AMERICAN BANKRUPTCY INSTITUTE

2020 Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer Bankruptcy Legal Update

CONCURRENT SESSION

Hon. Caryl E. Delano, Moderator
U.S. Bankruptcy Court (M.D. Fla.); Tampa

Jeffrey S. Ainsworth
BransonLaw, PLLC; Orlando

Dennis J. LeVine
Kelley Kronenberg; Tampa

2020

CONSUMER BANKRUPTCY LEGAL UPDATE

PANELISTS

- Caryl E. Delano, Chief Bankruptcy Judge, Middle District of Florida
- Dennis J. Levine, Kelley Kronenberg
- Jeffrey S. Ainsworth, BransonLaw

STUDENT LOANS

BREAKING NEWS!

IN RE ROSENBERG, 2020 WL 130302 (BANKR. S.D.N.Y. JANUARY 7, 2020)

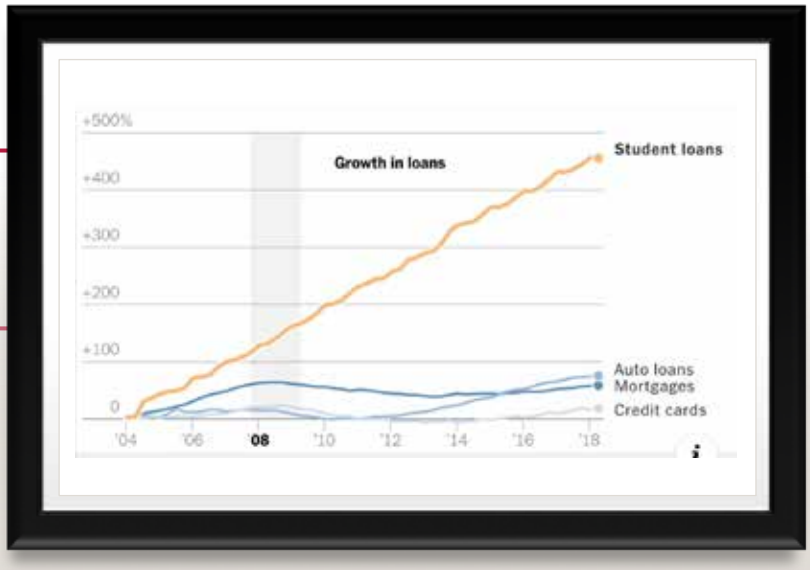
- The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner*. Over the past 32 years, many cases have pinned on *Brunner* punitive standards that are not contained therein.
- The Court determined that the Petitioner had satisfied the *Brunner* test and discharged the student loans because they imposed an undue hardship

NATIONAL PROBLEM

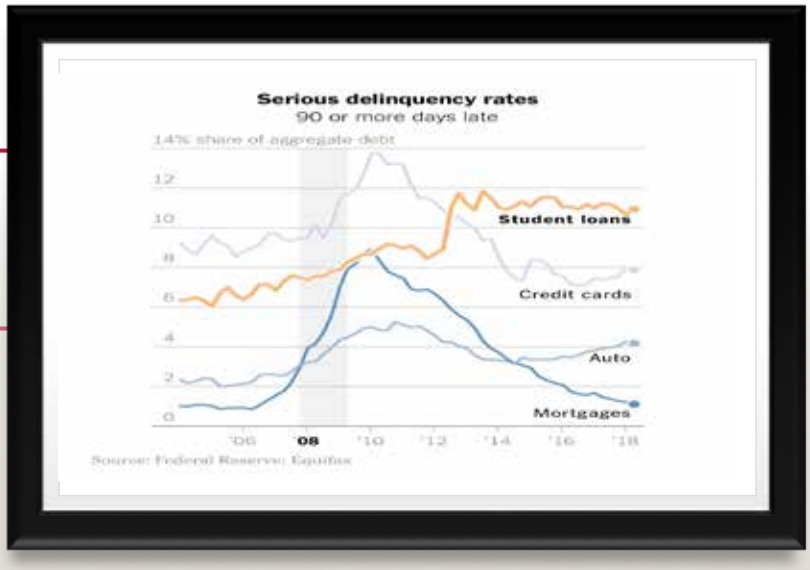
BANKRUPTCY PROBLEM: STUDENT LOANS LEAD TO A FALSE START NOT A FRESH START

- Over 44 million Americans have unpaid student loans totaling more than 1.6 trillion dollars!
- District-wide input, attorneys from all three divisions, Orlando, Tampa and Jacksonville
- Use of DMM Portal and Student Loanify
- Taking the lead on a National level

STUDENT LOAN GROWTH



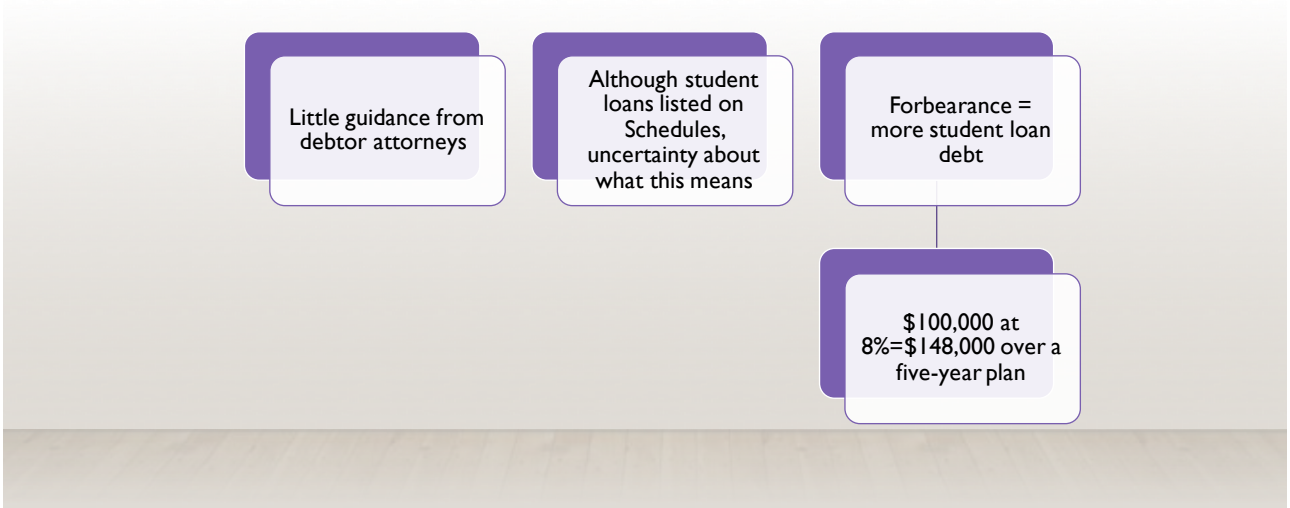
DELINQUENCY RATES



HIDDEN DEFAULT WAVE COMING

- Federal Student Loan Servicers Have Been Pushing Forbearances and Deferments for Years – Payments Coming Due Soon.
- Administrative Relief Limited for Defaults – One consolidation to Direct loans and only one successful rehab in a ten year period.
- Once both "get out of jail" cards are used, there is no other method to cure a default administratively.
- This is where our Bankruptcy Courts can help!

BEFORE STUDENT LOAN MANAGEMENT PROGRAM



INSPECTOR GENERAL AUDIT OF FEDERAL STUDENT LOAN SERVICERS

61% OF THE TIME, SERVICERS ARE IN NON-COMPLIANCE WITH FEDERAL LOAN SERVICING REQUIREMENTS REGARDING FORBEARANCES, DEFERMENTS, INCOME-DRIVEN REPAYMENT, INTEREST RATES, DUE DILIGENCE, AND CONSUMER PROTECTION.

ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE.

FEBRUARY 12, 2019 ED-OIG/A05Q0008

FORUM

- Creates a forum for debtors and lenders to discuss consensual repayment options for government student loans and possible workouts for private student loans

PROGRAM GOALS ARE THREEFOLD

Increase	increase communication which is presently lacking between both federal and private student loan borrowers and their servicers
Raise	raise awareness among borrowers and their counsel of available options
End	end unnecessary and costly forbearance during bankruptcy

SORT THE HERD

Eligible Loan: Any 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 any loan that purports to be a student loan on which Debtor is an obligor.

