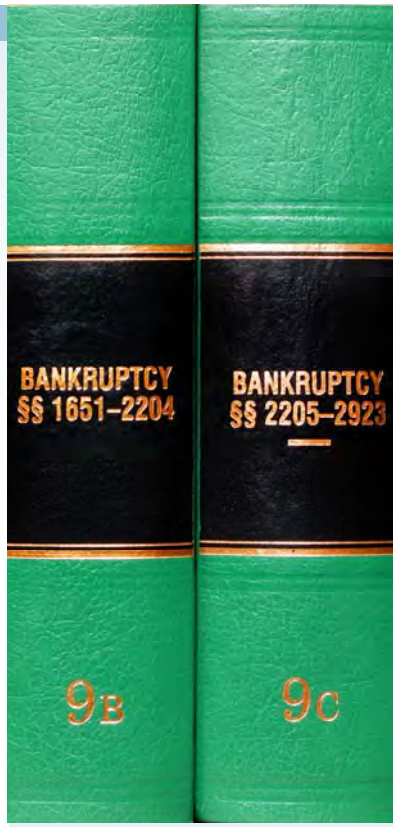
Spring 2020

Bankruptcy Court Liaison Committee Newsletter



A Message from the Co-Chair

Dear Bankruptcy Community,

Times like these are unsettling. COVID-19 has dramatically altered our lives and it's unclear when we will regain that sense of normalcy that we collectively long for. I've found solace in reaching out to colleagues and peers to check-in and catch up. After all, this is a community of professionals and judges who have devoted our respective careers to helping others.

In the coming months, our community will be called upon to assist people and their businesses as they traverse emotionally and financially trying episodes. As you take this time of solitude to reflect on your personal and professional lives, please remember that you make a difference to those in need. For many, we are the last line of defense. With numerous opportunities to give back standing just ahead, I encourage you to consider ways you can do your part.

On behalf of the Bankruptcy Liaison Committee, we wish you and your families continued good health. Please stay safe!

Sincerely,

Michael Brandess
Co-Chair of the Northern District of Illinois Bankruptcy Liaison Committee

In Memory of Judge Manuel Barbosa

By Judge Thomas M. Lynch

Last November our bankruptcy community lost retired Judge Manuel ("Manny") Barbosa. Appointed to the U.S. Bankruptcy Court for the Northern District of Illinois in 1998, Judge Barbosa served in the court's Western Division, principally sitting at Rockford. In addition, he "rode circuit" in the court's Eastern Division to hear cases at Geneva, Illinois.

Inside this Issue

Co-Editors

Alexander F. Brougham | Adelman & Gettleman, Ltd.
David R. Doyle | Fox Rothschild LLP

In Memory of Judge Manuel Barbosa *(Continued)*

Judge Barbosa was the first Hispanic judge to sit on the Northern District's bankruptcy bench. Long before his judicial appointment he was recognized for his deep and abiding commitment to public service and compassion for persons struggling to make ends meet. Manny was a charter commissioner of the Illinois Human Rights Commission for more than eighteen years, part of which time he served as its chairperson. In his eulogy for Judge Barbosa, retired Chief Judge S. Keith Lewis (Ill. 16th Cir.), recalled how his former law partner often worked long into the night for many clients too poor to pay for the services they received. Following his retirement from the bench, Manny was named to the board of trustees of Metra, Chicago's regional commuter railroad and the nation's busiest commuter rail system outside of metropolitan New York, and was reappointed to the Human Rights Commission. Manny was a longtime member of the board of visitors for the Northern Illinois University College of Law, a past member of the Elgin Zoning Board of Appeals, and a founder of the Club Guadalupano of Elgin, a scholarship program for college-bound Latino students. This is just a sampling of his many civic endeavors. Recently, the City of Elgin renamed a downtown street "The Honorable Manuel Barbosa Way" in recognition of Manny's many contributions to the community. That must have been a rather pleasing honor for Manny inasmuch as he considered his "most satisfying civil victory" as a courtroom lawyer to be the jury verdict he obtained in a case he tried against that city years before.

Judge Barbosa was born in the La Huasteca Potosina region of Mexico. Manny fondly remembered stories about his family, including his great uncle, Magdaleno Cedillo, a prominent leader in the Mexican Revolution of 1910 – 1920. When Manny was two months old, his parents, Eliseo and Concepcion, hazarded crossing the Rio Grande with their infant son, Manny's two-year-old sister and other family members to reach El Otro Lado in pursuit of the American dream. His family first lived on a cotton farm by the Texas border, then migrated to Nebraska. Manny had vivid memories of working as a young child alongside his family in the fields. Eventually the Barbosas settled in Elgin where his parents instilled a love of learning in their children. After college, Manny taught at a local elementary school while pursuing a law degree from the John Marshall Law School during the evening. Once admitted to the bar, he served as an assistant state's attorney before going into private practice. After retiring from the bench, he wrote a fascinating account of his journey and family legacy, *The Littlest Wetback: From Undocumented Child to United States Federal Judge* (State Street Publishing, 2014).

