 394 B.R. at 204-05.
17 In re Hill, 397 B.R. at 264 ("If the creditor is secured by real property, then there is no requirement that the payments be in an amount sufficient to provide the creditor adequate protection under Section 1325(a)(5)(B).").
18 In re Hernandez, 2015 Bankr. LEXIS 3175, at *10-11 n.6, 2015 WL 5554126 (Bankr. S.D. Fla. Sept. 18, 2015).
19 Id.
20 In re Amaya, 585 B.R. 403 (Bankr. S.D. Tex. 2018).

Program Summaries

By Gary R. Wallace

cdcbaa held its third meeting and MCLE Program of 2019: "Intersection of Bankruptcy and Probate"

On March 16, 2019, the *cdcbaa* held its third members meeting and MCLE program of the year at Southwestern Law School. The topic of the program was "Intersection of Bankruptcy and Probate." The distinguished panel was led by the Honorable Meredith A. Jury (ret.) of the United States Bankruptcy Court for the Central District of California. Additionally the panel featured Daniel Koontz, Esq. (Clerk to the Honorable Ernest M. Robles); John M. Pringle of Roquermore, Pringle & Moore, Inc.; Alan W. Forsley, Esq., of Fredman Lieberman Pearl LLP; Stella Havkin, Esq. of Havkin & Shrago; and Patrick T. Green, Esq. of Fitzgerald & Green.

The panel provided, in a very clear and well organized presentation, fundamental information concerning trusts (e.g., what they are, how they are created, how they are treated in bankruptcy court, etc.), conservatorships, powers of attorney, and the probate process. The rights and duties of trustees, beneficiaries, and debtors and creditors when trusts and wills are involved in bankruptcy were addressed in detail as well. Bankruptcy exemptions for trust property, fraudulent transfer issues and community property issues were touched on as well. The panel also explained how the "next friend" rule (FRBP 1004.1) can be used to file a bankruptcy petition. Numerous case authorities were discussed, including an important recent California Supreme Court decision in a matter on spendthrift trusts that originated in Judge Jury's courtroom, Carmack v. Reynolds (2017) 2 Cal. 5th 844. The panel brought all of these concepts, rules and cases to life with stories of their real world experiences in such matters. The panel also kindly permitted extensive questioning from attendees.

This time, not just one, but two detailed handouts for the program were available to all attendees. For attorneys who regularly practice bankruptcy but are not frequently involved in matters concerning wills, trusts and probate spillover, the discussion and handouts were simply invaluable.

The program was well attended, both in-person and via remote link, and by all accounts well received.

The fourth meeting and MCLE Program of 2019: "Business Marketing, Management and Ethics"

On April 6, 2019, the *cdcbaa* held its fourth members meeting and MCLE program of the year at Southwestern Law School. The topic of the program was "Business Marketing, Management and Ethics." The distinguished panel was led by Steven R. Fox, Esq. of the Fox Law Corporation, Inc. in Encino. Other panel members included Howard Raff, a financial advisor with Diversified Securities, Inc.; Jim Felton, Esq., the managing partner at Greenberg & Bass, LLP; Marty Rudoy, Esq. of Rudoy Law in Encino; and Arthur Margolis, Esq., of Margolis & Margolis, LLP. Each member of the panel offered unique insight and real world experience as well as a presentation of law.

Mr. Raff focused on how attorneys can build their practice through personal marketing. He explained the importance of building trust through good character and how in-person visibility, particularly with persons whom an attorney has identified as a potential source of referrals, can be effective. He also emphasized the value of focusing conversations on the needs and interests of the person with whom the attorney is speaking rather than the other way around.

Messrs. Felton and Rudoy focused their presentation on law firm management. They addressed what, in their experience, are the most common mistakes that attorneys and law firms make in taking on new business. They advised attorneys, for example, to use caution before taking on work that is not within the established capabilities of the law firm's attorneys. They spoke to the need to be realistic about rates and charges so as to maintain the balance between a healthy case load and a profitable bottom line. They also addressed the importance of using care in selecting staff and attorneys who are not merely qualified but who provide added value to the firm and its existing clients.

Mr. Margolis, who is a highly experienced attorney with a specialty in defending attorneys before the California State Bar, provided in an-depth presentation on how to avoid running afoul of the State Bar and what to do if an attorney is called before the Bar. Special attention was given to the new Ethics Rule 1.15, which concerns the use of client trust accounts, particularly as they apply to the receipt of client retainers. Mr. Margolis also spoke on the right way to handle negative on-line client reviews, and the standards by which an attorney may communicate with suddenly "former" clients when they retain new counsel.