First step is to pull a NSLDS report to see what government guaranteed student loans the debtor has

If Debtor's credit report shows additional loans other than what the government does, these are assumed to be private student loans

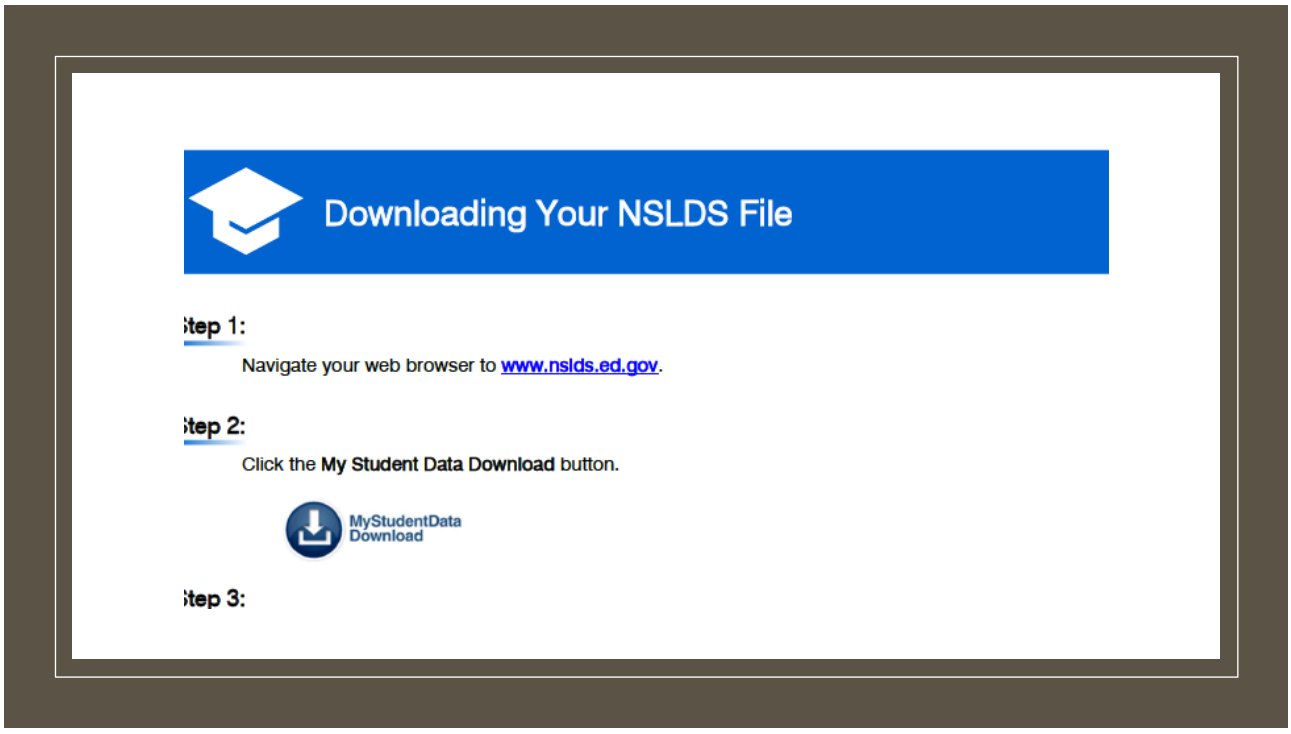
PREPARE INITIAL PACKAGE

Using DMM's Student Loanify

This software will give Debtor their repayment options under the current Income Based Repayment Programs

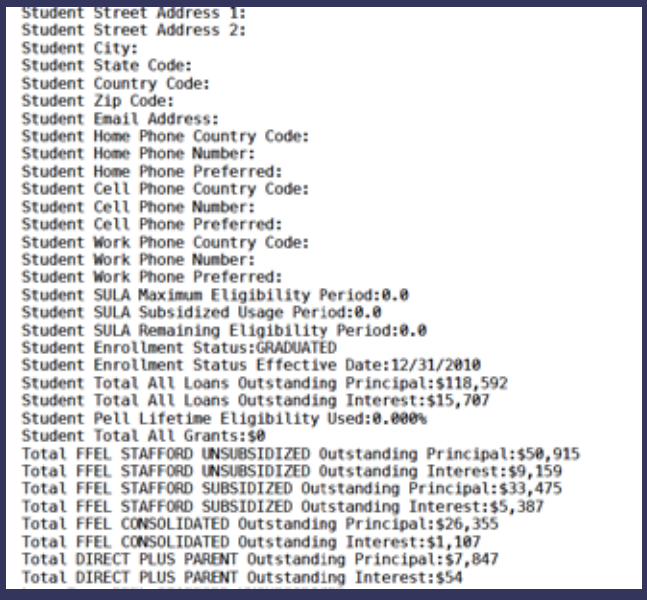
It also assists with the application process, insuring complete and accurate submission for the various programs

Debtor provides income documentation such as tax return or pay advices

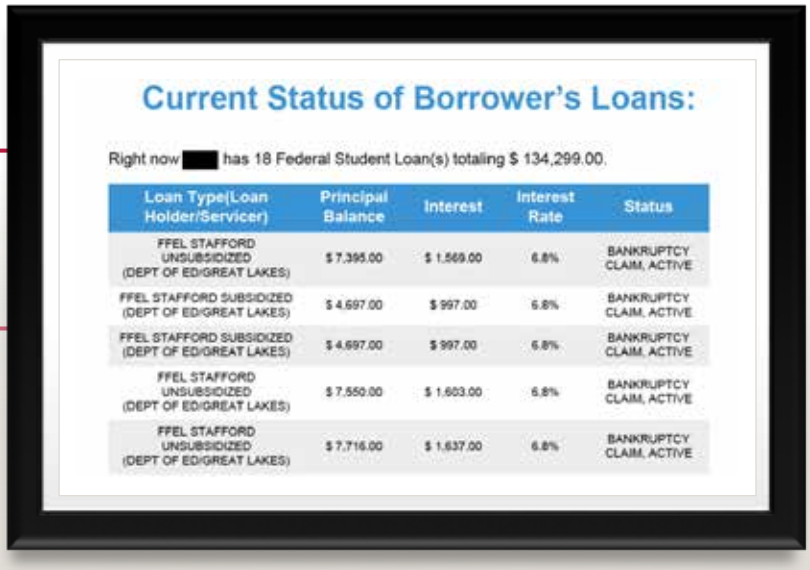


Debtor is a teacher NSLDS was 39 pages! Report is confusing and hard to read.

Debtor is blocked out of student loan servicer website after filing bankruptcy



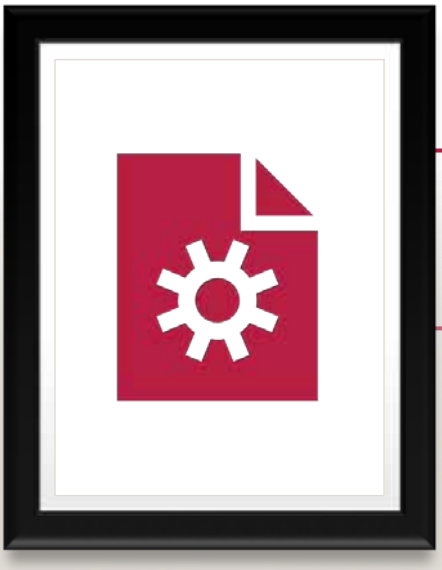
FIRST STUDENT LOANIFY LISTS FEDERAL STUDENT LOANS



Current Status of Borrower's Loans:

Right now [redacted] has 18 Federal Student Loan(s) totaling $ 134,299.00.