Manny spoke fondly of his induction as a judge and how, just a few days before that event, he received a call of congratulations from Judge Abraham Lincoln Marovitz who had sworn Manny in as a citizen of the United States many years before. Manny recalled thanking his parents at the ceremony, speaking of how his father taught him that "the true aristocracy of men . . . derives not from wealth or power, but from living a life that allows the fullness of human dignity to shine through." (*The Littlest*, p. 213). In its *Resolution on the Passing of Judge Barbosa*, the faculty of the Northern Illinois University College of Law recognized that he lived such a life, one which bequeathed a "legacy of tempered, sensible prudence" that will live on through the many "who benefited from his giving spirit and intellect."

Manny is survived by his wife Linda, and their three children and eight grandchildren. At the direction of Judge Rebecca Pallmeyer, Chief Judge of the Northern District of Illinois, the flag at the Stanley J. Roszkowski United States Courthouse flew at half-staff to honor the service of Judge Barbosa.

Behind the Bench with Judge Cleary

By: Alexander F. Brougham, Adelman & Gettleman, Ltd

I sat down briefly with the Honorable David D. Cleary to discuss his background and his transition to becoming our District's newest bankruptcy judge.

Q: Please describe your background prior to becoming a bankruptcy judge.

A: I've been practicing for about 33 years, and almost all of it has been spent doing corporate/commercial bankruptcy and restructuring work. After law school, I started out as a commercial litigator for a couple of years, and tried bankruptcy litigation because it provided a lot of courtroom experience. I loved—I love—the courtroom work in bankruptcy. It took some time, but I eventually merged over into the corporate restructuring side of it as well, and it became a full-fledged, well-rounded practice for me. I've done large cases, middle-market cases, and individual chapter 11 cases. I have represented debtors, creditors, committees, individuals, corporations, and trustees – essentially every constituency. I have predominantly been based here in Chicago, but my practice has taken me to many different jurisdictions, all around the country. Most recently, I spent a couple of years pretty much exclusively down in Puerto Rico, where I was representing the Commonwealth in their restructuring and, ultimately, bankruptcy. I did not do much individual consumer work, although I've been on committees and volunteered on panels and help desks, which allowed me to become familiar with the consumer side to some degree. This, though, is my first experience with a heavy consumer docket.

Q: Has that been a challenge for you?

A: It's definitely been a challenge. I think because of my general bankruptcy background, I was able to identify—at least from a high level—some of the issues, which helped. But consumer bankruptcy is somewhat different, and therefore it's exciting. You know, every day, that you'll learn a little bit more. There's a lot to learn, but I'm enjoying it.

Q: How have you gone about learning consumer bankruptcy?

A: I think it's a combination of several different things. One, when you take the bench, you find out you have a very heavy consumer docket; you're looking at between 400 and 500 cases a week. And that's a good learning experience by itself.

Second, I have a great staff. We bounce a lot of ideas off of each other; we work through issues. Their background has been extremely helpful. The third is reading a lot of caselaw and treatises. And finally, the bench here has been extremely helpful. It's a very collegial bench, and a very knowledgeable bench, and they reached out—both during my transition and since I've been on the bench—and I couldn't have survived without them.

Q: What led you to apply for a bankruptcy judgeship?

A: My corporations professor, [the Hon.] David Coar, became a bankruptcy judge, and later a district judge, after I completed law school. I still consider him my mentor. Judge Coar suggested I start applying for bankruptcy judgeships earlier rather than later, mostly just to understand the process and move toward being ready to be a bankruptcy judge. And I did. In fact, I still have my application from 1996 when I first applied—though I was clearly not, at that time, qualified to become a bankruptcy judge. Since then, there were times when my travel and caseload made it less realistic and I didn't apply. But the stars aligned when this one came up.

Behind the Bench with Judge Cleary - *(Continued)*

Q: What was it about a bankruptcy judgeship that appealed to you?

A: As a litigator, I loved trying to advocate for my client and win. But as I started to do more bankruptcy work, I did realize that being able to preside over something and help make the right decision, and guide it the right way, ultimately was something that gave me real satisfaction. On the corporate side, that fully applies to corporations coming out with a confirmed plan of reorganization. It's even more applicable on the consumer side. I mean, you're making real life decisions, on a daily basis, that affect both the debtors and the creditors. I like being able to contribute in that way. I could advocate as a litigator, but the judge ultimately makes the decision, and I think that's a great responsibility. It's a huge responsibility. But it's something I really wanted to do.

Q: How do you like to spend your free time?