Mr. Fox focused his discussion on the need for early evaluation of potential clients as an effective means of avoiding problems later. He explained how experience has taught him to consider carefully such factors as the true goals and financial abilities of the client, and he suggested approaches to handling initial calls and consultations. He reminded attorneys to prepare an exit plan at the outset of the representation. In the context of bankruptcy cases, Mr. Fox also advised attorneys to give special consideration to not only the character of the potential client (since, for example, plans of reorganization must be proposed in good faith) but also the perceived ability of the individual debtor to handle the emotional, spiritual and physical strain of the bankruptcy process.

A detailed handout for the program was available to all attendees. The program was well attended, both in-person and via remote link, and by all accounts well received.

The next *cdcbaa* members meeting and MCLE program is scheduled for June 8, 2019 at Southwestern Law School. The topic will be "Judges on Trial." We hope to see you there.

Does the Bankruptcy Code Allow Tiered Chapter 13 Plans?
Continued

Finally, §1326(b) requires that administrative expense claims be paid "[b]efore or at the time of each payment to creditors under the plan," which includes attorneys' fees to debtor's counsel. If chapter 13 plans had to start equal monthly payments to secured creditors just after confirmation, some bankruptcy courts caution that debtors might be unable to pay both administrative claims and secured creditors at the same time.[21] In these cases, debtors could not propose a confirmable plan, which is — according to some courts — "an absurd result that Congress could not have intended."[22]

Argument Against Tiered Chapter 13 Plans

Interpreting the same statutory language, another line of cases has rejected tiered plans. These courts hold that tiered plans violate the Bankruptcy Code by impermissibly favoring payment to debtor's counsel and other administrative claims over secured creditors. In addition, at least one court has held that proposing a tiered plan can constitute bad faith.[23]

These courts first emphasize that when Congress enacted §1325(a)(5)(B)(iii)(I), it intended to shift the risk of plan failure away from secured creditors.[24] However, a tiered plan shifts the risk the opposite way, favoring debtor's counsel and other administrative-expense claimants over the very creditors that Congress intended to protect.[25]

These courts continue that providing smaller adequate protection payments during any delay under a tiered plan violates the plain language of §1325(a)(5)(B)(iii)(I).[26] In reality, adequate-protection payments are "periodic payments." [27] Post-confirmation, all "periodic payments" must be in equal monthly amounts under §1325(a)(5)(B)(iii)(I). Thus, allowing a chapter 13 plan to pay smaller adequate protection payments in the first few months of a plan, with larger plan payments to follow, violates the plain language of §1325(a)(5)(B)(iii)(I).[28]

Next, these courts have concluded that §1326(b) does not require that administrative expenses be paid in full before plan payments to secured creditors begin.[29] Instead, §1326(b) expressly allows administrative expense claims and plan payments to secured creditors to be paid concurrently.

Section 1326(b) only requires payment of allowed administrative expenses "[b] efore or at the time of each payment to creditors under the plan." Clearly, that section permits creditors to be paid concurrently with administrative expenses.[30]

There is no language in §1326(b)(1) allowing a debtor to favor administrative-expense claims over secured creditors entitled to equal monthly payments.[31] Consequently, "in instances where both §§1325(a)(5)(B) and 1326(b)(1) apply, debtors 'need to calculate plan payments sufficient to provide for these payments and for payment of attorney fees and other administrative expenses.'"[32]

More recently, one bankruptcy court held that a debtor's attorney had filed a chapter 13 plan in bad faith by proposing tiered payments to secured creditors.[33] The court held that the tiered plan was not in the debtor's best interests because it not only shifted risk to secured creditors (in violation of congressional intent), it also

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21 In re Hill, 397 B.R. at 270.
22 Id.; see also In re Hernandez, 2009 Bankr. LEXIS 982, at *14, 2009 WL 1024621 (Bankr. N.D. Ill. April 14, 2009).
23 In re Shelton, 2018 Bankr. LEXIS 2815, at *38-42 (Bankr. N.D. Ill. Sept. 14, 2018).
24 Id.
25 Id.
26 In re Miceli, 587 B.R. 492, 498 (Bankr. N.D. Ill. 2018).
27 Id.
28 Id. (citing In re Hamilton, 401 B.R. 539, 543 (B.A.P. 1st Cir. 2009)).
29 In re Miceli, 587 B.R. at 497-98.
30 Id. (quoting 11 U.S.C. §1326(b)).
31 In re Williams, 583 B.R. 453, 458 (Bankr. N.D. Ill. 2018).
32 Id. at 458 (quoting In re Williams, 385 B.R. 468, 475 (Bankr. S.D. Ga. 2008)).
33 In re Shelton, 2018 Bankr. LEXIS 2815, at *38-42.