Loan Type(Loan Holder/Servicer)	Principal Balance	Interest	Interest Rate	Status
FFEL STAFFORD UNSUBSIDIZED (DEPT OF ED/GREAT LAKES)	$ 7,395.00	$ 1,569.00	6.8%	BANKRUPTCY CLAIM, ACTIVE
FFEL STAFFORD SUBSIDIZED (DEPT OF ED/GREAT LAKES)	$ 4,697.00	$ 997.00	6.8%	BANKRUPTCY CLAIM, ACTIVE
FFEL STAFFORD SUBSIDIZED (DEPT OF ED/GREAT LAKES)	$ 4,697.00	$ 997.00	6.8%	BANKRUPTCY CLAIM, ACTIVE
FFEL STAFFORD UNSUBSIDIZED (DEPT OF ED/GREAT LAKES)	$ 7,550.00	$ 1,603.00	6.8%	BANKRUPTCY CLAIM, ACTIVE
FFEL STAFFORD UNSUBSIDIZED (DEPT OF ED/GREAT LAKES)	$ 7,716.00	$ 1,637.00	6.8%	BANKRUPTCY CLAIM, ACTIVE



LISTS REPAYMENT PLAN OPTIONS

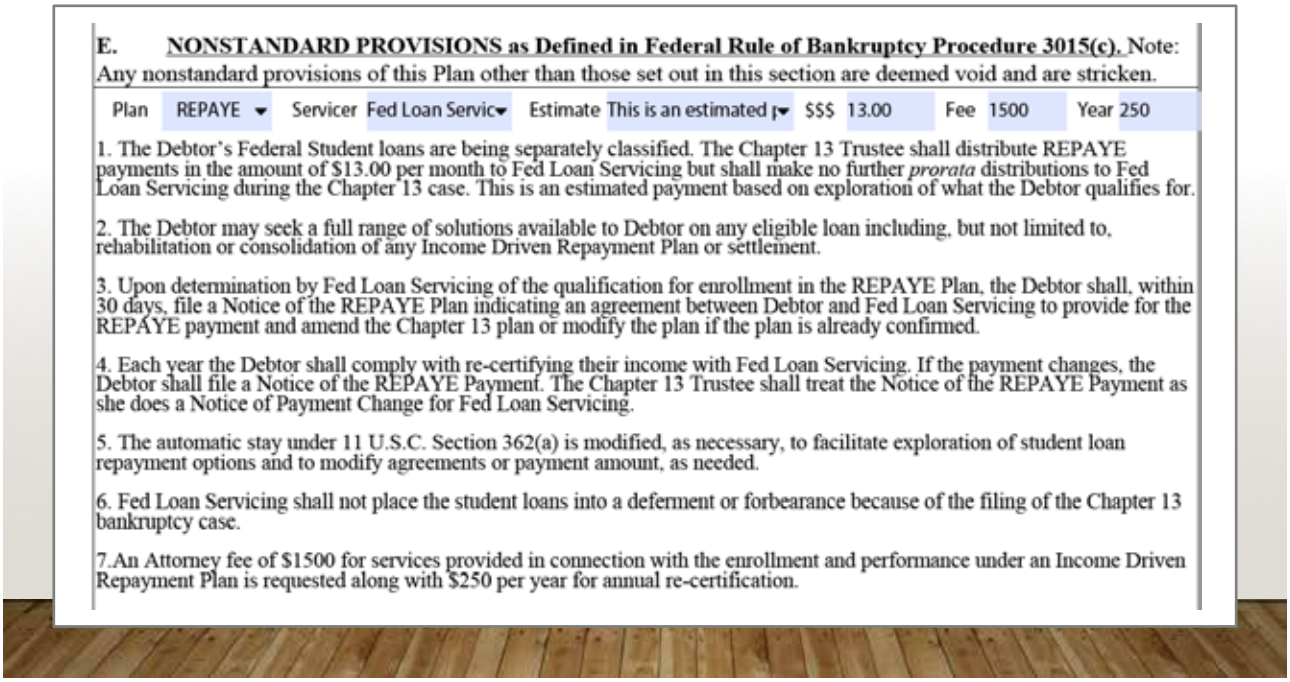
Plan	Details
Standard $ 1,547.00 /mo 120 months **Not Eligible**	Pay off full balance of loan - not eligible for loan forgiveness **Fixed monthly payments** Usually highest payment but pay least interest
Graduated $ 885.00 /mo *First 2 years only 120 months **Not Eligible**	Pay off full balance of loan – not eligible for loan forgiveness **Payment increases every 2 years** Payment must cover accrued interest but will never be more than three times greater than any other payment
Extended Fixed $ 898.00 /mo 300 months **Not Eligible**	Pay off full balance of loan – not eligible for loan forgiveness **Fixed monthly payments** Balance must be **at least $30,000**

Pay As You Earn (PAYE) $ 13.00 /mo *Based on current income 240 months **Not Eligible**	Repayment based on income and family size (must recertify each year) Monthly payment **set at 10% of discretionary income** (may be as low as $0.00) Eligible for **loan forgiveness (20 years)** Must be a new borrower as of 10/1/2007
Income-Based Repayment (IBR) $ 19.00 /mo *Based on current income 300 months **Not Eligible**	Repayment based on income and family size (must recertify each year) Monthly payment **set at 15% of discretionary income** (may be as low as $0.00) Eligible for **loan forgiveness (25 years)**
IBR for New Borrowers $ 13.00 /mo *Based on current income 240 months	Repayment based on income and family size (must recertify each year) Monthly payment **set at 10% of discretionary income** (may be as low as $0.00) Eligible for **loan forgiveness (20 years)**

	PSLF	Teacher Loan Forgiveness
Loans Eligible	Direct Only	Direct or FFEL
Teachers Eligible	Full-time teachers at any public or non-profit school	Full-time teachers at qualifying Title 1 school
Amount Forgiven	Entire remaining unpaid loan balance	$5,000 or $17,500 depending on grade level and subject taught
Payment Plan Requirement	Income Driven Repayment Plan or 10-year standard	N/A
Service Requirement	120 on-time payments	5 complete and consecutive academic years

DO THE MATH. UNFAIR TREATMENT?

Unsecured claims with student loans	Student Loans	Unsecured claims without student loans receiving a pro rata distribution	Distribution of $220.00 per month to unsecured creditors with student loans included	Distribution of $207.00 per month ($220.00 less $13.00 IBR) to unsecured creditors without student loans
$120,000.00	$100,000.00	$20,000.00	$13,200.00 over 60 month plan $13,200.00 divide by $120,000.00 = 11%	$12,420.00 over 60 months $12,420.00 divide by $20,000.00 =62%



E. NONSTANDARD PROVISIONS as Defined in Federal Rule of Bankruptcy Procedure 3015(c). Note: Any nonstandard provisions of this Plan other than those set out in this section are deemed void and are stricken.

Plan REPAYE Servicer Fed Loan Servic Estimate This is an estimated p $$$ 13.00 Fee 1500 Year 250

1. The Debtor's Federal Student loans are being separately classified. The Chapter 13 Trustee shall distribute REPAYE payments in the amount of $13.00 per month to Fed Loan Servicing but shall make no further *prorata* distributions to Fed Loan Servicing during the Chapter 13 case. This is an estimated payment based on exploration of what the Debtor qualifies for.

2. The Debtor may seek a full range of solutions available to Debtor on any eligible loan including, but not limited to, rehabilitation or consolidation of any Income Driven Repayment Plan or settlement.

3. Upon determination by Fed Loan Servicing of the qualification for enrollment in the REPAYE Plan, the Debtor shall, within 30 days, file a Notice of the REPAYE Plan indicating an agreement between Debtor and Fed Loan Servicing to provide for the REPAYE payment and amend the Chapter 13 plan or modify the plan if the plan is already confirmed.

4. Each year the Debtor shall comply with re-certifying their income with Fed Loan Servicing. If the payment changes, the Debtor shall file a Notice of the REPAYE Payment. The Chapter 13 Trustee shall treat the Notice of the REPAYE Payment as she does a Notice of Payment Change for Fed Loan Servicing.

5. The automatic stay under 11 U.S.C. Section 362(a) is modified, as necessary, to facilitate exploration of student loan repayment options and to modify agreements or payment amount, as needed.

6. Fed Loan Servicing shall not place the student loans into a deferment or forbearance because of the filing of the Chapter 13 bankruptcy case.