A: I like to exercise a lot, going to the gym. And I enjoy sports – especially from a spectating perspective, at my age. Until recently, my wife and I had the kids at home, and so I was pretty much devoted to family time, and the activities that evolve out of having twin daughters, and out of the chores you need to do around the house. My kids now have graduated—flown the coop so to speak—so really now my wife and I are entering into a whole new era. And so I'm not quite sure what I'll fill that time with. But this [pointing to his new chambers] has taken up that void, at least for right now.

Q: Is there any advice you'd like to give the attorneys who appear before you?

A: Be prepared, and be civil. I mean, being prepared is going to get you a long way, even if you're on the wrong side of the argument. And as to civility, we're a profession. We can argue, we can disagree, and we can make our professional arguments, but we don't need to be uncivil; the substance is going to win the argument, and the lack of civility doesn't help at all. The Northern District has an excellent bar. They set a great example for practitioners.

The City of Chicago Goes to the Supreme Court

By: Brianna M. Czajka, Geraci Law LLC

Issues arising out of the City of Chicago's attempts to enforce parking ticket debts continue to wind their way through the courts. In 2019 the Seventh Circuit ruled on three cases arising out of the City's attempt to enforce parking tickets and fines: *In re Steenes,* 918 F.3d 554 (7th Cir. 2019) ("*Steenes* I"), holding that § 1327(b) does not permit use of a form order that defaults to allowing a debtor's property to remain as property of the estate through the completion of the case; *In re Fulton,* 926 F.3d 916 (7th Cir. 2019), affirming several bankruptcy courts' reliance on the Seventh Circuit's holding in *Thompson v. General Motors Acceptance Corp.,* 566 F.3d 699, 703 (7th Cir. 2009) that passive retention of estate property violates the automatic stay; and *In re Steenes,* 942 F.3d 834 (7th Cir. 2019) ("*Steenes* II"), holding that parking fines and tickets incurred during the course of a Chapter 13 bankruptcy are administrative expenses as defined in § 503(b)(1)(A), at least to the extent that the debtor elects to vest the car as property of the estate during the term of the plan. While the effects of the *Steenes* I and II decisions are, for the time being, mostly local to Chicago, the Supreme Court accepted a petition for writ of certiorari in *Fulton*.

Fulton arose out of four bankruptcy cases,[1] each certified for direct appeal to the Seventh Circuit. The cases were consolidated for briefing and disposition. Prior to the filing of their Chapter 13 bankruptcies, the City of Chicago impounded each debtor's vehicle for failure to pay certain parking fines and tickets. *Fulton,* 926 F.3d at 921-22. The City asserted a possessory lien on these vehicles, created by ordinance in 2016, in the amount of the fees and fines owed. *Id*. at 920. After the filing of each case, the City refused to return the debtors' vehicles, claiming it needed to maintain possession of the vehicles to perfect its possessory lien and demanded payment of the fines and fees in full. *Id.* at 921-22. It did not move for adequate protection and did not object to confirmation of the plans treating the City as an unsecured creditor. *Id.* In each case, the bankruptcy court ordered the City to return the vehicle to the debtor, relying on *Thompson*, finding that the City violated the stay. The City returned the vehicles after being held in contempt, but appealed all four of the orders. *Id.*

The Seventh Circuit affirmed the bankruptcy court's reliance on *Thompson* and concluded that the City violated the stay pursuant to § 362(a)(3) by retaining possession of the debtors' vehicles after the debtors filed their bankruptcies. *Id.* at 924-25. The Seventh Circuit further rejected the City's arguments that it was excepted from the automatic stay pursuant to §§ 362(b)(3) and (b)(4), holding that the City would not lose its perfected lien via involuntary loss of possession of the vehicles due to the bankruptcy filings, *id.* at 927-28, and that the seizure of the vehicles was motivated by a pecuniary interest rather than police powers, *id.* at 929.

Fulton solidified a circuit split[2] over whether a stay violation requires an affirmative action to retain property of the bankruptcy estate or if simple passive retention of that property violates the stay. The City of Chicago filed a petition for writ of certiorari with the Supreme Court, which was granted on December 18, 2019. Oral argument was previously set for April 20, 2020, but is currently postponed indefinitely due to the outbreak of COVID-19.

---

[1] *In re Shannon,* 590 B.R. 467 (Bankr. N.D. Ill. 2018) (Doyle, J.); *In re Peake,* 588 B.R. 811 (Bankr. N.D. Ill. 2018) (Thorne, J.); *In re Fulton,* No. 18 B 2860, 2018 WL 2570109 (Bankr. N.D. Ill. May 31, 2018) (Schmetterer, J.); *In re Howard,* 584 B.R. 252 (Bankr. N.D. Ill. 2018) (Cox, J.)

