Volume 7, Issue 15: September 2015

cdcbaa

Central District Consumer Bankruptcy Attorney Association

From the President

By: Nancy B. Clark
nbc@blclaw.com

Dear Members:

This edition of the CDCBAA Newsletter is dedicated to Chapter 13 bankruptcies. On September 19, 2015, our Second Annual James T. King Bankruptcy Symposium will also be dedicated to Chapter 13. The Symposium will feature Judge Meredith Jury, Judge Keith Lundin, Chapter 13 Trustee Henry Hildebrand, Professor Katherine Porter and our own Akihito Koyama and Professor Jonathan Hayes. It will be entitled "Dear Congress: Chapter 13 Could Use A Little Help."

Unlike most of my previous messages, the following comments are not about the future of the CDCBAA. They are purely editorial in nature and are not supported by extensive research or empirical evidence in the area of Chapter 13. My comments are, thus, anecdotal and limited to my experiences which I assume is similar to other consumer debtor attorneys' experiences. However, I accept that I may be proven wrong, and I accept responsibility for my comments.

Chapter 13 bankruptcy has been much maligned in recent years. Some authors have called it a failed "government program" because of the high rate of dismissals. They view the ultimate goal of Chapter 13 as assisting the debtor in receiving a discharge and setting debtors on a path to a fresh start. They compare Chapter 13 to Chapter 7 and argue that the rate of Chapter 13 discharges is dismal in comparison to Chapter 7. Furthermore, they argue that debtors who do receive a discharge continue to face financial difficulties moving forward.

Others view Chapter 13 as a failed "government program" because they believe that Chapter 13 gives an advantage to debtors over creditors. Creditors are stayed while debtors make use of assets. They see the dismissal rate as evidence that most confirmed Chapter 13 plans fail. Therefore, they believe that even fewer plans should be confirmed. This argument seems to run afoul of BAPCPA which requires above median debtors to file a Chapter 13 plan if they have disposable income. These are two extreme views that seem to be diametrically opposed.

I would argue that Chapter 13 is not a failed

The Hon. Judge Robert Kwan Speaking at our June 20, 2015 Event

"government program" and if practiced properly, works fairly and equitably for all parties concerned. I believe that when you have a chapter that is dependent on payments made over a number of years, and which seeks to balance the interest of creditors and debtors while those payments are being made, a lower rate of discharge is a reasonable outcome. In Chapter 13 cases, Debtors are afforded an opportunity to save their homes and vehicles while making payments to creditors based on a workable structure under the supervision of a judge. Furthermore, we must accept that there are competing interests in Chapter 13 not only between debtors and creditors but also between classes of creditors. There is a balance that must be reached between providing debtors an opportunity to reorganize while treating creditors equitably. The rate of dismissals may out pace discharges, but that in and of itself does not equal failure.

To address the critics of Chapter 13, I believe we must first eliminate all the pro se filings from the calculation. Debtors are being advised by non-lawyers to file Chapter 13 for improper purposes. These Chapter 13 bankruptcies have no hope of succeeding and should not be factored into the discussion of the success or failure of Chapter 13 cases. Once we eliminate the number of pro se filings from the calculation, I believe we would find that chapter 13 is far more successful than the current perception.

Despite the overall rate of dismissals, some attorneys have reported that up to 48 percent of their confirmed Chapter 13 cases complete and the debtors receive a discharge. Given the overall percentage of dismissals this is evidence that Chapter 13 is not a failed "government program." In addition, it is evidence that when a debtor is properly represented, they have a higher degree of success. We need to encourage debtors to seek out competent bankruptcy attorneys.

Furthermore, it appears that certain combinations of dedicated consumer attorneys, Chapter 13 trustees and judges yield higher discharge rates than others. Chapter 13 trustees and judges who are more broadminded about "reasonable" expenses and budgets, allow for sufficient time between the 341(a) hearing and confirmation hearings for matters to be resolved, allow continuances to resolve post confirmation matters, and work with debtors to resolve issues, not surprisingly, saw higher numbers of confirmed Chapter 13 plans reaching discharge. Although, the numbers were calculated from a relatively small sample, the combination of a broadminded trustee and judge and dedicated consumer attorney resulted in a rate of discharge that was 10 percent higher than their counterparts.[1] I would venture a guess that these combinations would result in a higher disbursement to creditors as well.

As a consumer debtor attorney it is difficult for me to be unbiased regarding any discussion that starts with the premise that Chapter 13 is a failed "government program." I do not view Chapter 13 as a "government program." In addition, I pride myself on navigating the challenges of Chapter 13. However, I must concede that the number of dismissals out pace the number of discharges. To practitioners, it is not surprising that Chapter 13 has a lower discharge rate than Chapter 7s as it is administered over years as opposed to months. In addition, unlike Chapter 7 cases where debtors must show that they have no disposable income and have not committed fraud to receive a discharge, Chapter 13 repayment plans pit debtors against the various classes of creditors and the various classes of creditors against each other. These competing interests are hard to satisfy and, therefore, a comparison of Chapter 13 to Chapter 7 is inappropriate.

In order to improve the current practice of Chapter 13, I believe we need to examine why cases are dismissed and what seems to work in cases that are not dismissed. In most instances, the high number of dismissals is attributable to the failure of the debtor to adhere to the terms of the plan, either due to their budgets being too tight, or due to the loss of a job, health issues, family obligations, etc. Whenever you have a chapter where the discharge is dependent on payments over several years, there are bound to be unanticipated events that cause a plan to fail. In fact, it would be fair to say that unanticipated events are unavoidable. The Bankruptcy Code resolves this issue by allowing debtors to modify or suspend plan payments. However, it takes time to prepare and submit a modification. When trustees, judges and creditors allow for the time for modifications to be prepared, filed and considered, debtors are afforded an opportunity to reach a discharge.

Some dismissals can be attributed to the quality of representation of debtors. Attorneys who specialize in bankruptcy and attend MCLE classes such as those provided by CDCBAA have a higher rate of success than general practitioners who file only a handful of bankruptcy cases every year. It is difficult for debtors to navigate a Chapter 13 to discharge without the assistance of competent consumer bankruptcy counsel. To increase the rate of discharges, attorneys should be sanctioned for

poor work and ordered to take continuing education classes in bankruptcy. In addition, debtors should be allowed an opportunity to consult with a competent bankruptcy attorney. The CDCBAA, like many consumer debtor attorney organizations provides the general public on its website a list of its members and whether or not they are certified as Bankruptcy Specialists.

Sometimes Chapter 13 debtors are faced with trustees that put the best interest of creditors ahead of the debtors' ability to make plan payments. A Chapter 13 trustee has a duel obligation to look out for the best interest of creditors and to assist debtors in the administration of debtor's Chapter 13 plan. These two "duties" seem contrary in nature and trustees have a difficult job trying to balance the two. Some favor the best interest of creditors by objecting to "reasonable" expenses and insisting on longer plan terms. However, trustees who see the best interest of creditors test and assisting the debtors in the administration of their Chapter 13 plans as common goals with the ultimate goal of arriving at a discharge have higher rates of discharge than their counterparts.