7. An Attorney fee of $1500 for services provided in connection with the enrollment and performance under an Income Driven Repayment Plan is requested along with $250 per year for annual re-certification.

NOTICE OF PARTICIPATION

The debtor then files a Notice of Participation in SLM

Properly serving the student loan creditors pursuant to R. 7004

STAY IS LIFTED

- The automatic stay under 11 U.S.C. § 362(a) is modified, as necessary, to facilitate the SLM Program and to encourage the Required Parties to explore student loan repayment options and to modify agreements or payment amounts, as needed.

TIMELINES

7 days to upload initial package

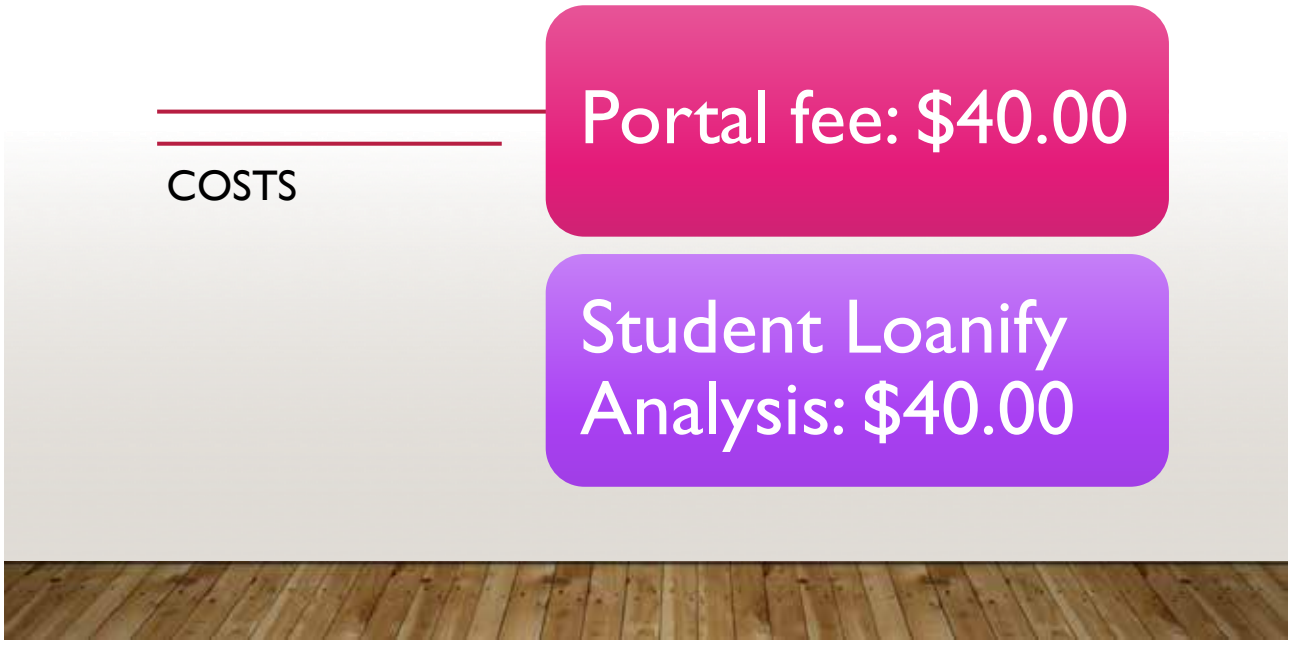
Creditor has 30 days to acknowledge package and assign point of contact

Within 60 days of the initial package or receipt of additional requested documents, determine eligibility of repayment options

Process is 180 days

Within 14 days of any agreement notify court of outcome

Amend or modify plan within 30 days to provide for any repayment plan to be paid through the Chapter 13 plan


COSTS
Portal fee: $40.00
Student Loanify Analysis: $40.00


ATTORNEY NO-LOOK FEE
$1500.00
$250.00 ANNUAL RECERTIFICATION
DUTIES ARE TIME CONSUMING AND ESSENTIAL

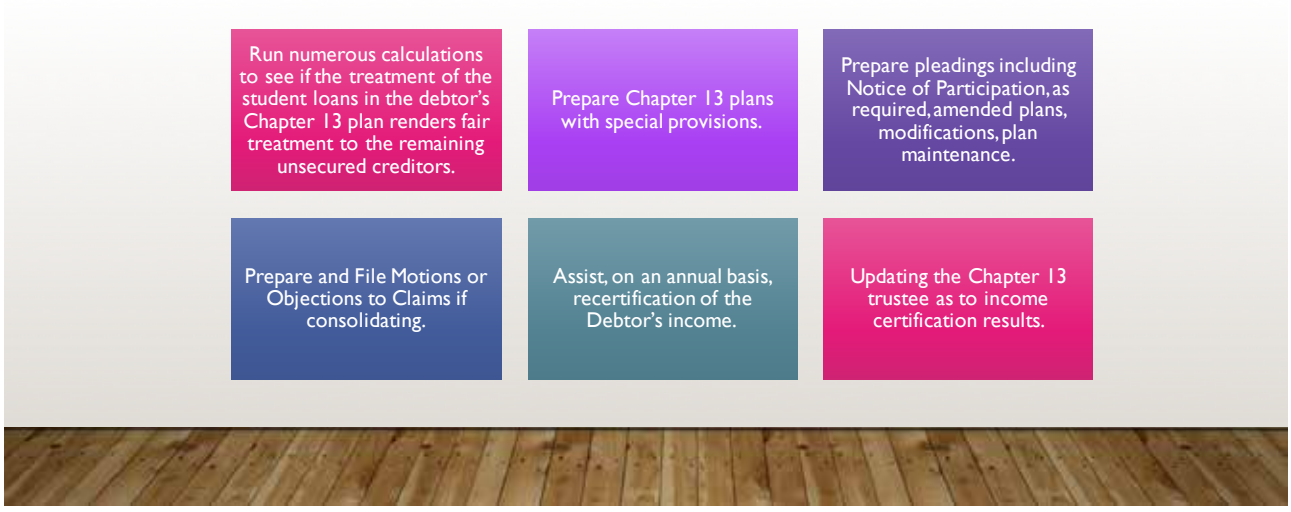
ANALYZE THE TYPES OF STUDENT LOANS THE DEBTOR HAS

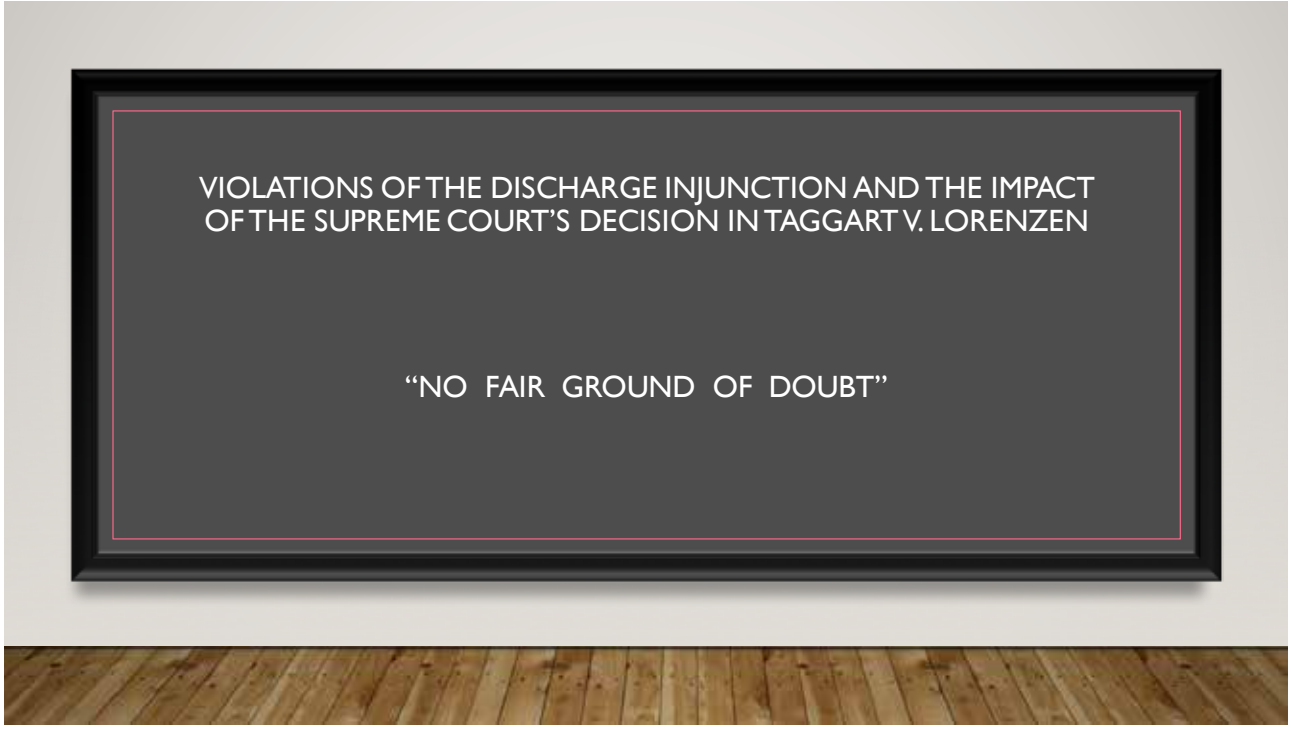
- FFEL, Direct, Consolidation, Parent Plus, Joint Spousal Consolidation Loans, HEAL, Perkins, private loans etc.
- Determine the benefits or drawbacks to consolidation versus rehabilitation, avoiding or curing defaults, dealing with multiple servicers, analyzing other options such as the Borrower Defense to Repayment, False Certification, Total and Permanent Disability Discharges etc.