Does the Bankruptcy Code Allow Tiered Chapter 13 Plans?
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shifted risk to the debtor.[34] During the delay period, secured debt would be left unpaid. If the plan failed during that period or shortly afterward, the debtor might be left "in a worse position that had [he/she] not filed for bankruptcy" in the first place.[35] This could be true even if the plan had provided adequate protection during the delay. Adequate protection payments are often less than the contractual payments due, so if the case were dismissed before equal monthly payments began, "the debtor [would] automatically [be] in default under the terms of the contract ... even if the debtor had been current with the terms of the bankruptcy plan."[36]

Conclusion

When it amended §§1325 and 1326, Congress intended to eliminate perceived abuses of chapter 13, but these amendments have instead created more confusion. Not only are bankruptcy courts within the same district interpreting these amendments differently, but at least one court has determined that proposing a tiered plan constitutes bad faith, leaving debtors and their counsel with no clear guidance on how to balance payments to administrative expense claimants and secured creditors. No matter what policy decision is ultimately made, Congress must step in and resolve the issue. An amendment as simple as setting forth when equal monthly payments to secured creditors must begin under §1325(a)(5)(B)(iii)(I) is likely all that is needed to do so. *abi*

34 Id. at *41.
35 Id.
36 Id. at n.11.

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Return of Vehicles Seized Before a Chapter 13 Filing

Does the Debtor Have to File a Turnover Motion?

By Hon. Eugene R. Wedoff (ret.)

One of the significant unresolved issues in consumer bankruptcy law is the right of a chapter 13 debtor to obtain the return of a vehicle seized before the bankruptcy was filed. The majority of the courts that have ruled on the issue, including the Seventh Circuit in Thompson v. GMAC and several other circuit courts, have held that creditors have a duty to return the seized vehicle to the debtor under the automatic stay set out in §362(a)(3).[1]

However, the Tenth Circuit's recent Cowen decision adopted a minority interpretation, holding that the automatic stay does not apply to vehicles seized pre-petition and that a creditor need only return the collateral to a chapter 13 debtor if the bankruptcy court grants a debtor's motion for turnover.[2] ABI's Rochelle's Daily Wire, in reporting both this decision and a subsequent one by the Tenth Circuit, noted the potential for a grant of certiorari to resolve the circuit split.[3]

Before any consideration by the U.S. Supreme Court, the Seventh Circuit is being asked to address the issue. The City of Chicago has enacted ordinances that (1) allow the city to seize vehicles for parking, revenue and camera-recorded driving violations, and (2) grant the city a possessory lien on the seized vehicles.[4] Vigorous enforcement of these ordinances has resulted in thousands of chapter 13 filings in Chicago.[5]

In these cases, the debtors have cited the Thompson decision as requiring the city to return seized vehicles to them when it receives notice of their bankruptcy filings. However, the city has contested Thompson's applicability, arguing that in order to retain its possessory lien, it is allowed to continue holding seized vehicles under §362(b)(3), an exception to the automatic stay that allows creditor action to maintain lien perfection. The city's more basic argument is that Thompson was incorrectly decided, and that the Seventh Circuit should overrule it and adopt the minority interpretation of §362(a)(3). Five bankruptcy judges have ruled on the city's arguments, and one found that the automatic stay exception applied.[6] The other four rejected that argument.[7] However, none of the judges found that Thompson should be overruled. The city has appealed the four decisions that denied it relief, and the Seventh Circuit has consolidated the cases for direct appeal.[8]

The narrow issue — application of the stay exception in §362(b)(3) — will only be relevant in the appeal if Thompson is upheld. Unless §362(a)(3) generally requires the return of seized collateral, there would be no need to consider a special exception for collateral