When trustees favor the best interest of creditors over debtor's ability to pay, many issues arise which lead to dismissals of cases. What is a reasonable expense for a debtor in Chapter 13 is often subjective. As consumer bankruptcy practitioners, we advise our clients regarding their expenses. Most debtor's monthly expenses fluctuate depending on various factors such as their children out growing their clothing, or maintenance of a vehicle or home, health or dental issues as they arise, the amount they spend on utilities based on seasonal changes, etc. Most expenses are not fixed and vary from month to month. We know this to be true and must propose reasonable budgets that factor these variables. However, some trustees and creditors who advocate for unreasonably lean budgets find that the debtors' proposed budgets are overly generous and object to confirmation. Such trustees believe the amounts provided by the IRS Manual for expenses to be overly generous and argue for even leaner budgets. For example, a trustee may argue that a debtor's food budget should be limited to the USDA amounts awarded for food stamps. The IRS Manual allows a single individual $315.00 per month for food.[2] The USDA food stamp program in California only allows a single individual up to $194.00 per month for food (and as little as $151.44).[3] These are fairly big differences. While it may be true that a trustee who insists that debtors reduce their food budget to the USDA food stamp amount as opposed to the higher IRS Manual amount will succeed in obtaining a higher percentage for the general unsecured creditors, this kind of budget scrutiny ultimately results in earlier dismissals because these budgets are unsustainable. When you combine trustees who believe in excessively lean budgets and judges who rely heavily on the Chapter 13 trustees' judgment and are disillusioned with Chapter 13 bankruptcy, there is a danger that parties can influence a debtor to agree to a higher percentage plan that is doomed to fail. In order to increase the number of cases achieving a discharge, budgets must be reasonable and realistic given the financial variables debtors face during years of payments. Higher percentages, although attractive to the trustees, do not necessarily make for successful Chapter 13 cases. If our goal is to increase the number of Chapter 13 discharges, it is better to have a reasonable, realistic budget, a lower percentage with a sustainable plan payment that can go the distance than to confirmed a plan with a higher percentage that is doomed to fail. Distribution to creditors might be higher in the short term but so will dismissals. If we truly commit to assisting Chapter 13 debtors in achieving a fresh start, we need to balance distributions to creditors with discharges for debtors.

In this humble attorney's opinion, Chapter 13 is not a failed "government program." We save thousands of debtors from losing their homes and vehicles while they pay secured and unsecured creditors millions and millions of dollars. Is there room for improvement? Yes! To further improve the rate of discharges, we need to encourage trustees and judges to allow for truly reasonable budgets, sustainable plans and opportunities to resolve matters. When trustees, judges, and attorneys work together to resolve matters, higher numbers of Chapter 13 cases result in discharges. Unless we change how we practice Chapter

13 bankruptcy, dismissals will remain high and naysayers will continue to characterize Chapter 13 as a failed "government program."

The upcoming James T. King Bankruptcy Symposium will address many of the issues raised herein, and will discuss outside the box solutions. I encourage you all to attend the seminar as it is sure to be one of our best seminars yet.

Yours truly,
Nancy B. Clark
CDCBAA President

These views are not the views of the Board of Directors of the CDCBAA, nor are they the views of Borowitz & Clark, LLP. These are merely the views of the author and the author is the only individual who should be held responsible for the comments made herein.

Footnotes:

1: These numbers were gathered from law firms who were able to report their findings before publication of this Newsletter. Therefore, the sample was small and more information may be needed. However, it seems reasonable to conclude that broadminded trustees and judges report higher rate of discharges.

2: Based on National Standards for Allowable Living Expenses provided at www.justice.gov/ust/eo/bapcpa/20150515/bic_data/national_expenses/

3: Based on data as of October 1, 2014 through September 30, 2015 from the United States Department of Agriculture Food and Nutrition Service at www.fns.usda.gov/snap/eligibility. See also The Henry J. Kaiser Foundation.

Profile of Judge Meredith A. Jury

By:

Renee Sawyer Blume
renee@srhlawfirm.com
Nancy B. Clark
nbc@blclaw.com

Looking back on her extraordinary career, Judge Meredith Jury states, "My mother was a wonderful role model. The most important influence in my life was my mother. [Although] my mother was disabled, there was no 'Poor me.' There were no bad days in my mother's life. My mother was born with the glass three quarters full. You could never whine when you had a mother like mine. You couldn't say, 'Poor me.' She was such a positive person that "regret" was not a part of her vocabulary." Meredith Jury's life is a testament to her mother's spirit and values: first, show who you are by what you do and, second, show respect and you will gain respect. Her mother taught her to look for the silver lining. "No matter what happens there is a good side to it. There is something to learn from it, something to grow from it. When you live your life, you don't have a pre-planned place it is going. My mom was fabulous. She treated every human being with dignity. She lived the Golden Rule. I'm not religious but I was raised with the Golden Rule. Do unto others as you would have others do unto you. If everyone lived that way we would have no problems."

Meredith Jury's family provided a solid foundation that she used to guide her through her decisions in life. She spent her formative years in Valparaiso, Indiana, a community of 15,000. "The city is unique in the sense that it is surrounded by farms but it is dominated by Valparaiso University, a Lutheran institution with 3,000 students," she explains. It was attractive to professionals who worked for the oil industry in East Chicago and Whiting, Indiana, and the steel mills in Gary, Indiana. Although, it was a small town, education was valued and college graduates were plentiful. Meredith's father was a chemical engineer who commuted 50 miles each way to Whiting for his job at an oil company. Her mother, who had gone to night school for eight years at the University of Chicago, but never graduated, worked as a journalist after the end of World War II writing articles such as "How to Travel with a Baby" for Parent's Magazine. However, soon after starting a family, her mother gave up her career in journalism as was customary in that era.

While growing up in "Valpo," a young Meredith was happy to spend time tagging along with her older brother. He was two years older but always treated her as an equal

Judge Meredeth Jury with her mother and brothers

cdcbaa
Central District of California Bankruptcy Attorneys' Association

Newsletter Volume 7, Issue 15, September 2015

Stella Havkin & Michael Gouveia
Newsletter Co-Editors

Nancy Clark
President

Peter Lively
Vice President

David Jacobs, Secretary
Jeffrey Hagen, Treasurer

2015 Board of Directors
Hale Andrew Antico
Raymond Aver
Magdalena Bordeaux
Erik Clark
Nancy Clark
Gaurav Datta
Michael Gouveia
Patrick Green
Jeff Hagen
Stella Havkin
Jon Hayes
Keith Higginbotham
David Jacobs
James King
Akihito Koyama
Christine Kingston
Sylvia Lew
Peter Lively
Dennis McGoldrick
Roksana Moradi
Daniela Romero
David Shevitz
Marcus Tiggs
Thomas Ure

Administrator
Linda E. Righi
cdcbaa@aol.com

as did all the members of her family, including her father. Her younger brother, six years her junior, eventually became her best friend. Her family's unquestioning acceptance of her as a person and the gift of being treated equally and not less valuable than her brothers because she was a woman, allowed her the ability to have high expectations of herself and to not allow other's prejudices to interfere in pursuing her career.

"I never considered myself any different [than men]." She explains, "I really didn't. Maybe the only way it did influence me is that I might have become a physics major instead of an English major if I had been a man. Women were discouraged from sciences." It is only upon reflection that she recognizes that sexism had a subtle influence on her career path. "My mother was a writer and I considered journalism and so, studying science wasn't something I was even thinking about. Being a woman did have something to do with what I studied in college."

Being one of the only girls in her neighborhood, Meredith was asked to babysit a lot. She quickly found that caring for babies was hard work. Meredith recognized that her personality was such that motherhood without a career would not suit her. She preferred to spend time writing, being with her brothers, and playing sports. On family vacations in Montana and Colorado she and her brothers enjoyed biking and hiking in the mountains. One of her early passions was creative writing and she has all of her writing saved in boxes. Her love of the outdoors and writing would influence her decision when choosing a college.