[2] The Second, Seventh, Eighth, Ninth and Eleventh Circuits hold that the automatic stay requires turnover of any property in which the bankruptcy state has an interest. *Weber v. SEFCU (In re Weber),* 719 F.3d 72, 81 (2d Cir. 2013); *Thompson v. Gen. Motors Acceptance Corp.,* 566 F.3d 699, 703 (7th Cir. 2009); *Motors Acceptance Corp. v. Rozier (In re Rozier),* 376 F.3d 1323, 1324 (11th Cir. 2004); *In re Del Mission Ltd.,* 98 F.3d 1147, 1151 (9th Cir. 1996); *Knaus v. Concordia Lumber Co. (In re Knaus),* 889 F.2d 773, 775 (8th Cir. 1989). The Third, Tenth and District of Columbia Circuits have held that a creditor's continued passive retention of property in which the bankruptcy estate has an interest is not an act to exercise control over the property. *In re Denby-Peterson*, 941 F.3d 115, 119 (3d Cir. 2019), *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 950 (10th Cir. 2017), *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991).

Treatment of a Tax Buyer's Post-Redemption Claim

By: David R. Doyle[1], Fox Rothschild LLP

The legal landscape governing the rights of real estate tax buyers in bankruptcy continues to evolve. Judges in this district have been grappling with the following issue: whether a chapter 11 or 13 plan may pay off unpaid real estate taxes if the deadline to redeem the taxes expires prior to the bankruptcy filing, but no tax deed has been issued or recorded.

As discussed in detail in the BCLC Spring 2019 Newsletter, a recent opinion by Judge Barnes held that the "passing of the redemption deadline is not a material event." *In re Robinson,* 577 B.R. 294, 299 (Bankr. N.D. Ill. 2017). Departing with longstanding precedent, the court held that § 1322 of the Bankruptcy Code permits a debtor to pay off unpaid real estate taxes in a chapter 13 plan, even if the deadline to redeem has expired. In a subsequent ruling, however, Judge Barnes addressed an issue that was left unanswered in *Robinson*: how to establish the nature and amount of the tax buyer's claim after the redemption deadline expires. *In re Woodruff,* 600 B.R. 616 (Bankr. N.D. Ill. 2019). The court held that a tax buyer in this situation holds two claims: (i) a secured claim for the unpaid taxes, and (ii) an unsecured claim to account for the tax buyer's right to obtain a tax deed outside of bankruptcy. *Id*. at 639; *see also* 35 ILCS 200/22-40.[2]

Woodruff has important implications for a debtor's ability to confirm a chapter 11 or 13 plan, and the opinion should be carefully considered when advising clients with unpaid real estate taxes.[3]

In re Bates* and *In re Robinson

Until recently, judges in this district generally followed Judge Wedoff's analysis in *In re Bates,* 270 B.R. 455 (Bankr. N.D. Ill. 2001). In *Bates*, the court held that, if the deadline to redeem property taxes expires prepetition, the tax buyer does not hold a "claim" under the Bankruptcy Code that could be treated in a chapter 13 plan. *Id*. at 469-70. After the redemption period expires, the tax purchaser "has a right to the debtor's property." *Id*. at 469. "In effect, a transfer of the landowner's rights occurs at the end of the redemption period if a bankruptcy is not in place." *Id*. As such, as of the bankruptcy filing, "there is no claim . . . that can be treated in the bankruptcy case." *Id*. Under those circumstances, cause to lift the automatic stay existed under § 362(d)(1) of the Bankruptcy Code, because the tax buyer "could be not required to accept payment through the bankruptcy case." *Id*. at 470.

Bates was generally considered good law until Judge Barnes issued his opinion in *Robinson*. There, the court held that a chapter 13 plan may treat a tax buyer's secured claim under § 1322 of the Bankruptcy Code, even if the deadline to redeem the taxes expires prepetition. *Id.* at 305. Disagreeing with *Bates*, the court held that a tax buyer held a "claim" until the tax buyer had obtained and recorded a tax deed. *Id*. The court cautioned, however, that "the running of the redemption period prior to the commencement of a bankruptcy case may be meaningful to determining the tax purchaser's bankruptcy claim." *Id*. In other words, the court left open the possibility that the prepetition expiration of the redemption period would impact the amount and/or nature of the expired tax claim, but the issue remained undecided because the amount of the tax buyer's claim was not before the court. *See id.*

In re Woodruff

The open issue was resolved in *Woodruff.* In that case, the deadline to redeem unpaid real estate taxes expired prepetition. *Id*. at 623-24. Relying on the analysis in *Robinson*, the tax buyer in *Woodruff* filed a secured claim in the amount of the value of the underlying property. *Id*. at 624. The tax buyer's position was that, as of the date of the bankruptcy filing, the tax buyer had a right to obtain issuance of a tax deed and thus held a claim for the value of the property itself. *See id.* at 637. The debtor objected to the claim, arguing that the tax buyer merely held a secured claim for the value of the unpaid taxes.