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1 See Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009); Weber v. SEFCU (In re Weber), 719 F.3d 72 (2d Cir. 2013); Calif. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996) (expressly adopting Abrams v. Sw. Leasing & Rental Inc. (In re Abrams), 127 B.R. 239 (B.A.P. 9th Cir. 1991), which holds that failure to return repossessed car after receiving notice of debtor's bankruptcy violates §362(a)(3)). Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773 (8th Cir. 1989), applied the same reading of §362(a)(3) to require the return of collateral to a chapter 11 debtor. See also Motors Acceptance Corp. v. Rozier, 348 F.3d 1305 (11th Cir. 2003); Rozier v. Motors Acceptance Corp. (In re Rozier), 376 F.3d 1323 (11th Cir. 2004) (requiring return of collateral obtained pre-petition as long as collateral remained estate property after repossession). Accord, STMIMA v. Carrigg (In re Carrigg), 216 B.R. 303 (B.A.P. 1st Cir. 1998); TranSouth Fin. Corp. v. Sharon (In re Sharon), 234 B.R. 676 (B.A.P. 6th Cir. 1999).

2 WD Equip. v. Cowen (In re Cowen), 849 F.3d 943 (10th Cir. 2017), rejecting the contrary opinion, Unified People's Fed. Credit Union v. Yates (In re Yates), 332 B.R. 1 (B.A.P. 10th Cir. 2005). A more extensive argument for the minority interpretation is set out in In re Hall, 502 B.R. 650 (Bankr. D.D.C. 2014).

3 Bill Rochelle, "Tenth Circuit's Narrow View of Automatic Stay Erodes Estate Property," Rochelle's Daily Wire (July 14, 2017), available at abi.org/newsroom/daily-wire/tenthcircuit's-narrow-view-of-automatic-stay-erodes-estate-property; Bill Rochelle, "Tenth Circuit Opinion Can Be the Springboard for a 'Cert' on the Automatic Stay," Rochelle's Daily Wire (Oct. 18, 2018), available at abi.org/newsroom/daily-wire/tenth-circuitopinion-can-be-the-springboard-for-a-'cert'-on-the-automatic-stay (unless otherwise specified, all links in this article were last visited on Jan. 25, 2019).

4 Municipal Code of Chicago, Ill., §§9-100-120 (impounding vehicles), 9-92-080 (f) (possessory lien).

5 See Melissa Sanchez and Sandhya Kambhampati, "Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy," ProPublica Illinois (Feb. 27, 2018), available at features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy ("In 2007, an estimated 1,000 Chapter 13 bankruptcies included debts to the city, usually for unpaid tickets, with the median amount claimed around $1,500 per case. By last year, the number of cases surpassed 10,000, with the typical debt to the city around $3,900.").

6 In re Avila, 566 B.R. 558 (Bankr. N.D. Ill. 2017).

7 In re Shannon, 590 B.R. 467 (Bankr. N.D. Ill. 2018); In re Peake, 588 B.R. 811 (Bankr. N.D. Ill. 2018); In re Fulton, 588 B.R. 834 (Bankr. N.D. Ill. 2018); In re Howard, 584 B.R. 252 (Bankr. N.D. Ill. 2018).

8 City of Chicago v. Robbin L. Fulton, No. 18-2527, Docket Nos. 2, 6 and 14. The author is serving as counsel to debtors in this appeal.

Return of Vehicles Seized Before a Chapter 13 Filing
Continued

subject to a possessory lien.[9] The applicability of §362(a)(3) then becomes the principal issue to be determined by the Seventh Circuit, and it is a major issue for consumer bankruptcy, since it affects not only Chicago vehicle seizures but the repossession of vehicles for ordinary auto loan defaults across the nation. There are three major arguments about the application of §362(a)(3) to repossessed collateral: (1) the requirements for turnover under §542(a); (2) the meaning of §362(a)(3); and (3) compliance with general bankruptcy policy.