Growing up in an upper middle class family, Meredith was expected to go to college and to graduate. Her decision to have a career came naturally to her but deciding what her career would be was a mystery. She attended the University of Colorado for undergraduate school because of her love for the mountains. Even though she could have gone to a more prestigious university, she was happy with her choice not only because of the mountains but also because the campus was diverse and allowed her to flourish as a student. She contrasts her experience with that of her older brother's who had gone to a more prestigious university that was heavily attended by high school valedictorians. At her brother's school, competition was fierce and her brother found it difficult to distinguish himself in a sea of extraordinary students. At the University of Colorado, Meredith could enjoy her mountains and stand out as a student. She became a member of the prestigious honor society, Phi Beta Kappa.

The honor's societies motto, "Love of learning is the guide to life," epitomizes her career. She explains, "You should go to undergrad where you want. You will make of it what you will." She took classes in English, Creative Writing and Journalism because she toyed with becoming a journalist like her mother. However, after scrutinizing writers in her literature classes, she became disillusioned with writing, especially fiction, and felt as though she had nothing to say. This base in writing, however, was crucial in her ability to communicate effectively throughout her life.

During her junior year while studying abroad at the University of East Anglia in Norwich, England, Meredith was happy when her parents came for a visit. However, she was taken aback when she was told by her father that she was not expected to have a career after graduating from college. To this day, she has a visual memory of the hotel room where this conversation took place. "I was about to finish my junior year of college and I was debating what I was going to do when I grew up. My Dad said, 'Well, you're going to get married and have a family.' I thought, 'You sent me to college with the idea that that was what I was going to do?'" Her disagreement with her father about whether to have a career or be an educated housewife took almost 20 years to resolve. "He really did think I was going to be like my mother. I was going to be a housewife. And I wasn't about to do that so we had a disagreement. It always surprised me but that was that era. He told me when I left for school that even if I got married before I graduated, he would continue to contribute to my income while I was going to school to make sure that I finished. It was that important to him that I finish my degree...but then didn't work." Before her father died 10 years ago, they were able to reconcile their differences. Although her father didn't really like lawyers, he thought she was 'alright.'

Meredith Jury finished her degree in 1969, graduating cum laude in English with a double minor in History and Journalism. Her graduation coincided with the emerging women's movement. This growing acceptance of women as being more than wives and mothers was in line with Meredith Jury's developing view of her place in the world. She always had the confidence that she could do anything and the women's movement helped pave the way for acceptance of this new interpretation of women's place in society.

After graduating from the University of Colorado, a friendship led her to Washington DC where she programmed computers for the 1970 census. Based on an economics course she had taken her senior year of college, Meredith decided to apply to graduate school in economics. She was attracted to the idea that it was a form of science. "So, I took calculus by correspondence and took night school classes at the University of Maryland. Then, I applied to graduate school in economics and was accepted at the University of Wisconsin. So, I went off to Wisconsin … and one year in academic economics taught me that it was a pseudo science." She was sadly disappointed. "It was a bunch of theoretical mathematicians trying to make a science out of a social science." Despite her disillusion, she received an M.A. in Economics in 1971.

Having found economics to be overly dependent on theory, Meredith turned to education and obtained an M.S. from University of Wisconsin in English Education in 1972. "When I was getting my second masters degree in Education and English, the goal being to teach composition in high school…I took a class on composition for teachers in summer school at Wisconsin. It was a hands on writing class where we wrote a composition a week and the instructor critiqued our writing using a different technique for doing so every week - redline, oral discussion, recorded audio comments, I have forgotten all the techniques. It was intense and enlightening and reinforced how hard it is to write well. It was the best college class I ever took in my life."

However, she soon found that she was not suited for teaching. "They stuck me in an eighth grade class, student teaching a bunch of thirteen year olds." Suffice it to say, it was not her forte. "I got a "B" in student teaching." Despite graduating with a masters degree in education, Meredith found her prospects at finding a job in teaching were low due to the fact that schools would have to pay the rookie teacher with the "B" in student teaching more

because of her masters degree. She was forced to make a new career plan.

During that time she met her husband-to-be who was a physicist. "We met playing tennis," she said. "He was every bit as liberal about women as my older brother had been. He treated women like equals. He was a really smart guy. The smartest person I ever met," she tells me. "There was never anything but one hundred percent respect from him for me."


Honorable Judge Meredith Jury

In 1973, Meredith Jury made the decision to enroll in Law School at the University of Wisconsin. "I went to law school so that I could use my left side and my right side brain. And then I was going to do some public services." After her husband obtained a job at the University of California's Riverside campus as a physics professor, she transferred to the School of Law at the University of California, Los Angeles. She had a small room in Brentwood and commuted to Riverside to be with her husband on weekends.

Within weeks of arriving at UCLA, someone mentioned that Best, Best & Krieger (BB&K) was looking for summer law clerks and that they were located in downtown Riverside, five minutes from where she lived. Naturally, she applied for the summer job with BB&K. "This was about 1974. [At the interview] they said, 'We see that you are following your husband. Will you be following him if he moves?' Then, they started asking me questions about how many kids I was going to have and how much time I would take off. So, then, I started asking them, 'How many kids did you have and how much time did you take off.' I knew what they were asking was inappropriate. So, I just made fun of the situation. When I went to the interview at the firm, which was a block away [from my chambers], they had my resume, which probably did not have much on it," she laughs quietly. "I noticed that on the top of it they had written 'Spunky.' And I thought, 'They're going to hire me,'" she laughs again. "And they did." After her summer clerkship at BB&K ended, the venerable firm wisely chose to offer the gifted student a job after she graduated. She deferred her decision until early in her third year.

One of Meredith Jury's favorite professors at UCLA, Paul Boland, became one of her mentors and a great influence on her legal career. Boland helped design one of the first clinical law programs that used students in the theater department who were role playing and video technology to teach students. He later became an associate justice of the California State Court of Appeal. She had taken an intensive second year class on office practices, such as how to intake a client, how to conduct interview, etc., taught by Professor Boland. Impressed by his intelligence and practical approach, she took a second clinical class with Professor Boland in trial advocacy her third year. She respected his opinion and went to him for advice regarding the job offer by BB&K. She knew that he had worked in public interest law before becoming an Adjunct Professor at UCLA. She also knew that he was well acquainted with the members of BB&K. She had always imagined she, like Professor Boland, would end up practicing public interest law. Therefore, after BB&K had offered her the job she went to him for advice. "He said, 'Meredith, you can't do better. They are the best lawyers by far in that area. You'll get wonderful training, better than working in legal services where you will get no training at all,'" she explains. "That advice turned out to be perfect." She accepted the position offered, and in 1976 she became the first female associate at BB&K.

Her experiences with her brother and her husband enabled her to approach her life and career as an equal of any man. "I never really had the concept that I couldn't do what a man could do because my male role models actually encouraged me. I had men in my life who treated me like an equal. That really helped me a lot when I was a young lawyer because there were no civil lawyers at that time who were women. There were just no women in the profession. Not even in Family Law were there women. I never thought I couldn't do anything that men could do, and I never, ever heard any sexism. The only thing that I ever perceived as sexism was one comment that appeared on the annual review of the associates. It was that I was too aggressive. I laughed because I was a litigator. I thought to myself, 'They would never say that about a man if he were a litigator.' They would never criticize a man for being too aggressive. I would have preferred, assertive."