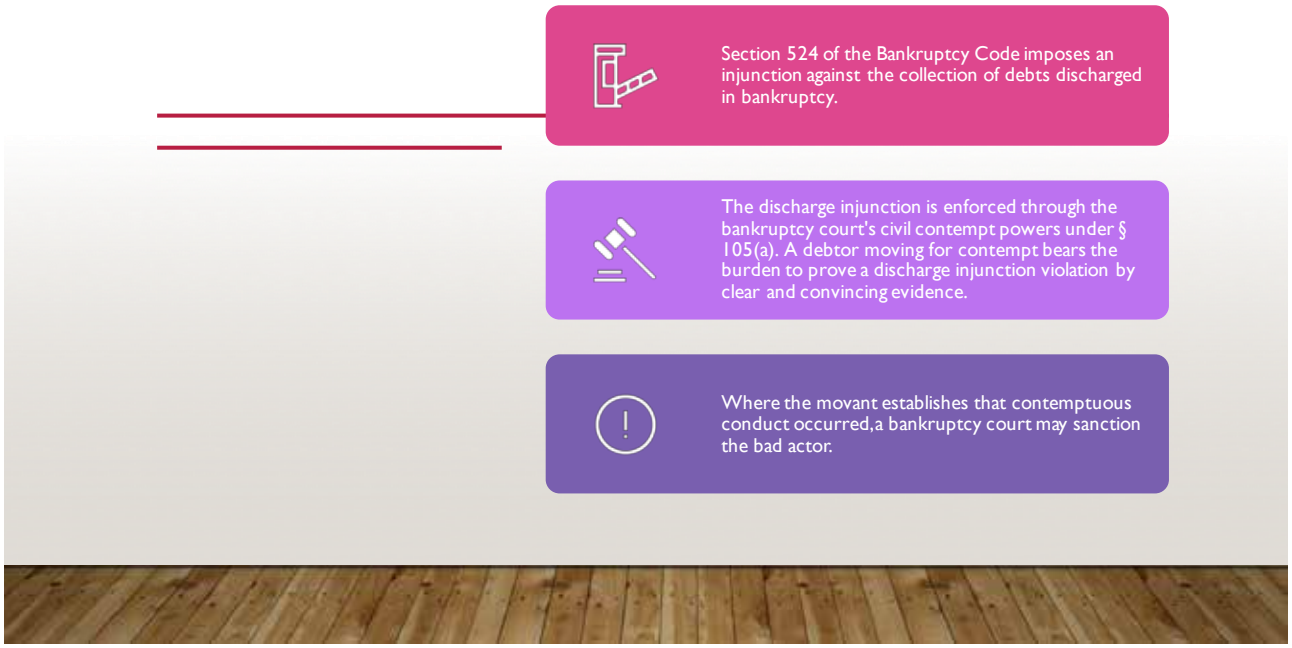
ANALYZE THE VARIOUS REPAYMENT OPTIONS

- IBR, Repaye, ICR, Paye, ISR, and IBR for New Borrowers) available to the Debtors for their individual loan types
  - The Government's website does not provide clear guidance on what types of loans qualify for the various repayment programs
- Determine what changes can be made through consolidation to a different loan type or even the separate filing of tax returns that can improve the Debtor's payment options or forgiveness term.
- Additional analysis of tax ramifications of forgiveness, and refinance options to a private lender may also be necessary.