Turnover Under § 542(a)

Section 542(a) provides that a party holding property that a trustee can use under §363 must deliver that property to the trustee unless it has inconsequential benefit to the estate.[10] Section 1306(b) generally places chapter 13 debtors in possession of estate property; §1303 gives them the general rights of a trustee under §363; and §542(a) gives them the right to receive property that a trustee could use under §363. Minority decisions acknowledge that chapter 13 debtors have the property rights of trustees, but argue that §542 requires the debtors to obtain a court order before creditors are required to turn over seized property to the debtor.[11]

The difficulty with this argument is that it contradicts the text of the statute. Section 542(a) does not condition its turnover requirement on court orders, but simply states that property that can be used under §363 "shall" be delivered. The congressional reports setting out the effect of §542(a) confirm its plain meaning,[12] and the majority decisions have interpreted §542(a)

9 The treatment of possessory liens in bankruptcy is beyond the scope of this article, but are discussed in Eugene R. Wedoff, "The Automatic Stay Under §362(a)(3) — One More Time," 38 Bankr. L. Letter No. 7, at 5-6 (July 2018); and Ralph Brubaker, "Turnover, Adequate Protection and the Automatic Stay: A Reply to Judge Wedoff," 38 Bankr. L. Letter No. 11, at 11-12 (Nov. 2018).

10 Section 542(a) provides, in relevant part "[A]n entity ... in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 ... shall deliver to the trustee ... such property ... unless such property is of inconsequential value or benefit to the estate."

11 For example, In re Hall, 502 B.R. at 654-64, sets out a lengthy argument that §542(a) continues a pre-Bankruptcy Code practice requiring trustees and debtors in possession to obtain turnover of estate property by moving for a court order. Pre-Code practice might inform the interpretation of ambiguous statutory Code provision language, but it may not be used to contradict the Code's language. See Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 10, 120 S. Ct. 1942, 1949 (2000) ("[W] hile pre-Code practice 'informs our understanding of the language of the Code,' it cannot overcome that language. It is a tool of construction, not an extratextual supplement.") (citation omitted).

12 S. Rep. No. 95-989, 95th Cong., 2d Sess. 84 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977) ("Subsection (a) of this section requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee.").

accordingly.[13] Cowen expressly declines to challenge this interpretation and only asserts that if it is correct, §362(a)(3) is not necessary to enforce the turnover obligation, since §105(a) would allow debtors to seek sanctions for a creditor's failure to turn over property voluntarily.[14]

The Meaning of §362(a)

The majority interpretation of §362(a)(3) is also grounded in the plain meaning of its terms. Section 362(a)(3) applies the automatic stay to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," and the majority decisions hold that a creditor "exercises control" over a debtor's vehicle by continuing to hold it after the bankruptcy filing.

Thompson made the point this way: Webster's Dictionary defines ''control'' as, among other things, ''to exercise restraining or directing influence over'' or ''to have power over.'' Merriam- Webster's Collegiate Dictionary (11th ed. 2003). Holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition, as well as within the common sense meaning of the word.[15]

On the other hand, Cowan focused on the action prohibited by the paragraph: §362(a)(3) prohibits "any act to obtain possession of property" or "any act to exercise control over property." "Act," in turn, commonly means to "take action" or "do something." New Oxford American Dictionary 15 (3d ed. 2010).... This section, then, stays entities from doing something to obtain possession of or to exercise control over the estate's property. It does not cover "the act of passively holding onto an asset," Thompson, 566 F.3d at 703, nor does it impose an affirmative obligation to turn over property to the estate.[16]

Continued on Page 9

13 See, e.g., In re Knaus, 889 F.2d at 775 ("The duty to turn over the property is not contingent upon ... any order of the bankruptcy court...."); Thompson, 566 F.3d at 704 (under §542(a) "turnover of a seized asset is compulsory").

14 Cowen, 849 F.3d at 950.

15 Thompson, 566 F.3d at 702.

16 Cowen, 849 F.3d at 949.

Return of Vehicles Seized Before a Chapter 13 Filing
Continued

The difficulty with Cowen's approach to the language is that a creditor does more than "passively hold" a seized vehicle by refusing to return it; the creditor actively prevents the debtor from regaining possession by keeping the vehicle locked or guarded. Only if the creditor were truly passive, allowing the debtor free access to the vehicle, would there be no exercise of control. In at least one bankruptcy decision, the minority interpretation is supported with an alternative argument that "property of the estate" does not include all the rights of property ownership, but only the rights to which the debtor was entitled when the bankruptcy case was filed. If the debtor had no right to possess seized property before the bankruptcy case was filed, the argument continues, the right of possession would not become property of the estate, and the creditor would not "exercise control over property of the estate" by preventing the debtor from obtaining the property.[17]

Cowen does not make this argument, so it avoids addressing the difficulty with the argument presented by §542(a). While a chapter 13 debtor would not have had the right to possess seized property before the bankruptcy filing, §542(a) conveys that right as soon as the bankruptcy case is filed. Thompson makes the point that §542(a) "draw [s] back into the estate a right of possession that is claimed by a lien creditor pursuant to a prepetition seizure."[18] So, by depriving the debtor of the right to possess property that §542(a) accords, a creditor would clearly exercise control over "estate property," violating §362(a)(3).