Nevertheless, Meredith Jury does not remember any overt discrimination due to her being a woman in the

seventies. Her approach was to allow men to be polite and to not make a point of espousing her equality in such situations. "If the men wanted to open the doors for me, I didn't make a big fuss about it." Thus, Meredith Jury was able to make friends while other more dogmatic women who made a point of not allowing men to open a door for them had a harder time. "If they wanted to walk along the outside of a sidewalk or open the door for me, I didn't care. It's your brain they care about, the work you're doing," she explains. She allowed her work and her intelligence to speak for her and to let her actions speak volumes. A lesson that had been learned by watching her mother and seeing how her mother had led her life.

Although BB&K was not a public interest law firm, she was extremely happy with her decision to join the firm. "Even though BB&K represented businesses they were small businesses. They were human beings. My clients weren't institutions. All the work I did in bankruptcy court, secured creditor work...lessor work. They weren't institutions. Even though some were corporations, they were corporations of one person, like the little Mexican restaurant. So, I felt like I wasn't working in the big business world. [I]t was like working for private clients, essentially. And they needed help," she explains. "Plus, I did a lot of public law and litigation for cities. It was interesting. The work that I did for cities and water districts was fabulous. And, in the long run, when I ended up here [as a bankruptcy judge], I realized, Paul [Boland] was so right because the training I got by going to a good law firm gave me the ability to do what is more of a service oriented job - although, that is a secondary issue to the fact that I love it. If I am doing some good for the world, that's a side benefit. I found the right job at the right time of my life. I couldn't have been luckier."

Although she never took a bankruptcy class in law school, during her first few years at BB&K, her mentor at the firm advised her to try to distinguish herself by learning the new bankruptcy laws as the Bankruptcy Reform Act of 1978 went into effect. He had wanted her to become a Chapter 7 Trustee. "The last thing I wanted to be was a trustee because it was like running a business and nothing like being a trial lawyer. His recommendation was that I needed a niche. I needed something that would make me different than the other litigators at the firm for partnership reasons. So, it was at his recommendation that I learned the new law. I knew more about it the day it became effective than most of the lawyers that had been practicing for a long time. It was a very different law.

2015 Committee Chairs

Amicus Committee:
Marcus Tiggs

Calvin Ashlakd Committee:
Keith Higginbotham

Chapter 13 Committee:
Nancy Clark & Aki Koyama

Earle Hagen Committee:
Jeffrey Hagen & Maggie Bordeaux

Inn of Court Liason:
TBD

James T. King Symposium Committee:
Jonathan Hayes

Judge Selection Committee:
TBD

Limited Scope Committee:
Thomas Ure, Sylvia Lew & Nancy Clark

MCLE Certification and Location Committee:
Daniela Romero

MCLE Program Committee:
Roksana Moradi

MCLE Survey Committee:
Hale Antico

Membership Committee:
Thomas Ure

NACBA Representative:
M. Erik Clark

Newsletter:
Stella Havkin & Michael Gouveia

Outside Group & Court Liason:
TBD

Photographer:
Eric Mitnic

Refreshments Committee:
Bert Kawahara

Self Help Desk/Pro bono Representative:
Maggie Bordeaux

Trustee Liason:
Aki Koyama

Website Committee:
Pat Green with Desmond Hayes

You do not have to be a Board Member to join a committee. If you are interested in joining a committee, please contact the Chairman. Your participation will be welcome.

Newsletter Layout by Desmond Hayes: dh@desmondhayes.com

I appeared in front of Judge David Naugle about ninety percent of the time. And he was happy to have a woman in his courtroom. He recognized that I knew the new law and the other attorneys did not. So, I had a leg up."

Her strong work ethic earned her the respect of her peers and in 1982 she became the first female partner at BB&K and eventually, Jury became managing partner of BB&K's Ontario, California Office. About thirty percent of her practice was in bankruptcy. Toward the end of her practice she did some trustee work.

Meredith Jury gave respect and expected it from others. Her strength of character did not allow for disrespect from anyone. As the first woman partner, she observed how other women did not take charge of a situation or demand respect. "Other women associates would come back from a deposition and would comment about how a man had treated her, and I thought, 'You let him. You let him.' Because I never let them treat me that way. I never saw it [sexism] at my firm. I never had any problem with sexism. None whatsoever because I made them treat me like an equal by what I did. Did I open doors [for other women]? No. I just was me. I didn't work hard to make a role for women in that law firm. I just went and did what was required of the job."

She admits that women like Phyllis Schlafly who advocated that a woman was happiest as a full time mother and wife did bother her. "My way of commenting on that was to be in the professional world and do the job that a man could do. Action as opposed to reaction."

Her decision not to have children did not mean she did not recognize the difficulty raising children presented for professional women. Her experiences as a babysitter and student teacher had convinced her that taking care of children was extremely demanding. "[It] was a difficult decision for me because I always wanted to be superwoman." She recognizes that by not having children, she did not have as many obstacles to overcome as other career women who did. "I'm still astonished by the women who do have children because I do not know how you do it when you have a career and also want to be a good parent."

Reflecting back on the other areas of practice, she enjoyed the cases in which she represented cities and municipalities. "The most fun was when I litigated water suits for the City of Redlands. I know the entire history of the Inland Empire because of those lawsuits. How we got settled by Mormons and Native Americans and the influence of the Catholic fathers." The water and municipal litigation work accounted for the public law component of her practice at BB&K.

Meredith Jury never had plans to be a judge. "I never even wanted to be a judge. It wasn't on my radar." She explains, "In the mid nineties, they were about to appoint a new federal district court judge in the Inland Empire. They had never had a district court judge out here. They knew who the person was going to be, Judge Robert Timlin, who had been a Municipal Court Judge, a Superior Court Judge, and was on the Court of Appeal in San Bernardino. He was the smartest judge I ever appeared before and he had no ego. He was my role model for how to be a judge. They wanted him to be the candidate to be the District Court Judge but they needed people to apply. So, I actually got asked by fairly high ranking people if I wanted to apply. So, I did it because it was a compliment. It was really nice to be asked. When you do a judicial application it is a lot of work. It takes a week out of your life. I'll never, forget. I dictated my letter while I was driving from a court hearing in Orange County, and I gave it to my secretary. She said, 'This is a first draft?' I said, 'Yeah, this is what I'm supposed to do.' And she said, "Yeah! You're supposed to be a judge.' So, I applied." She was not surprised when

cdcbaa **Upcoming Calendar**

September 19, 2015
Second Annual
James T. King Banktuprcy Symposium

September 21, 2015
Earle Hagen Memorial Golf, Tennis and
Poker Tournament

October 17, 2015
How to be Appealing to the Bankruptcy
Appellate Panel

November 5, 2015
Twelfth Annual Calvin Ashland Awards Banquet

Meetings to be held at Southwestern Law School. Please check www.bklawyers.org for up to date MCLE meeting information.

they nominated Judge Timlin.

Having gone through the process of applying for a judicial appointment, Meredith Jury decided to try again if the opportunity arose. As destiny would have it, she ran into her former professor Paul Boland at a conference. By that time he had been appointed to the California Court of Appeals, and when she told Judge Boland of her interest in becoming a judge, he supported her decision. When Bankruptcy Judge Robert Alberts transferred from the Riverside Division of the Central District of California to the Santa Ana Division and a judgeship became available in the Riverside Division, at the urging of her colleagues, Meredith Jury applied.