The *Woodruff* court disagreed with both parties. Ruling on the claim objection, the court held that a tax buyer holds two distinct claims when the redemption deadline expires prepetition: (i) a right to receive the amount necessary to redeem the taxes under Illinois law (the "Redemption Amount"), and (ii) a contingent, equitable right to obtain a tax deed to the property after the redemption deadline expires (the "Equitable Remedy"). *Id*. at 630.

With respect to the Redemption Amount, the court held that a tax buyer holds a "secured and perfected, noncontingent claim." *Id.* at 633. With respect to the Equitable Remedy, the court held that the tax buyer holds a contingent, unsecured claim for the value of the property, less the Redemption Amount. *See id.* at 637-38.

The *Woodruff* court considered whether, under the facts of that case, the contingent aspect of the Equitable Remedy "results in another, smaller amount owed," based on the likelihood of the contingency occurring (*i.e.,* the tax buyer obtaining a tax deed). *Id*. at 638. The court found that the debtor raised no facts challenging the tax buyer's right to a tax deed outside of bankruptcy. *See id.* As such, the court found no reason to discount the amount of the unsecured claim, assessing the Equitable Remedy as the full "value of the property, less [the Redemption Amount]." *Id.*

Implications of *Woodruff*

Under *Robinson* and *Woodruff,* the expiration of the redemption period is no longer "game over" for chapter 11 and 13 debtors. Even so, confirming a plan may prove difficult. Unpaid real estate taxes are often significantly less than the value of the property, so in a typical case, a tax buyer may hold a large unsecured claim. If there is significant equity in the property, *Woodruff* may require the debtor to devote more resources to funding a chapter 13 plan in order to satisfy the best interest of creditors test.

There are no reported decisions following *Robinson* or *Woodruff*. At least two judges, however, have followed the opinions in unreported rulings.[4] The Seventh Circuit has not directly addressed this issue. *But see In re LaMont,* 740 F.3d 397, 406 (7th Cir. 2014) (suggesting in dicta that, if the redemption deadline expires prepetition, it may be appropriate to lift the automatic stay to permit tax buyer to obtain tax deed to property).

---

[1] The opinions expressed in this article are those of the author, not of Fox Rothschild or any of its clients.

[2] An overview of the law governing real estate tax sales in Illinois is provided in the "Real Estate Tax Sales in Bankruptcy," BCLC Spring 2019 Newsletter, *available at* https://www.ilnb.uscourts.gov/news/bankruptcy-court-liaison-committee-newsletter-spring-2019.

[3] In a chapter 7 bankruptcy case, the impact of the prepetition expiration of the redemption deadline is less clear, and is beyond the scope of this article.

[4] *See In re Watkins,* No. 19-18824 (Bankr. N.D. Ill. Jan. 23, 2020), ECF No. 76 (Goldgar, J.); *In re Thompson,* No. 19-6176, 2020 WL 728605, at *3 (Bankr. N.D. Ill. Jan. 15, 2020) (Schmetterer, J.).

The "Student Debt Crisis" and Bankruptcy: Recent Cases in Dischargeability and Avoidance Proceedings

By: Allison Hudson, Vedder Price P.C.

News outlets reported at the end of 2019 that there was approximately $1.4 trillion of outstanding student debt in the United States.[1] In recent years, the issue of how best to address the "student debt crisis" has been hotly debated by lawmakers and presidential candidates alike. Indeed, three bills were introduced in Congress in 2019 seeking to amend the Bankruptcy Code to make student loans *per se* dischargeable.[2] Politics aside, opinions from bankruptcy courts across the country are making headlines for judges' and practitioners' interpretations and applications of 11 U.S.C. §§ 523(a)(8) and 548 to student loan debt and tuition payments, respectively. Recently issued opinions in these areas illustrate that the Bankruptcy Code's application to student debt is still not uniform.

Are Bankruptcy Courts Relaxing Application of the *Brunner* Test?

Practitioners in the Northern District of Illinois, as well as in other districts nationwide, are familiar with the test set forth in *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987) (*i.e.*, the "*Brunner* test") that the majority of courts use to assess whether excepting a debtor's student loans from discharge would impose "an undue hardship on the debtor."[3] In order to meet the *Brunner* test for undue hardship, a debtor must demonstrate that (i) she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans, (ii) additional circumstances exist indicating that her state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (iii) she has made good-faith efforts to repay the loans.[4] A newly issued opinion from the Bankruptcy Court for the Southern District of New York, however, recently evaluated the *Brunner* test and considered the "harsh results that often are associated with *Brunner*[.]"