Bankruptcy Policy

The policies underlying §§362(a)(3) and 542(a), as Thompson explains, are to "allow the debtor to reorganize and repay the majority of his debts without having to liquidate his assets" and so let the debtor "retain the beneficial use of productive assets."[19] For chapter 13 debtors, enforcing this policy by applying the automatic stay to seized vehicles is particularly important. Chapter 13 debtors often need their vehicles to get to work or care for their children, but they typically have limited financial resources, so they would often lack the additional funds needed to obtain alternative transportation while a motion to enforce turnover was being considered by the court. Requiring a motion to be granted before the debtor can obtain the return of a seized vehicle would often make bankruptcy unable to address the debtor's financial distress.[20]

For creditors, on the other hand, complying with §362(a)(3) imposes no extraordinary burden. The major concern raised by the minority decisions is that the creditor might be required to return a vehicle without a court order providing adequate protection. However, this situation is not significantly different from that faced by any creditor whose collateral is not adequately protected while a chapter 13 case is pending.[21]

Hon. Eugene R. Wedoff (ret.)
Oak Park, Ill.

Hon. Eugene Wedoff is a retired bankruptcy judge and a past ABI president. His practice is exclusively pro bono and is limited to representing clients in bankruptcy appeals. He is also an ex officio member of the ABI Commission on Consumer Bankruptcy.

The remedy is for the creditor to seek a court order for relief from the automatic stay, which (if the creditor is threatened with immediate and irreparable loss) can be obtained without notice to the debtor.[22] The most troubling situation for a creditor is a request for the return of a repossessed vehicle that is uninsured.[23] However, a loss of insurance (caused by the debtor's failure to pay premiums) can also occur during a case, and again, the remedy is stay relief. Creditors who have repossessed an uninsured vehicle before filing have an additional alternative: to retain the vehicle and respond to any motion for enforcement of the automatic stay with a request for stay annulment, which would retroactively validate the vehicle retention.[24] There appear to be no published decisions imposing sanctions for a creditor's refusal to return an uninsured vehicle, and there is ample indication that no such turnover would be ordered.[25]

Conclusion

Each of the arguments discussed herein will likely be addressed in the Seventh Circuit's decision in the pending appeal, and that decision might have a major effect on chapter 13 practice. *abi*

17 Hall, 502 B.R. at 667-69.
18 Thompson, 566 F.3d at 704 (quoting In re Sharon, 234 B.R. at 683).
19 Id. at 705.
20 Id. at 707 ("If a debtor's car remains in the hands of a creditor, it could hamper the debtor from either attending or finding work, which is crucial for garnering the funds necessary to pay off his debts.").
21 See In re Yates, 332 B.R. at 5 ("As a practical matter, there is little difference between a creditor who obtains property of the estate before bankruptcy is filed, or after bankruptcy is filed.").
22 Fed. R. Civ. P. 4001(a)(2), providing for ex parte stay relief under §362(d).
23 See Hall, 502 B.R. at 660 ("If immediate turnover were required, an accident might result in the collateral being destroyed, with no insurance proceeds recovered, and the lien being rendered worthless.").
24 Annulment is one of the forms of stay relief authorized by §362(d), and its effect of retroactive validation is well recognized. See, e.g., In re Siciliano, 13 F.3d 748, 751 (3d Cir. 1994) ("[I] nclusion of the word 'annulling' in the statute ... indicates a legislative intent to apply certain types of relief retroactively and validate proceedings that would otherwise be void ab initio.").
25 While adopting the majority interpretation of §362(a)(3), one court bluntly stated that it "takes the lack of insurance seriously and will not permit a debtor to obtain or retain possession of a vehicle that is not adequately insured." Stephens v. Guaranteed Auto Inc. (In re Stephens), 495 B.R. 608, 615 (Bankr. N.D. Ga. 2013). Another court, though otherwise accepting the minority interpretation of § 362(a)(3), upheld the district's practice of finding a violation of the automatic stay by a creditor that refuses to return a seized vehicle, but only after the debtor produces proof of insurance. In re Denby-Peterson, 576 B.R. 66, 81-82 (Bankr. D.N.J. 2017).