Because she had previously applied for the District Court vacancy, she was fairly confident she could survive the process. In fact, she is surprised at how relaxed she felt about applying. "I was never even worried. Honestly, I know now that people didn't know what they were talking about but all these people would come up to me and tell me, 'It's yours.'" She recognizes now that she should have been more concerned but at the time she found the endorsements comforting. "When I went to the Ninth Circuit interview which in those days was in San Francisco in that big beautiful building, someone asked me what I did to prepare for it. I told them, 'You can't prepare for it. It's a once in a life time opportunity...to be interviewed by a group of Ninth Circuit Judges. There is nothing you can do to prepare." Because she could not prepare for the interview, she did not worry herself. "I was in the right place in the right time because I think they really cared that they were getting a person from the area for Riverside." Judge Meredith Jury was first appointed to the Riverside Division of the Bankruptcy Court for the Central District of California by the Unites States Court of Appeals of the Ninth Circuit on November 24, 1997.

She was offered the position in June of 1997 but had to wind down her practice. She was appointed the week of Thanksgiving in 1997. Since Judge Robert Alberts was not transitioning to the Santa Ana Division until February 1998 he held on to all of his Riverside cases until he moved and Judge Jury did not immediately inherent a case load. "We were the capital of the Chapter 20's. Huge 13 calendars. Equivalent to what we were doing in 2008. They [the Riverside bankruptcy Judges] were worn out. I was here two days and I just took their calendars." In addition, Judge Lisa Fenning who sat in the Los Angeles Division of the Central District of California was having foot surgery. Judge Jury drove down to Los Angeles and spent a day with Judge Fenning and watched how she conducted her calendar. "The next week, I went down there [to the Los Angeles Division] for a day and did all of her Chapter 11 calendars. I put on a robe and went out there and did them. I remember the courtroom deputy saying, 'You've never done this before?' I said, 'No. But I've been in courtrooms all my life.'"

Despite having represented business for years, she had no difficulty transitioning from an advocate to an arbiter of the facts and law. What was important was to make the right decision based on the law. She explains that debtor attorneys were concerned that she might not be able to put aside years of representing creditors and trustees but they had nothing to fear. Adjudicating cases came easily for the energetic Judge Jury. "It's not about creditor or debtor. It's about getting it right. I had a real idea that the bench is no place for ego. My job is to make the right decision where the law and the facts are...not creditor or debtor...not big firm, little firm...just the right decision. If they miss an issue, often it is my job to see it and rule accordingly."

Judge Jury understands the difficulty lawyers have in presenting their arguments, even if they lose. "When I first took the bench, I said, 'As a lawyer I would not like me' because I will not favor the better lawyer." She explains that when she was in practice, she and her colleagues endeavored to never miss a deadline and were always

prepared for court. Although, she knows how to take a loss, she stated that she felt dissatisfied when she knew that she had met every deadline and was better prepared than her opponent. However, as a judge, she recognizes that despite meeting deadlines and being better prepared, sometimes a lawyer will lose on the merits. "If you don't know how to lose, you don't know how to be a lawyer."

She was surprised at how she felt when ruling against parties who had made really good arguments. "I want to make sure they understand that they are doing their job right. Whether it's a consumer debtor lawyer because they are good with their clients, or because they gave me a big intellectual argument and I thought the law went the other way, I still feel bad for them because I once was a lawyer. But it doesn't affect how I make my decisions because I am willing to announce them to their face, orally as opposed to doing it under submission. Written tentatives usually don't work for me. If I have a really complicated case, to give a tentative orally, I really have to be on top of it which is the highest level of my thinking. If your law clerk writes it down, it is passive. If I write it, it is active. Many of the written tentatives are written by the law clerks. When I give a tentative, it is an active thinking process which is a lot harder."

When asked if Chapter 13 is a failed program, Judge Jury responds, "No. I always remember the successes not the failures. I am getting a whole lot of discharges which means that people are finishing their plans. A lot of people are completing. I have a whole slew of them every day because I have to review the Applications for Discharge. So, I know that many come through. I don't know how many percentagewise because no one has ever kept those numbers right. They do them by the amount of cases filed including the pro se that are never even going to get to confirmation. But the true percentage is how many confirmed plans complete." Her approach to Chapter 13 cases is pragmatic. "I test confirmation feasibility with performance. My attitude is that if you are close, I am going to confirm. I have seen people who might have been on the bubble of income and they make it work."

In 2007, Judge Jury was appointed to her first seven year term with the Ninth Circuit Bankruptcy Appellate Panel. She feels that the Bankruptcy Appellate Panel ("BAP") as an intermediate court to the 9th Circuit Court of Appeals is not an activist court. "We have no agenda to make change. The opportunity to be "activist" is probably biggest when an appellant relies on [11 U.S.C.] Section 105 to expand the court's power. The BAP has traditionally looked askance at Section 105 arguments and resisted that form of activism." She explains that as a jurist you are mostly looking at precedent and judicial statutory interpretations which does not give the BAP judges the opportunity to act as activists. "You may bend the interpretation to the preferred decision but that is not judicial activism. Activism is trying to create a change in the law by how one rules on the bench."

She currently presides over one of the few Chapter 9 cases in the country. The City of San Bernardino filed Chapter 9 bankruptcy on August 1, 2012. Judge Jury relished the opportunity to preside over a Chapter 9 and was grateful when Chief Judge Kozinski assigned the case to her. She was familiar with municipal financing from her days representing cities while at BB&K. In fact, she had even advised cities on Chapter 9 bankruptcy while in practice. "The issues in the Chapter 9 are unique.... you know there is no law. You are making the law. What I did when I did eligibility on Summary Judgment was unheard of." In order to find them eligible on Summary Judgment, she had to assume all the worst facts and, even after assuming the worst facts that could be presented, make the determination that there was no question that the City of San Bernardino was eligible for insolvency. Others have questioned her making the decision on Summary Judgment but asked if she would do it again, she responds emphatically and with no doubt in her mind that she would. And it moved the case. "It was a whole lot of work for my law clerk and me. I announced an oral tentative that took me two hours. The hardest thing I have ever done in my life," she explains. She feels the responsibility and she is committed to seeing the San Bernardino Chapter 9 bankruptcy through to its end.

Judge Jury enjoys her status as the senior bankruptcy judge in the Riverside Division of the Central District of California. She has an open door policy with her colleagues and enjoys answering questions. When contemplating retirement, Judge Jury explains, "I would never leave the bench before San Bernardino is finished. I have two commitments, my term on the Bankruptcy Appellate Panel and San Bernardino."

Judge Jury understands her family is the core of who she is as a person and as a jurist. She had the advantage of a family who treated her no differently than a man and a mother who taught her that actions let the world know who you are and that everyone deserves respect. "My mother had help. She was from the upper middle class. My father made a good income. We lived in an upper middle

class town, and you had housekeepers who might live in the back forty. My mother gave them a coffee break and sat down with them and chatted with them and treated them like equals...always. People would come back and clean for my mother when they did not even have to do that anymore. They had moved on to become realtors, or other professions. They came back because she made them feel like they were somebody. I wish I had that skill. My mother was amazing that way. So, I learned a lot from my mom. When we spread my mother's ashes in Colorado, I went to the stream where my mother liked to watch the elk drink. My mother was special. My parents were special. My mom more than my dad, and my dad and I had made peace before he died. When we had a ceremony for my mom I said, 'What ever good I am is because of my mom.' Any good I have done or any good thing I might do is because of my mom."