In *Rosenberg v. N.Y. State Higher Education Services Corp. (In re Rosenberg)*, Judge Cecelia G. Morris held that a debtor's repayment of his student loan would impose an undue hardship on the debtor, and that the student loan was discharged.[5] Judge Morris noted that the "harsh results" of *Brunner* "are actually the result of cases interpreting *Brunner*,"[6] and that the court would apply the *Brunner* test as it was originally intended. In applying the *Brunner* test, Judge Morris considered, *inter alia*, the following: (i) the debtor had negative monthly income and the amount due on his student loan was accelerated and currently due and payable in full, (ii) since the repayment period of the student loan had ended and payment was demanded immediately, the debtor's present state of financial affairs would exist during the term of repayment, and (iii) the debtor had missed only 16 payments since the loan originated thirteen years prior.[7]

---

[1] Patrick B. Healey, *We Should All Be Concerned About the Student Debt Crisis*, CNBC, Nov. 4, 2019, http://www.cnbc.com/2019/11/04/we-should-all-be-concerned-about-the-student-debt-crisis.html (citing sources).

[2] *See* Discharge Student Loans in Bankruptcy Act of 2019, H.R. 770, 116th Cong. (2019) (referred to S. Comm. on Antitrust, Commercial, and Administrative Law, Mar. 5, 2019); Student Borrower Bankruptcy Relief Act of 2019, H.R. 2648, 116th Cong. (2019) (referred to S. Comm. on Antitrust, Commercial, and Administrative Law, June 26, 2019); Student Borrower Bankruptcy Relief Act of 2019, S. 1414, 116th Cong. (2019) (introduced in Senate, May 9, 2019).

[3] 11 U.S.C. § 523(a)(8); *see also In re Roberson*, 999 F.2d 1132 (7th Cir. 1993).

[4] *Brunner*, 831 F.2d at 396.

[5] 610 B.R. 454, 462 (Bankr. S.D.N.Y. 2020).

[6] *Id.* at 458.

[7] *Id.* at 460-62.

The "Student Debt Crisis" and Bankruptcy: Recent Cases in Dischargeability and Avoidance Proceedings *(Continued)*

It remains to be seen whether other bankruptcy courts will similarly reevaluate how to apply the *Brunner* test in student loan dischargeability proceedings. Recent decisions from the Seventh Circuit and bankruptcy courts in the Northern District suggest, however, that the *Brunner* test still remains difficult for debtors to meet.[8]

Are Private Student Loans Excepted from Discharge Under 11 U.S.C. § 523(a)(8)(A)(ii)?

Section 523(a)(8)(A)(ii) of the Bankruptcy Code provides that a debt for "an obligation to repay funds received as an educational benefit, scholarship, or stipend" is excepted from discharge unless repayment of the debt would impose an undue hardship on the debtor and the debtor's dependents.[9] There is currently a split among lower courts as to whether private student loans that otherwise do not meet the requirements of section 523(a)(8)(B) may still be excepted from discharge under section 523(a)(8)(A)(ii).[10]

In *Crocker v. Navient Solutions, L.L.C. (In re Crocker)*, 941 F.3d 206 (5th Cir. 2019), the Fifth Circuit Court of Appeals became the first appellate court to address the issue and reasoned that section 523(a)(8)(A)(ii) applies "only to educational payments that are not initially loans but whose terms will create a reimbursement obligation upon the failure of conditions of the payments."[11] In its reasoning, the court considered, *inter alia*, that the text of section 523(a)(8)(A)(ii) does not include the word "loan," though the term "loan" appears in other subsections of section 523(a)(8), and that the common quality of the list provided in section 523(a)(8)(A)(ii) referred to instances signifying a "grant" that might not need to be repaid, as opposed to a loan. Accordingly, the court held that even though some loans are obtained in order to pay for the expenses of education, those loans do not qualify as an "obligation to repay funds received as an educational benefit, scholarship, or stipend."

This same issue is currently on appeal before the Tenth Circuit and awaiting decision.[12] In the Seventh Circuit, at least one lower court has interpreted section 523(a)(8)(A)(ii) narrowly to exclude private loans from its ambit, but no district court in this circuit appears to have addressed the issue.[13]

Do Parents Receive "Value" in Exchange for Making Tuition Payments on Behalf of their Child?

In the event that families are in a position to assist students with their tuition payments, bankruptcy trustees are increasingly seeking to clawback tuition payments made to colleges by parents on behalf of their children. In *DeGiacomo v. Sacred Heart University, Inc. (In re Palladino)*, 942 F.3d 55 (1st Cir. 2019), the First Circuit Court of Appeals became the first appellate court to evaluate whether parents receive "reasonably equivalent value" under 11 U.S.C. § 548 in exchange for making a tuition payment to an educational institution on behalf of their child.

In a short opinion, the First Circuit answered that question in the negative. Although noting that "[t]uition payments made by insolvent parents have divided the courts," the First Circuit reasoned that the tuition payments made by the debtors for their adult child's education depleted their estate, and "furnished nothing of direct value to the creditors who are the central concern of the code provisions at issue."[14] Opinions from some lower courts are in accord.[15] Other lower courtshave drawn a distinction between payments made by parents on behalf of their adult children, versus payments made on behalf of minor children.[16] No court within the Seventh Circuit appears to have addressed the issue.