CHAPTER 13 DUTIES



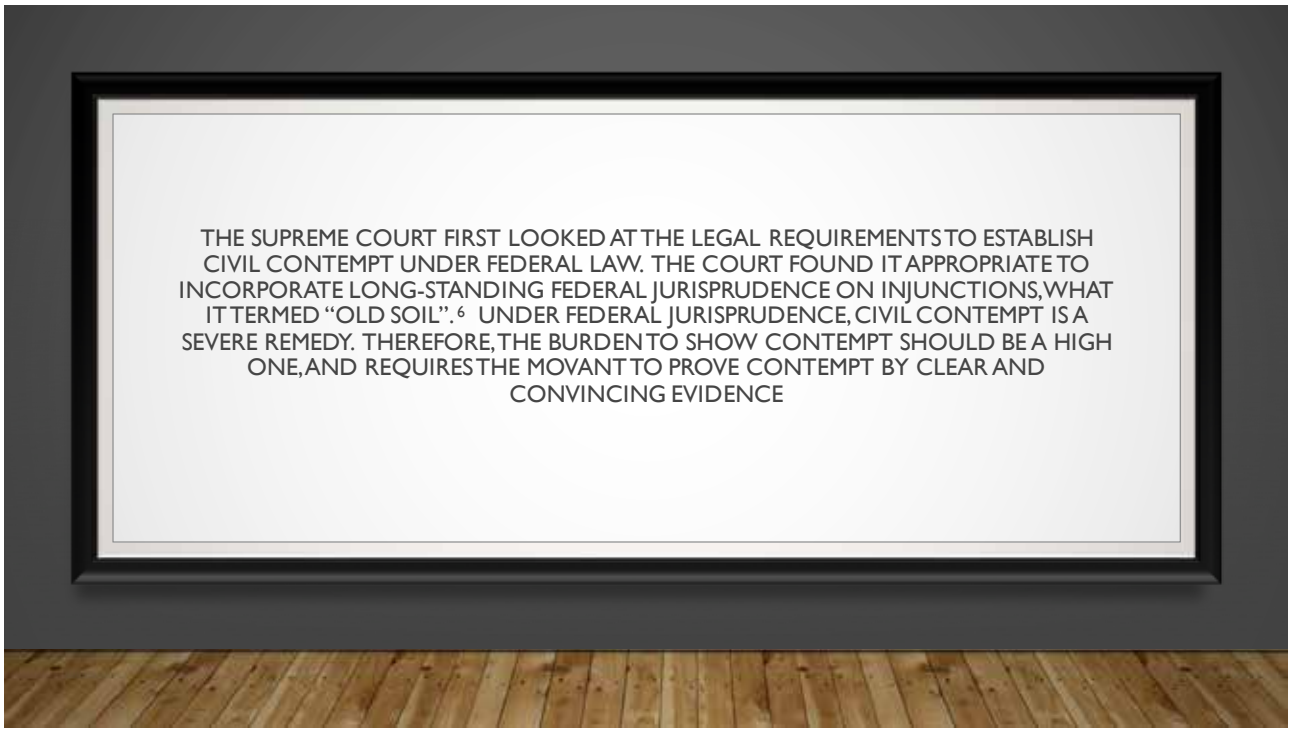


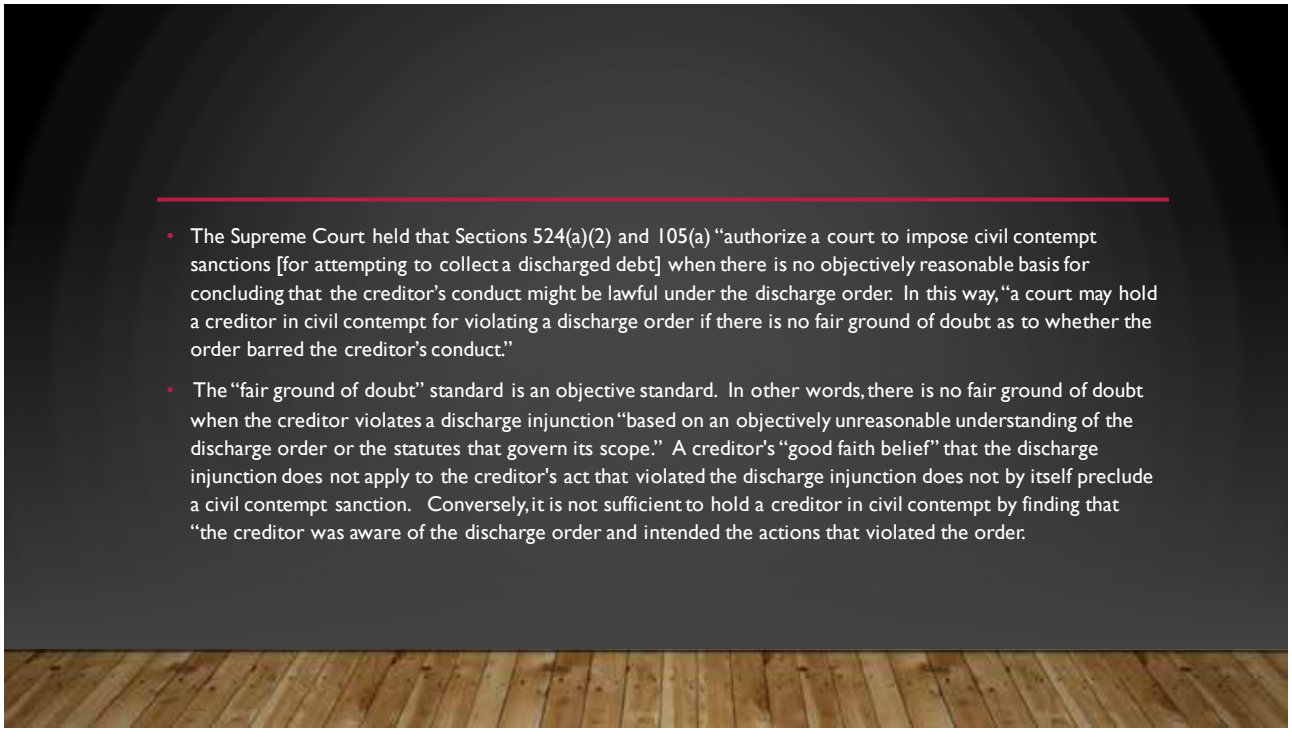


- Prior to the Supreme Court's 2019 decision in *Taggart v. Lorenzen*, —— U.S. ——, 139 S.Ct. 1795, 1801, 204 L.Ed.2d 129 (2019), in determining whether a creditor's post-discharge actions violated the discharge injunction, many courts judged creditors on an almost strict liability standard.
- For example, the 11th Circuit applied a two-part test to determine whether there has been a violation of the discharge injunction: (1) whether the Creditor knew that discharge injunction was invoked; and (2) whether the Creditor intended the action which violated the discharge injunction.
- The "strict liability" standard was applied by the Bankruptcy Court in *Taggart*.

Other Courts have used a different standard to determine whether a discharge injunction violation occurred. On appeal, the Ninth Circuit in *Taggart* reversed the bankruptcy court's decision and adopted a very subjective standard -- a creditor's good faith belief that the discharge order did not apply to the creditor's claim precluded a finding of contempt and sanctions, even if the creditor's belief was unreasonable. *In re Taggart*, 888 F.3d 438 (9th Cir. (Or.) 2018)

- In June 2019 the Supreme Court announced a new standard regarding sanctions for violations of the discharge injunction under Section 524. *Taggart v. Lorenzen*, —— U.S. ——, 139 S.Ct. 1795, 1801, 204 L.Ed.2d 129 (2019). The question before the Supreme Court in *Taggart* concerned the legal standard for holding a creditor in civil contempt when a creditor attempts to collect a debt in violation of the discharge injunction. The Supreme Court rejected both the strict liability standard applied by the bankruptcy court, and the subjective standard applied by the Ninth Circuit.


THE SUPREME COURT FIRST LOOKED AT THE LEGAL REQUIREMENTS TO ESTABLISH CIVIL CONTEMPT UNDER FEDERAL LAW. THE COURT FOUND IT APPROPRIATE TO INCORPORATE LONG-STANDING FEDERAL JURISPRUDENCE ON INJUNCTIONS, WHAT IT TERMED "OLD SOIL".[6] UNDER FEDERAL JURISPRUDENCE, CIVIL CONTEMPT IS A SEVERE REMEDY. THEREFORE, THE BURDEN TO SHOW CONTEMPT SHOULD BE A HIGH ONE, AND REQUIRES THE MOVANT TO PROVE CONTEMPT BY CLEAR AND CONVINCING EVIDENCE


The Supreme Court held that Sections 524(a)(2) and 105(a) "authorize a court to impose civil contempt sanctions [for attempting to collect a discharged debt] when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order. In this way, "a court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct."
The "fair ground of doubt" standard is an objective standard. In other words, there is no fair ground of doubt when the creditor violates a discharge injunction "based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope." A creditor's "good faith belief" that the discharge injunction does not apply to the creditor's act that violated the discharge injunction does not by itself preclude a civil contempt sanction. Conversely, it is not sufficient to hold a creditor in civil contempt by finding that "the creditor was aware of the discharge order and intended the actions that violated the order.

TAGGART'S OTHER LESSONS

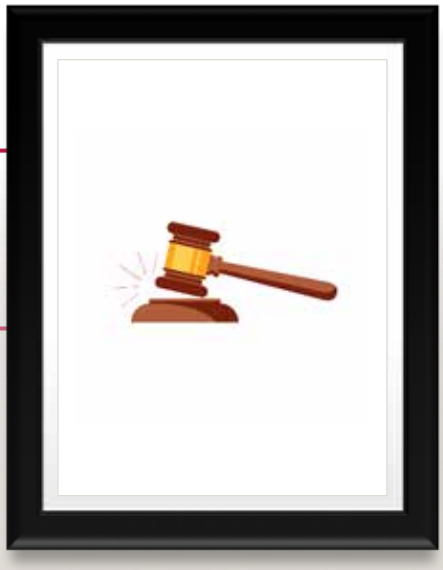
TAGGART HAS MORE TO TEACH ON THE SANCTIONS ISSUE. WHILE THE TAGGART CASE DID NOT FOCUS ON DAMAGES, THE SUPREME COURT NOTED THAT A CREDITOR'S SUBJECTIVE INTENT IS RELEVANT TO DETERMINING DAMAGES.

ALSO, IN CONSIDERING SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION, A COURT MUST TAKE THE CREDITOR'S PRIOR ACTIONS INTO ACCOUNT (E.G. WAS THE CREDITOR HELD IN CONTEMPT BEFORE).

ROTH V. NATIONSTAR MORTGAGE, LLC (IN RE ROTH), 935 F. 3D 1270 (11TH CIR. 2019)

- Eleventh Circuit applied Taggert to hold that mortgagor who sent informational statements to debtor post-discharge did not violate the discharge injunction.

RECENT CASES



IN RE YERIAN, 927 F.3D 1223 (11TH CIR. 2019)

- Debtor set up a self-directed IRA that qualified for tax exempt status. But he lost the exemption under Fla. Sta. 222.21(2)(a)(2) when he used IRA funds to purchase a home and two automobiles for his personal use.