Judge Jury was reappointed in November 2011 to the Riverside Division of the Bankruptcy Court for the Central District of California by the Unites States Court of Appeals of the Ninth Circuit. In 2014, she was appointed to an additional three year term on the Ninth Circuit Bankruptcy Appellate Panel. The San Bernardino Chapter 9 bankruptcy continues and Judge Jury's appointment to the Bankruptcy Appellate Panel expires in 2017.

Good Faith - One of the Most Common Objections to Chapter 13 Plan Confirmation

By: Nancy B. Clark
nbc@blclaw.com

One of the most common objections to Chapter 13 Plan confirmation is "bad faith." The Bankruptcy Code does not make reference to "bad faith." What most trustees and creditors are referring to when they state that the debtor filed in "bad faith" is actually a reference to the "good faith" provisions in 11 U.S.C. §1325. Good faith is a subjective standard which is fact based and will be determined by the arbiter of the facts. Because of its subjective nature, judges approach it differently. Therefore, it is always good to know your trustee and your judge. The following is a starting point for anyone doing research on good faith in Chapter 13.

I. Good Faith

Good faith is not defined in the Bankruptcy Code. It is mentioned in 11 U.S.C. §1325(a)(3) and §1325(a)(7). §1325(a)(3) was introduced under the Bankruptcy Reform Act of 1978, and states:

> (a) Except as provided in subsection (b), the court shall confirm a plan if-
>
> (3) the plan has been proposed in good faith and not by any means forbidden by law[.]

11 U.S.C. §1325(a)(3). A bare examination of Section 1325(a)(3) suggests an assessment that the manner or method of proposing a plan must be lawful.

Section 1325(a)(7) was introduced in 2005 under BAPCPA, and states:

> (a) Except as provided in subsection (b), the court shall confirm a plan if-
>
> (7) the action of the debtor in filing the petition is in good faith[.]

11 U.S.C. §1325(a)(7). A bare examination of §1325(a)(7) suggests that the act ("action" as opposed to "actions") of filing of the plan is to be assessed to determine good faith. Few cases addressing §1325(a)(7) specifically have been decided in the Ninth Circuit. Therefore, most of the case law regarding good faith pertains to §1325(a)(3).

The Ninth Circuit Court of Appeals first addressed good faith under §1325(a)(3) of the Bankruptcy Reform Act of 1978 in *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386 (9th Cir. 1982). The Court in *Goeb* stated:

> Given the nature of bankruptcy courts and the absence of congressional intent to specifically define "good faith," we believe that the proper inquiry is whether the Goebs acted equitably in proposing their Chapter 13 plan. A bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. Though it may consider the substantiality of the proposed repayment, the court must make its good-faith determination in the light of all militating factors.

Id. at 1390 (footnote omitted). In *Goeb*, the "substantiality of the proposed repayment" to the general unsecured creditors was raised as an objection to Chapter

13 Plan confirmation under the auspices of good faith. However, the Court stated that although "substantiality of the proposed repayment" is a factor, it was not the only factor in the determination of good faith. *Goeb* at 1390. The Court determined that good faith must be reviewed under the totality of circumstances and said, "bankruptcy courts cannot substitute a glance at the amount to be paid under the plan for a review of the totality of circumstances." *Id*. at 1391. In analyzing the facts in Goeb, the Ninth Circuit reasoned:

> In this case, some facts strongly suggest that the Goebs proposed their plan in good faith. They did not elect Chapter 13 over Chapter 7 to cheat their creditors: there plan would pay secured and priority creditors in full, which might not have occurred in Chapter 7. Moreover, the plan does not leave the Goebs any surplus.
>
> In finding bad faith, the bankruptcy court relied exclusively on the facts that (1) Goebs elected to proceed under Chapter 13 to take advantage of an incidental feature of that chapter (deferring payments of back taxes), and (2) they did not intend to substantially repay unsecured creditors. In re Goeb, 4 B.R. at 736-37. Although these two considerations are relevant, they are not determinative. Unless the court can muster other evidence of bad faith on remand, it must confirm the Goebs' proposed plan.

Id. at 1391. Thus, the concept of "factors" to be considered under the totality of circumstances was introduced.

Since *Goeb* was first decided many cases have addressed the factors that must be considered under the totality of the circumstances. See *Leavitt v. Soto, (In re Leavitt)*, 171 F.3d 1219, 1224-1225 (9th Cir. 1999); *Fidelity & Casualty Company of N.Y. v. Warren (In re Warren)*, 89 B.R. 87 (9th Cir. BAP 1988). The Ninth Circuit BAP enumerated the following eleven factors in *Warren* in 1988:

> 1) The amount of the proposed payments and the amounts of the debtor's surplus;
> 2) The debtor's employment history, ability to earn, and likelihood of future increases in income;
> 3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;
5) The extent of preferential treatment between classes of creditors;
6) The extent to which secured claims are modified;
7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
8) The existence of special circumstances such as inordinate medical expenses;
9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
11) The burden which the plan's administration would place upon the trustee.

Warren at 93. In *Leavitt*, the Ninth Circuit Court of Appeals addressed the good faith factors as follows:

(1) whether the debtor misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner, id. (citing *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir.1982));
(2) the debtor's history of filings and dismissals, id. (citing *In re Nash*, 765 F.2d 1410, 1415 (9th Cir.1985));
(3) whether the debtor only intended to defeat state court litigation, id. (citing *In re Chinichian*, 784 F.2d 1440, 1445-46 (9th Cir.1986)); and
(4) whether egregious behavior is present, *Tomlin*, 105 F.3d at 937; *In re Bradley*, 38 B.R. 425, 432 (Bankr. C.D.Cal.1984).

Id. at 1224. Most recently, the Ninth Circuit Court of Appeals in *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) reiterated the four factors that comprise the good faith test as determined in *Leavitt*. The Court stated:

As we set forth in In re Leavitt, 171 F.3d at 1224, our good faith analysis includes whether: (1) the debtor has misrepresented facts, manipulating the Bankruptcy Code or filed in an inequitable manner; (2) the debtor's history of bankruptcy filings; and (3) the debtor intended to frustrate collection of state-court judgment; and (4) "egregious behavior is present."

Welsh at 1123. Judge Mark Houle in *In re Gilbert*, case no. 614-bk-11606-MH distinguished the *Leavitt* factors from the *Warren* factors by finding that the *Leavitt* factors applied where dismissal was sought with prejudice to re-filing, and *Warren* factors applied to cases were dismissal was sought without prejudice to re-filing. Either way, an attorney addressing good faith must be familiar with both sets of factors.

2. Good Faith and the Means Test

Unlike *Leavitt* and Warren which predated BAPCPA, the Court in *Welsh* had to contend with the changes to the Bankruptcy Code under BAPCPA. The changes to BAPCPA in 2005 took much of the discretion the courts had when determining the plan payment and replaced it with the mechanical approach embodied in 11 U.S.C. §1325(b) and 11 U.S.C. §707(b) (commonly known as the "means test"). These changes to the Bankruptcy Code were meant to encourage debtors to file repayment bankruptcies. *Danielson v. Flores (In re Flores)*, 692 F.3d 1021, 861 (9th Cir. 2013) *citing to Dumont v. Ford Motor Credit Co. (In re Dumont)*, 581 F.3d 1104, 1111 (9th Cir. 2009) and *Ransom v. FIA Card Servs. (In re Ransom)*, N.A., 131 S.Ct. 716, 729 (2011). Therefore, some of the debate as to whether the debtor acted in good faith by filing a Chapter 13 over a Chapter 7 may now be supported by a showing that the means test calculation required the debtor to file a Chapter 13.