Lawyers are People Too

An Interview with Daniela Romero

By M. Jonathan Hayes

Jon: Daniela, tell me about your family and your upbringing.

Daniela: I was born in Miami Beach. My father was born in Cuba and my mother is Polish-American. They divorced when I was two and my mother and I moved to New York. Mom was originally from Brooklyn but we moved to the Bronx.

Jon: So you're a Yankees fan?

Daniela: Yes, but growing up I was a Mets fan because they were the underdogs and somehow I have always aligned myself with underdogs.

Jon: Any fond memories of your years in the Bronx?

Daniela: Yes, I loved growing up in New York. My mom was an editor for Fairchild Publications. She taught me independence, perseverance and to never give up. She was a working single mom my whole childhood until she remarried and had a son, my half-brother, Alex. I remember having all kinds of odd jobs; like selling comic books, cards and books on the street corner. Looking back it was a children's co-op and it started my entrepreneurial spirit.

Jon: What about school?

Daniela: I went to Harry Truman High School and then to SUNY Stony Brook on Long Island for a while. At the time I didn't know what I wanted to do and I wanted to find my father so I left college and moved back to Florida to look for him.

Jon: Did you find him?

Daniela: Yes, it turned out he was living in Southern California. That's how I came to California, around 1986. I worked for him in sales for a while, got my real estate agent license, and decided to go back and finish school. I graduated from Cal State Fullerton in 1992 with a double major in Economics and Psychology.

Jon: And then on to law school?

Daniela: No, I got a job as a paralegal for an attorney, Daniel Benger, who passed away in 2010. He did criminal defense work, some estate planning and personal injury. I really liked Dan and the job. I like to help people and solve problems.

Jon: Is that why you decided to go to law school?

Daniela: Yes. I went to Southwestern as a full time student and graduated in 1996. I really liked law school and my teachers. It wasn't easy for me though. I had to work hard but I thought it was a lot of fun. I was pregnant with my daughter Miranda when I took the bar exam!

Jon: Where did you practice after you passed the bar exam?

Daniela: My daughter was really young and I wanted to make sure we had a good home life so I volunteered part-time at first for the Los Angeles County Bar Association Domestic Violence Project and the Immigration Legal Assistance Project. As she got a little older I worked as a staff attorney for the Domestic Violence Project at the Stanley Mosk Courthouse. I was there a few years and then I practiced family law for the Law Office of Rose Marie Gallegos and then at Cotkin & Collins in its family law department. I think it's really important to love what you're doing and I didn't really care for that area of law. I had been Minor's Counsel in some cases but the hand-to-hand combat atmosphere was not something I enjoyed, especially since it appeared to me that most of the players were not really interested in the best interests of the child.

Jon: How did you get into bankruptcy?

Daniela: I had been interested in it since I externed for Judge Kathleen March in law school. In 2006, my husband died of pulmonary fibrosis and I had to restructure my life so I took a little time off. I had to be there for my daughter who was about 10 at the time. It was a difficult process. After about a year, I decided to hang out my own shingle and got a small office in Pasadena. During my off year I started volunteering at the Children's Law Center at the Edmund D. Edelman Children's Court. I decided to learn bankruptcy and I never looked back. I did a lot of studying and went to a lot of programs before actually taking on any clients. I started taking on bankruptcy clients in about 2009.

Jon: How do you like the bankruptcy practice?

Daniela: I absolutely love bankruptcy! It really solves problems for lots of people and helps provide a fresh start to people who need it. Bankruptcy changes peoples' lives for the better. I found and joined the *cdcbaa* around this time. I really look forward to the programs at Southwestern and being on the Board of Directors. I also just got back from the NACBA convention in Cleveland. I find the more I learn about bankruptcy law the more I love it.

Jon: What does Daniela do when your bankruptcy lawyer hat comes off?

Daniela: I love hiking and traveling! In 2016, I walked 100 miles on the Camino de Santiago in Spain. It's a pilgrimage leading to the shrine of the apostle Saint James the Great in the Cathedral of Santiago de Compostela in Galicia. In 2018, I also hiked 100 miles in Ireland, the Wicklow Way, which took about seven days. I hope to go back and walk some more in Ireland, Scotland and back to Spain to walk the full 500 miles on the Camino. The picture is me on a very windy peak called the Alto de Perdon (Mountain of Forgiveness) near Pamplona, Spain.