[8] *See Williams v. U.S. Dep't of Educ.*, 752 Fed. App'x 363 (7th Cir. 2019); *Davis v. Conduent, Nat'l Student Loan Program (In re Davis)*, 608 B.R. 693 (Bankr. N.D. Ill. 2019).

[9] 11 U.S.C. § 523(a)(8)(A)(ii).

[10] *See, e.g.*, *Homaidan v. SLM Corp. (In re Homaidan)*, 596 B.R. 86, 101-07 (Bankr. E.D.N.Y. 2019) (summarizing cases).

[11] *Crocker*, 941 F.3d at 223.

[12] *See McDaniel v. Navient Solutions, LLC*, Case No. 18-1445 (10th Cir. argued Sept. 25, 2019).

[13] *See Swenson v. Swenson (In re Swenson)*, Adv. No. 16-00022, 2016 WL 4480719, at *3 (Bankr. W.D. Wis. Aug. 23, 2016).

[14] 942 F.3d at 59.

[15] *See Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (In re Knight)*, Adv. No. 15-02064, 2017 WL 4410455, at *6-7 (Bankr. D. Conn. Sept. 29, 2017); *Roach v. Skidmore Coll. (In re Dunston)*, 566 B.R. 624, 637 (Bankr. S.D. Ga. 2017).

[16] *See In re Geltzer v. Oberlin Coll. (In re Sterman)*, 594

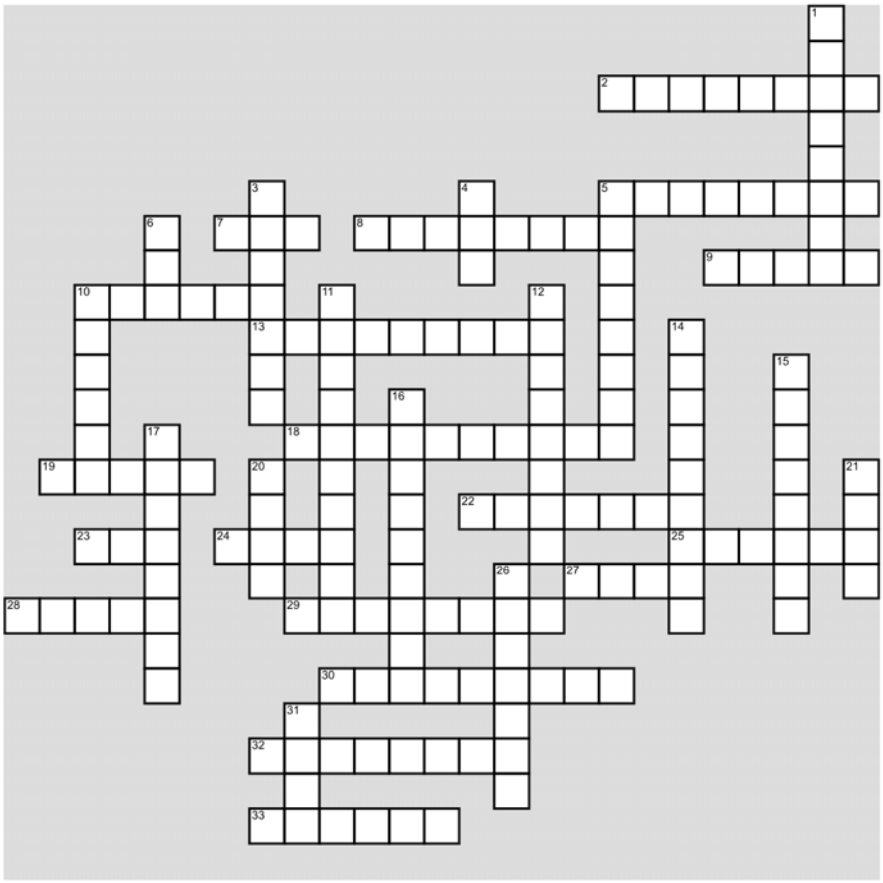
B.R. 229, 236-39 (Bankr. S.D.N.Y. 2018) (holding debtors did not receive either "reasonably equivalent value" or "fair consideration" for prepetition college tuition payments made on behalf of adult daughters, but did receive "reasonably equivalent value" and "fair consideration" for prepetition college tuition that they made to allow daughter to attend private college while she was still a minor).

Thank you!

The Editors would like to thank the Clerk of Court and the Clerk's Office staff for their generous assistance in publishing this newsletter during the COVID-19 crisis.