3.Good Faith and Best Interest of Creditors Test

The best interest of creditors test is another common objection raised by trustees and creditors and is closely related to good faith. You may want to include it in our argument as an additional factor that may be considered under the totality of the circumstances. The best interest of creditors test is embodied in 11 U.S.C. §1325(a)(4) and provides guidance as to good faith. §1325(a)(4) states:

(a) Except as provided in subsection (b), the court shall confirm a plan if-
(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on

such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]

Under §1325(a)(4) the plan must propose to pay at least the amount creditors would receive in a Chapter 7 liquidation as of the date of filing. In addition to a Chapter 7 liquidation analysis, debtors may want to point to the loss of a residence to foreclosure, or the loss of personal property like a vehicle for justification that the Chapter 13 was filed in good faith. As was first stated in *Goeb*, if secured and priority creditors would get less in a Chapter 7 than they would in the Chapter 13, the best interest of creditors test may be met. *Goeb* at 1391; *see also Kitchens v. Georgia R.R. Bank & Trust Co.*, 702 F.2d 885, 889 (11th Cir. 1983), *citing to Matter of Bellgraph*, 4 B.R. 421, 423-24 (Bkrtcy.W.D.N.Y. 1980).

4. Superdischarge and Good Faith

Many of the cases you will run across in your research regarding good faith will make reference to the "superdischarge." Prior to the enactment of the BAPCPA, a debtor in Chapter 13 bankruptcy could discharge a claim that was exempted from discharge in Chapter 7. *In re Warren*, 89 B.R. 87, 90-91, 95 (9th Cir. BAP 1988) (the court found bad faith where the debtor converted his chapter 7 case to chapter 13 in order to avoid an adversary proceeding regarding dischargeability of a claim based on a default judgment for embezzlement); *In re Meltzer*, 11 B.R. 624 (Bankr. E.D.N.Y. 1981). This phenomena in Chapter 13 was called a "superdischarge" and many cases regarding good faith under §1325(a)(3) revolved around the fact that the Chapter 13 debtor was seeking to discharge a claim that was non-dischargeable in Chapter 7. However, BAPCPA changed that in 2005. BAPCPA added to §1328 many of the same exceptions to discharge in Chapter 7, i.e. certain taxes, domestic support, student loans, fiduciary fraud, embezzlement, larceny, wrongful death, debts owed for willful or malicious injury in personal injury due to driving while intoxicated, improperly listed debts, criminal fines and restitution. 11 U.S.C. §1328. However, many of these cases are still cited in reference to the good faith analysis in Chapter 13.

5. Additional Cases Relevant to the Good Faith Analysis

Goeb, Leavitt, Warren, Welsh and the other cases cited in this article are the usual starting point for a good faith argument under 11 U.S.C. §1325(a)(3) and §1325(a)(7). However, the following is a list of additional cases that may assist you in your good faith analysis (in no specific order):

- *Drummond v. Welsh (In re Welsh)*, 465 B.R. 843 (9th Cir. BAP 2012)
- *Mattson v. Howe (In re Mattson)*, 468 B.R. 361 (9th Cir. BAP 2012)
- *Meyer v. Hill (In re Hill)*, 268 B.R. 548 (9th Cir. BAP 2001)
- *In re Chinichian*, 784 F.2d 1440 (9th Cir. 1986)
- *In re Enewally*, 368 F.3d 1165 (9th Cir. 2004)
- *In re Cavanagh*, 250 B.R. 107 (9th Cir. BAP 2000)
- *Meyer v. Lepe (In re Lepe)*, 470 B.R. 851 (9th Cir. BAP 2012)
- *In re Eisen*, 14 F.3d 469 (9th Cir. 1994)
- *In re Morimoto*, 171 B.R. 85 (9th Cir. BAP 1994)
- *In re Ellsworth*, 455 B.R. 904 (9th Cir. BAP 2011)
- *In re Villanueva*, 274 B.R. 836 (9th Cir. BAP 2002)
- *Johnson v. Home State Bank*, 501 U.S. 78 (1991)
- *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010)
- *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010)
- *In re Eardley*, No. CC-08-1175-MoMkH (B.A.P. 9th Cir. 5/11/2009) (B.A.P. 9th Cir., 2009)

Ninth Circuit Discharges Student Loan on Issue of First Impression

By: Shannon A. Doyle
sdoyle@debankruptcyassistants.com

By now we are all aware of the student debt crisis this country and the lack of relief available through bankruptcy. A borrower practically needs to show they are in a state close to Terri Schiavo to meet the undue hardship test, and qualify for a discharge of their student loan. While the government has addressed the problem through Income Based Repayment Plans, private student loans remain an extreme economic burden for millions of people. While some Courts seem to be loosening the standard for a showing of undue hardship, the noose remains tight. However, there is some good news. In this case of first impression, the Ninth Circuit has found a loophole, allowing for the discharge of certain student loans without a showing of undue hardship. In *Meridian University vs. Christoff*, BAP No. NC-14-2336-PaJuTa (9th Cir. B.A.P. March 27, 2015) (*In re Christoff*), the Ninth Circuit addresses whether tuition advanced to debtor by a for-profit college is excepted from discharge pursuant to §523(a)(8)(A)(ii). Debtor, Tarra Nicole Christoff, attended

Meridian University, a private for-profit California licensed institution offering studies in psychology. Meridian advanced tuition as credit to be repaid when debtor received her degree. There was no third party lender and debtor did not receive any funds directly from Meridian. Debtor signed a few promissory notes which included interest on the unpaid balance of nine percent per annum, compounded monthly and was to be paid at $350.00 per month. After completing the program, debtor made payments on the notes but subsequently defaulted and filed for chapter 7 bankruptcy. Meridian filed an adversary proceeding against debtor claiming the debt was excepted from discharge under 11 U.S.C. §523(a)(8)(A)(ii). The Bankruptcy Court granted debtor's motion for summary judgment and held that debtor's "loans" were not excepted from discharge under §523(a)(8)(A)(ii). Meridian appealed and the Ninth Circuit BAP ("Panel") affirmed.

The question to be answered is: Does 11 U.S.C. §523(a)(8)(A)(ii) require that actual funds be received by a debtor, or received from a third party to a for-profit post-secondary educational college in order for the student debt to qualify for an exception to discharge under that provision? Section 523(a)(8)(A)(ii) does not discharge a debt, absent a showing of undue hardship for -

> "an obligation to repay ***funds received*** as an educational benefit, scholarship or stipend." [emphasis added]