Jon: Do you have any advice for young lawyers?

Daniela: I'd say several things: 1) practice in an area that you are passionate about; 2) study hard; 3) join a local bar organization; 4) network; and most importantly, 5) find some mentors. And do what you love.

Loyola Law School Consumer Bankruptcy Clinic Mock Trial and Reception

By Alexandra Jernigan, Aram Karagueuzian, and Andrea Oguntula. Externs to the Honorable Sandra R. Klein

On April 2, 2019, seven Loyola Law School students enrolled in the Consumer Bankruptcy Clinic (CBC) and appeared before Judge Sandra R. Klein to participate in a mock hearing. Under the guidance of Maggie Bordeaux and Christian Cooper of Public Counsel, the students spent part of their semester assisting unrepresented individuals who visited the Bankruptcy Court's Los Angeles Self-Help Desk. The finale of the CBC was the mock hearing at which the students ably represented their "clients" and received detailed feedback from Judge Klein.

Each of the dedicated students advocated for their clients in a hypothetical §523(a)(2) non-dischargeability adversary case, Creditco v. Ms. Debtor. Creditco, a credit card company, filed the non-dischargeability complaint against the Debtor after she racked up credit card charges for jewelry, clothes and tickets to several shows during a family trip to Las Vegas. Shortly after the trip, the 67-year-old Debtor experienced two medical emergencies and lost her job. She filed a Chapter 7 bankruptcy after unsuccessfully attempting to negotiate a repayment plan with Creditco.

The mock hearings began when everyone rose as Judge Klein took the bench donned in a black robe and asked the parties to state their name and the party they represented. Counsel(s) for Creditco claimed that the Debtor betrayed its trust and that her spending spree in Las Vegas only two months before filing bankruptcy indicated that she never intended to repay her $10,100 credit card debt. In response, Debtor's counsel(s) zealously refuted that accusation, arguing that she was an "honest but unfortunate debtor" who had timely paid

her bills for seven years until she suffered two unexpected medical emergencies and lost her job. Debtor's counsel(s) emphasized that the Debtor's bankruptcy was not fraudulent. She filed after realizing that as a non-English-speaking, 67-year-old woman, her future job opportunities were limited.

The students' advocacy rivalled that of many experienced attorneys who appear before Judge Klein. Judge Klein commended everyone for their advocacy and offered the students some advice. She mentioned that "the first 30 seconds of oral argument are key" and said the best oral arguments set the stage with a clear theme, provide a concise roadmap of the argument, and state the end result desired. She also advised the students to sharpen their written advocacy skills because some courts decide matters solely on the briefs and do not allow any oral argument. Finally, Judge Klein mentioned that advocates should be responsive to the judge's questions and their opponent's arguments.

After a quick group photo, it was time to celebrate at a catered reception in honor of the students! Chief Bankruptcy Judge Tighe and Bankruptcy Judges Bason, Bluebond and Klein attended the reception, as did numerous attorneys and law clerks. The courtroom roared with conversations over sushi and sliders and everyone raved about the Thai chicken satay and truffle mac-n-cheese balls. Judge Klein thanked the students for all their hard work assisting unrepresented individuals, who comprise approximately 16% of all persons who appear in Central District of California bankruptcy cases. Each student received a certificate of recognition and a "swag" bag to commemorate their participation in the CBC. Judge Klein also recognized Public Counsel, the Loyola Law School faculty, and the bankruptcy practitioners who make the CBC possible. She presented them all with thank you gift bags from the Court.

cdcbaa

Central District Consumer Bankruptcy Attorneys Association

Advancing the interests of Consumer Bankruptcy Practice in the Central District of California

2019 Membership

I hereby apply for membership in the *cdcbaa*, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for calendar year 2019. I understand the basic goals of the organization are to: address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California; and to provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors. As a condition of membership, I declare as follows:

1. I am a duly-licensed attorney presently authorized to practice law in the Central District of California; and
2. I am interested in consumer debtor practice; and
3. I support the basic goals of the *cdcbaa* as outlined above.

I understand the *cdcbaa* is incorporated as a 501(c)(6) nonprofit organization and that a portion of my dues will not be deductible as a business expense because *cdcbaa* advocates within California for legislation on behalf of consumer debtors.

The 2019 calendar year membership fee is $250.00, and includes one ticket to the Calvin Ashland Awards Dinner

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