IN RE LESTER, 603 B.R. 187 (BANKR. M.D. FLA. 2019)

- Debtors moved to reopen their Chapter 7 bankruptcy case to try to vacate state court foreclosure judgment on grounds that plaintiff lacked standing. Motion denied: Rooker-Feldman precluded court from reviewing the final foreclosure judgment; final judgment was preclusive on standing issue which had been litigated in state court; and creditor had met burden to establish standing. Holding: motion to reopen should be denied where the requested relief is precluded.

IN RE MCGREGOR, 606 B.R. 460 (BANKR. M.D. FLA. 2019)

- Chapter 13 debtor confirmed plan that provided for distribution on her share of martial debt. Post-confirmation, former spouse moved in state court to modify alimony obligations based on his having paid marital debt. Debtor and spouse litigated in state court for two years; debtor moved for sanctions as a stay violation asking for award of her state court attorney's fees. Holding: debtor denied damages for attorney's fees incurred after she should have come to bankruptcy court for relief; she failed to mitigate her damages.

IN RE PINA, 602 B.R. 72 (BANKR. S. D. FLA. 2019)

- Debtor's attorney sanctioned – and barred from practicing in bankruptcy court for two years – when court found pattern of attorney electronically filing schedules and statements that had not been signed by the client in over 100 cases.

IN RE MENDOZA, 597 B.R. 686 (BANKR. S.D. FLA. 2019)

- Immigrant debtors who resided in Florida for past five years, intended to remain in Florida, and had pending applications for asylum, were domiciled in Florida and able to claim Florida exemptions. Holding: Debtors precluded from claiming federal exemptions.

IN RE ROTHMAN, 2019 WL 413629 (BANKR. S.D. FLA. JANUARY 31, 2019)

- Debtor's attorney filed petition without signatures of debtor and attorney. One day later, the attorney filed the amended petition with the signature. Holding: missing signature rendered the petition "fatally defective" and not a proper request for relief under Sec. 301; petition date did not relate back to the date of the defective petitions.

MUKAMAL V. JAGUAR FINANCIAL GROUP, LLC, ADV. NO. 18-1478 (DOC. NO. 21) (BANKR. S.D. FLA. JUNE 4, 2019)

- Trustee filed suit against Jaguar, but after expiration of statute of limitations, amended complaint to name Jaguar's assignee, Chase Bank. Court hold amendment did not relate back to the original complaint as the failure to name Chase was not the result of a mistake and information regarding assignment of loan was readily available prior to expiration of the statute of limitations

ARE WE HEADED TO A CIRCUIT SPLIT?

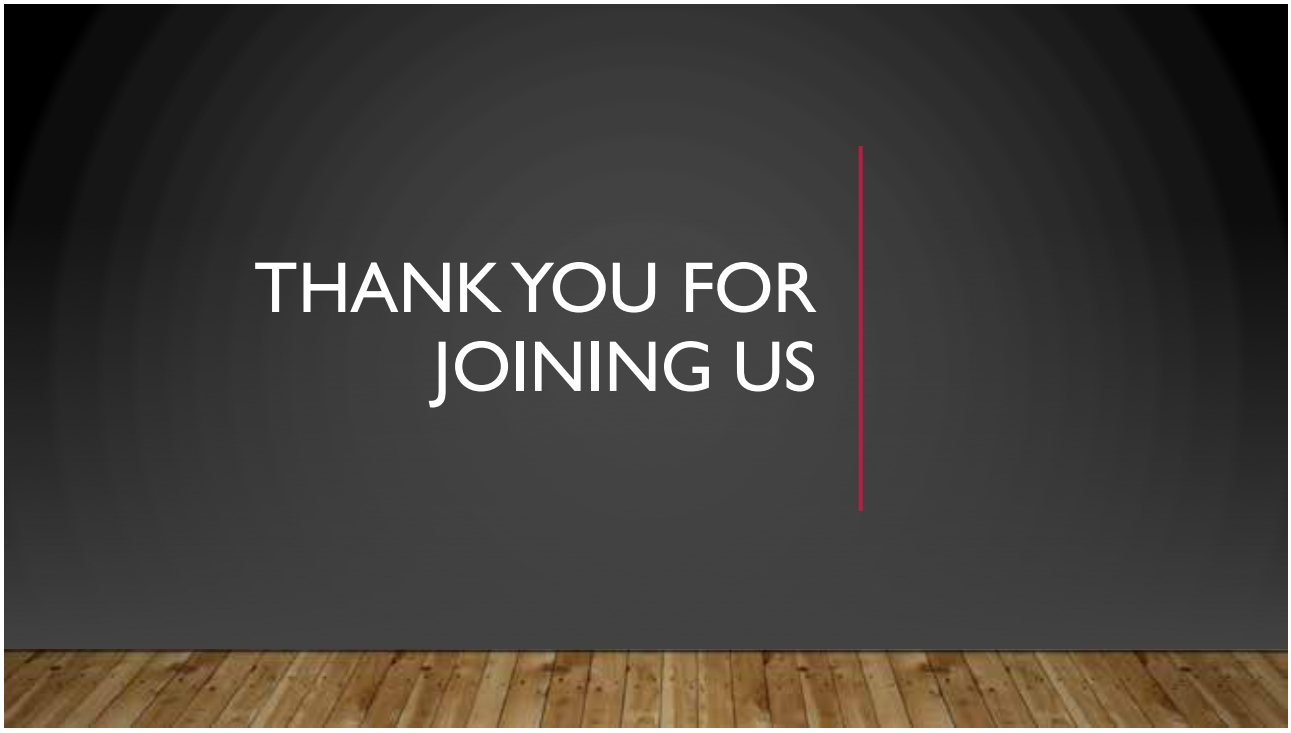
- **In re Dukes,** 909 F. 3d 1306 (11th Cir. 2018)
- "Pay direct" mortgage is not "provided for by the plan" as required for discharge under Sec. 1328(a)
- **But**
- **In re Mrdutt, 600 B.R. 72 (9th Cir. BAP 2019)**
- The BAP joins "the overwhelming majority of courts holding that a chapter 13 debtor's direct payments to creditors, if provided for in the plan, are "payments under the plan" for purposes of a discharge under § 1328(a) and hold that this same rule should apply in the context of post-confirmation plan modifications under § 1329(a)."

IN RE PARKER 2020 WL 97383 (5TH CIR. JANUARY 8, 2020)

- Chapter 13 Debtor failed to disclose post-petition personal injury claim to Trustee. Defendant moved to reopen case, asking to judicially stop Debtor from pursing claim.
- Bankruptcy Court found elements of judicial estoppel were present, but declined to apply on equitable grounds. Court ruled Debtor required to turnover any recovery to Trustee for benefit of creditors.
- On direct appeal, the Fifth Circuit AFFIRMED.

IN RE DEBERRY 2019 WL 7046904 (5TH CIR. DECEMBER 23, 2019)

- Recipient of fraudulent transfer of $241,500 returned the funds to Debtor. Trustee sued for fraudulent transfer and won on summary judgment. District Court affirmed.
- Fifth Circuit REVERSES: under Section 550(d), the trustee is only entitled to a single satisfaction of under 550(a). Once the fraudulently transferred property has been returned, the trustee cannot "recover" it again using 550(a).



Violations of the Discharge Injunction and the Impact of the Supreme Court's Decision in Taggart v. Lorenzen

"NO FAIR GROUND OF DOUBT"

Dennis J. LeVine
Partner
1511 N. Westshore Blvd.| Suite 400
Tampa | FL 33607
813. 223. 1697|Office (x1947)
813. 601. 0683 |After hours
813. 433. 5275|Fax
877. 222. 9529 |Toll Free
Email – dlevine@kklaw.com

Mr. LeVine attended Tulane University, and received his J.D. from George Washington University's National Law Center in 1983. Mr. LeVine, a Tampa native, has practiced law in Tampa since 1983. He is one of only seven Florida lawyers who is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification.