Meridian argues that there need not be a physical exchange of funds for a debt to be considered "an obligation to repay funds received". Meridian relies on *McKay v. Ingleson*, 558 F.3d 888, 889 (9th Cir. 2009) (*In re McKay*), a pre-BAPCPA case which addressed the issue of whether an agreement between the debtor and Vanderbilt University, a non-profit institution, was a loan for purposes of §523(a)(8)(A)(i). At the time *McKay* was decided §523(a)(8)(A)(i) was simply §523(a)(8). This distinction becomes important in the Panel's analysis of the current case. In McKay, the debtor and Vanderbilt University entered a contract wherein tuition and educational costs would be charged on an account and billed monthly. The debtor was to pay the bill at the end of each month or a late fee would incur. The Bankruptcy Court found the agreement created a "loan" as defined in §523(a)(8)(A)(i) (formerly §523(a)(8)). The Court concluded that an actual exchange of funds was not required to deem the agreement a "loan" that qualifies for the discharge exception because the debtor was allowed to attend classes. The Ninth Circuit affirmed relying on *Johnson v. Mo. Baptist Coll. (In re Johnson)*, 218 B.R. 449 (8th Cir. BAP 1998), another pre-BAPCPA case which found that it is inconsequential whether debtor received actual funds – an extension of credit is a "loan" under §523 (a)(8)(A)(i) and is a non-dischargeable debt. The critical distinction in *McKay* and *Johnson* is that both of those universities were non-profit institutions, and therefore the applicable law relating to those agreements was §523(a)(8)(A)(i). Section 523(a)(8)(A) (i), does not discharge a debt absent a showing of undue hardship for -

> "an educational benefit overpayment ***or loan*** made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or non-profit institution." [emphasis added]

Meridian then argues that the term "loan" as defined in §523(a)(8)(A)(i) is synonymous with the term "funds received" as described in §523(a)(8)(A)(ii) and since the Ninth Circuit has already determined that funds do not need to be exchanged in order for an agreement to be considered a "loan", Meridian's arrangement with the debtor constitutes a dischargeable student loan.

ENTER BAPCPA

Prior to BAPCPA, there was only §523 (a)(8)(A) which provided that, absent a showing of undue hardship, a discharge would not apply to a debt for -

> "an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit, or non-profit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend"

After BAPCPA, there were three distinct sections of §523(a)(8) wherein Congress created (A)(i) added (A)(ii) and (B). The creation of new subsections A(i) and A(ii) separated the pre-BAPCPA §523(a)(8) language into two distinct subsections. Debtor argues that since Congress did not use the term "loan" in the newly created (A)(ii), it intended for the exception to discharge to extend to a different type of debt – one where the debtor "received funds". Therefore, *Johnson* and *McKay* do not apply because those cases dealt with "loans" as defined in (A)(i),

and not the newly created (A)(ii) which specifically leaves out the term "loan" and instead reserves the term "funds received".

The Panel further reviewed *Ohio Univ. v. Hawkins (In re Hawkins)*, 469 F.3d 1316, 1317 (9th Cir. 2006). While *Hawkins* was another pre-BAPCPA case, it construed the same language at issue in the current case. In *Hawkins*, Ohio University and the debtor contracted that admission to the medical school would be predicated on debtor practicing medicine in Ohio for at least five years after licensure, otherwise she would be subject to liquidated damages. The *Hawkins* Court determined that the agreement was not a "loan "as described in §523(a)(8) because the agreement contained arbitrary repayment terms. The Court then had to decide if the agreement was "an obligation to repay funds received as an educational benefit" (under the second part of pre-BAPCPA §523(a)(8), now §523(a)(8)(A)(ii)). The Court found the plain language to be clear. Funds received means funds actually received and since debtor did not receive funds, the debt did not meet the requirement for nondischargeability.

The Panel ultimately agreed with the analysis in *Hawkins* and further agreed with debtor that when Congress severed §523(a)(8), it meant to distinguish "loans" made in connection with non-profit and government agencies from "funds received" by for-profit institutions clearly creating a prerequisite that funds be received from a for profit college in order to be classified as a nondischargeable student debt. While this decision is sure to help many student borrowers seeking bankruptcy relief, undoubtedly the overall problem endures with nearly 1.2 trillion in student loan debt. If we could just get Congress to pass Senator Durbin's student loan bill, The Fairness for Struggling Students Act of 2015, we would be on our way to deactivating this student loan debt bomb in America.

CDCBAA HOROSCOPES FOR CHAPTER 13

DISCLAIMER: CDCBAA Horoscopes are for entertainment proposes only and are not meant as actual astrological predictions

Capricorn (12/22-1/19): Tame the animal inside. Instead of litigating, find another means of conflict resolution. You may want to request assignment to a mediation. Use form F701. Save yourself from costly conflict. This attitude will get you far.

Aquarius (1/20-2/18): Find deeper meaning in your life. You need to search through the words and look in between the lines to find your way. Take the time to read, I mean, really read, In re Lanning, 130 S.Ct. 2464 (2010). Dig in. Revel in the words.

Pisces (2/19-3/20): Now is the time to take action. Central District of California Local Bankruptcy Rule 3015-1(j) will guide you through the filing of a Motion for Order Disallowing Claim (Objection to Claim). Pending resolution, the chapter 13 trustee will stop making payments on the uncontroverted portion. So don't wait. Stop the payments.

Aries (3/21-4/19): Give special attention to creditors today. Remember who comes first. This is a good time for you to become familiar with 11 U.S.C. §507. Remember to get your priority unsecured creditors straight and you will enjoy life.

Taurus (4/20-5/20): Proceed with caution. Clear the confusion that has plagued you by paying attention to details. Chapter 13 Plans may contain several things. Therefore, look to 11 U.S.C. §1322 for Contents of a Plan. Do not stay in the dark. There is a big bright world you need to explore in your Chapter 13 Plans.

Gemini (5/21-6/20): This is your time to shine. So, turn up the volume and let 11 U.S.C. §1325 will provide you the guidance you need to defend your Chapter 13 Plan. You have a chance to propel your plan into confirmation.

Cancer (6/21-7/22): Stay home and enjoy your surroundings. Think of ways to take care of yourself today. Familiarize yourself with each judge's rules regarding telephonic appearances by visiting the court's website at www.cacb.uscourts.gov/judges/ regarding telephonic appearances. Take time for you. You will not regret it.

Leo (7/23-8/22): People a clamoring to be heard. Jump in and add your opinion. Force yourself to be more social and participate in your community. Join CDCBAA today and you will find likeminded individuals who will listen to you and appreciate you.

Virgo (8/23-9/22): Be on the look out. Your clients will make mistakes and you will have to be ready to help. 11 U.S.C. §1329 will save your client from failure. Tackle their problems and you will be rewarded in your supplemental fee applications.

Libra (9/23-10/21): Do not let yourself become overwhelmed by negativity. 11 U.S.C. §1328(b) regarding hardship discharges in Chapter 13 allows your client the fresh start they so desperately need without making all of their plan payments. Your spirited approach will save the day.

Scorpio (10/22-11/21): You must remain firm and positive. You know what 11 U.S.C. §1321 says, Debtor shall file a plan. Not the trustee, not the creditors, not even the judge. The Debtor files the plan! So, get to it and file the debtor's plan today.

Sagittarius (11/22-12/21): Do not let the clients overwhelm you with phone calls and emails. Take advantage of the Central District Court's new Debtor Electronic Bankruptcy Noticing (DeBN). Your clients can get court order and court generated notices by email for free. Get them off your back and on track to discharge.

cdcbaa

Central District Consumer Bankruptcy Attorneys Association

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

2015 Membership

I hereby apply for membership in the *cdcbaa*, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for calendar year 2014. 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 2014 calendar year membership fee is $250.00, and includes one ticket to the Calvin Ashland Awards Dinner

Name: _____

Bar Number: _____

Firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail: _____

Website URL: _____

Signature: _____ Date: _____

Membership Fee: *Please make checks payable to: cdcbaa*	**$250.00**
Mail this completed form and application fee to:	***cdcbaa*** Attn: Linda Righi, Administrator c/o Jeffrey Hagen, Treasurer 4559 San Blas Avenue Woodland Hills, CA 91364