Stay in touch! Follow the Liaison Committee on **LinkedIn** to receive all the latest news and announcements: http://www.linkedin.com/company/ilnb-bclc

Bankruptcy Crossword Puzzle



Across

2 Vendors disappointed by Kmart.

5 Docket Entry No. 1.

7 Period between involuntary filing and order for relief.

8 Stay arising automatically only in Chapter 13.

9 Case shared by individual and spouse.

10 Says property rights are determined by state law.

13 Fate of many prepetition transfers.

18 Difference between claim and value of collateral.

19 Feature of Abraham and Hon. Timothy.

22 Street known for Art Deco skyscrapers and, farther north, absolute priority.

23 Ch. 7 trustee's strong-arm status: abbrev.

24 Spans three to five years in chapter 13.

25 Limited to pre- versus pre- or post- versus post-.

27 Relief agency with special rules under BAPCPA.

28 Shopping commonly done in New York and Delaware.

29 Waiver making insider guarantor a non-creditor.

30 Assume, assign, or reject unexpired leases and these contracts.

32 Newer word for fraudulent.

33 Repeat offender in either filing or killing.

Down

1 Confirmation over objection of an impaired class.

3 Says no absolute right to escape Chapter 7.

4 For bankruptcy lawyers, a better app than Instagram or Snapchat.

5 DSOs, wages, and taxes have this in common.

6 Federal overseer of bankruptcy process: abbrev.

10 Favorite accessory of Bill Nye and Judge Cassling.

11 Older word for transfer.

12 Permits adjudication of Stern claims with consent.

14 Section 363(f) eliminates these.

15 Home of our newest courthouse.

16 Goal of most bankruptcy cases.

17 Excepted from section 552's effect on after-acquired-property clauses.

20 Useful for both soil and cramdown interest.

21 Furniture you might list in Sch. A/B; also the name of the form where it's listed if you gave it away 89 days ago: abbrev.

26 Page limit for motions.

31 Type of proceedings that arise in or arise under.

Mission Statement

The Bankruptcy Court Liaison Committee for the Northern District of Illinois was formed to assist the Bankruptcy Court and its practitioners to create a more efficient and collegial environment throughout the entire Northern District of Illinois. To further that purpose, the Liaison Committee publishes a periodic newsletter, develops local practice questionnaires, and sponsors educational programs and social events to encourage interaction among judges and practitioners. Additionally, section 2.01 of the Committee's bylaws provides that practitioners may relay issues, concerns, or complaints about bankruptcy judges or the bankruptcy court to the Committee – anonymously – through the co-chairs or any other committee member. The information will then be anonymously presented to the appropriate bankruptcy judges for review and consideration under 28 U.S.C. § 154(b), which provides that the chief judge of the bankruptcy court "shall ensure that the business of the bankruptcy court is handled effectively and expeditiously."

Practitioners wishing to share any issues, concerns, or complaints with the Committee may contact any of its Members anonymously via mail, email, phone, or on the Bankruptcy Court's website at: http://www.ilnb.uscourts.gov/bankruptcy-court-liaison-committee.

United States Bankruptcy Court, Northern District of Illinois

Chief Judge A. Benjamin Goldgar

Judge Janet S. Baer

Judge Timothy A. Barnes

Judge Donald R. Cassling

Judge David D. Cleary

Judge Jacqueline P. Cox

Judge Carol A. Doyle

Judge LaShonda A. Hunt

Judge Thomas M. Lynch

Judge Jack B. Schmetterer

Judge Deborah L. Thorne

2019-2020 Bankruptcy Court Liaison Committee

Honorable A. Benjamin Goldgar (Chief Judge)

Honorable Janet S. Baer

Honorable David D. Cleary

Honorable Thomas M. Lynch

Jeffrey P. Allsteadt
Clerk of Court

Sharon Zurowski
Chief Deputy Clerk

Jean M. Dalicandro
Operations Manager

Michael A. Brandess (Co-Chair)
Sugar Felsenthal Grais & Helsinger LLP

Michael Miller (Co-Chair)
Law Offices of Robert J. Semrad & Associates, LLC

Alexander F. Brougham
Adelman & Gettleman, Ltd.

Briana M. Czajka
Geraci Law L.L.C.

David R. Doyle
Fox Rothschild LLP

Joel P. Fonferko
Codilis & Associates, P.C.

Matthew T. Gensburg
Gensburg, Calandriello & Kanter, P.C.

Allison B. Hudson
Vedder Price P.C.

Paulina Garga-Chmiel
Chuhak & Tecson, P.C.

Kathryn Liss
Legal Aid Chicago

Michael Kelly
Assistant United States Attorney

Nicholas M. Miller
McDonald Hopkins LLC

Alexandra Schwarzman
Kirkland & Ellis LLP

Gretchen Silver
Office of the U.S. Trustee

James E. Stevens
Barrick, Switzer, Long, Balsley & Van Evera, LLP

Brian P. Welch
Burke, Warren, MacKay & Serritella, P.C.

Mark S. Wheeler
Tom Vaughn, Trustee

Blair Zanzig
Hiltz Zanzig & Heiligman LLC