Violations of the Discharge Injunction and the Impact of the Supreme Court's Decision in Taggart v. Lorenzen

Section 524 of the Bankruptcy Code imposes an injunction against the collection of debts discharged in bankruptcy.[1] The discharge injunction is enforced through the bankruptcy court's civil contempt powers under § 105(a). A debtor moving for contempt bears the burden to prove a discharge injunction violation by clear and convincing evidence.[2] Where the movant establishes that contemptuous conduct occurred, a bankruptcy court may sanction the bad actor. [3]

Prior to the Supreme Court's 2019 decision in *Taggart v. Lorenzen*, ––– U.S. ––––, 139 S.Ct. 1795, 1801, 204 L.Ed.2d 129 (2019), in determining whether a creditor's post-discharge actions violated the discharge injunction, many courts judged creditors on an almost strict liability standard. For example, the 11th Circuit applied a two-part test to determine whether there has been a violation of the discharge injunction: (1) whether the Creditor knew that discharge injunction was invoked; and (2) whether the Creditor intended the action which violated the discharge injunction. [4] The "strict liability" standard was applied by the Bankruptcy Court in *Taggart*. [5]

Other Courts have used a different standard to determine whether a discharge injunction violation occurred. On appeal, the Ninth Circuit in *Taggart* reversed the bankruptcy court's decision and adopted a very subjective standard -- a creditor's good faith belief that the discharge order did not apply to the creditor's claim precluded a finding of contempt and sanctions, even if the creditor's belief was unreasonable. *In re Taggart*, 888 F.3d 438 (9th Cir. (Or.) 2018)

In June 2019 the Supreme Court announced a new standard regarding sanctions for violations of the discharge injunction under Section 524. *Taggart v. Lorenzen*, ––– U.S. ––––, 139 S.Ct. 1795, 1801, 204 L.Ed.2d 129 (2019). The question before the Supreme Court in *Taggart* concerned the legal standard for holding a creditor in civil contempt when a creditor attempts to collect a debt in violation of the discharge injunction. The Supreme Court rejected both the strict liability standard applied by the bankruptcy court, and the subjective standard applied by the Ninth Circuit.

The Supreme Court first looked at the legal requirements to establish civil contempt under federal law. The Court found it appropriate to incorporate long-standing federal jurisprudence on injunctions, what it termed "old soil". [6] Under federal jurisprudence, civil contempt is a severe remedy. Therefore, the burden to show contempt should be a high one, and requires the movant to prove contempt by clear and convincing evidence.[7]

The Supreme Court held that Sections 524(a)(2) and 105(a) "authorize a court to

impose civil contempt sanctions [for attempting to collect a discharged debt] when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order. In this way, "a court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct." [8] The "fair ground of doubt" standard is an objective standard. In other words, there is no fair ground of doubt when the creditor violates a discharge injunction "based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope." A creditor's "good faith belief" that the discharge injunction does not apply to the creditor's act that violated the discharge injunction does not by itself preclude a civil contempt sanction. Conversely, it is not sufficient to hold a creditor in civil contempt by finding that "the creditor was aware of the discharge order and intended the actions that violated the order."

Taggart's Other Lessons

Taggart has more to teach on the sanctions issue. While the *Taggart* case did not focus on damages, the Supreme Court noted that a creditor's subjective intent is relevant to determining damages.[9] Also, in considering sanctions for violation of the discharge injunction, a court must take the creditor's prior actions into account (e.g. was the creditor held in contempt before).[10]

CASES CITING TAGGART

The Supreme Court's new standard announced in *Taggart* can be viewed as "in between" the strict and subjective standards. The Supreme Court found that not every violation of the discharge injunction entitles a debtor to relief, and "civil contempt 'should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct.' " Stated differently, the question is whether there is no "fair ground of doubt" regarding whether the discharge order barred the creditor's conduct. Id. at 1804.

A number of Courts have examined alleged discharge violations under this new standard. The cases which have cited the Supreme Court's *Taggart* decision generally have allowed creditors to escape a contempt finding, even where the Court believed the creditor was attempting to collect a discharged debt.

In re Roth, 935 F.3d 1270 (11th Cir. 2019)

Facts: The Debtor filed a motion for contempt sanctions against a mortgage holder for allegedly willful violation of discharge injunction. The basis of the motion was the Creditor sending a monthly Informational Statement to the Debtor regarding the home mortgage, which the Debtor alleged was an effort to collect a discharged mortgage debt in violation of
Section 524. There have been a number of cases across the country involving debtors alleging that an Informational Statement sent by a mortgage lender post-discharge violated Section 524, with varying results.

The 11th Circuit affirmed the lower court decisions finding no violation of the discharge injunction. The Court found there was no objective effect of the creditor's action to pressure a debtor to repay a discharged debt. [11] The single, post-discharge Informational Statement sent to the Debtor/mortgagor was not an attempt to collect a discharged mortgage debt as personal liability of debtor. But, even assuming the Creditor's Informational Statement had violated the discharge injunction, the 11th Circuit applied *Taggart* and held that the Creditor's conduct would not warrant an award of contempt sanctions since there was a fair ground of doubt as to whether the order barred the creditor's conduct. The 11th Circuit found:

> "The *Taggart* standard is a rigorous one: in order to find that sanctions are appropriate here, we would have to hold that "there is no objectively reasonable basis for concluding that [Nationstar's] conduct might be lawful." Id. With more than a "fair ground of doubt," *Taggart*, 139 S. Ct. at 1799, as to whether the discharge order barred Nationstar's conduct, sanctions would be inappropriate". [12]

***In re Cantrell*, 605 B.R. 841 (Bankr. W.D. Mich. 2019)**

Facts: This case also involved a mortgage creditor's post-discharge Informational Statement. The Chapter 7 debtor moved to hold the Creditor in contempt and to recover damages for their allegedly willful violations of discharge injunction based on: (1) sending her monthly mortgage statements; (2) sending her mortgage loan modification solicitations; (3) entering into a Home Affordable Modification Agreement with her; and (4) calling her by telephone on several occasions in an alleged attempt to collect on the pre-petition debt.

The Court found only one of the Creditor's Informational Statement was an attempt to collect the mortgage debt as a personal liability of the Debtor and violated the discharge injunction. Applying *Taggart*, the Court did not impose sanctions, holding that the Debtor "has not met her burden of establishing that there was no objectively reasonable

basis for concluding that the creditors' actions might be lawful".

***In the Matter of: Craig and Amber Jenkins*, 2019 WL 5699943 (Bankr. N.D. Ala. Nov. 4, 2019)**

Facts: Jackson County Solid Waste moved post discharge to collect the Debtor's past due utility bills. The County argued the Debtors' failure to pay for pre-petition solid waste collection services constituted a misdemeanor under Alabama law punishable by fine or penalty, and thus nondischargeable pursuant to 11 U.S.C. § 523(a)(7) as a debt for a fine or penalty payable to a governmental unit. The County argued it should not be held in contempt and sanctions not imposed.

The Court found that the County failed to establish by a preponderance of the evidence that the debt is "not compensation for actual pecuniary loss" for purposes of § 523(a)(7). Nevertheless, applying the objective standard in *Taggart*, no civil contempt sanctions were imposed for the post-discharge actions because the Court found there was a fair ground of doubt under the circumstances of this case as to whether the County's actions were lawful under the discharge order.

***In re Freeman*, 2019 WL 5584884 (B.A.P. 9th Cir. Oct. 29, 2019)**

Facts: The Debtor's Chapter 13 Plan bifurcated the secured creditor's claim into secured and unsecured portions and provided for full payment of the secured portion of the claim in the plan. The Debtor made all of the payments under his Plan, including full payment of the secured portion of the Creditor's claim, and received a discharge. Later, the secured creditor commenced post-discharge proceedings to foreclose its lien, arguing that the Plan did not provide for a lien release.

The Debtor filed a motion to hold the lienholder in contempt for violating the discharge order. The lienholder then released the lien, but opposed the contempt motion. The bankruptcy court concluded that because the Plan and the discharge order did not expressly avoid the trust deed, no discharge violation had occurred and the creditor's post-discharge action was not contemptuous. The District Court reversed and found the creditor's action constituted a discharge violation. During the appeal, however, the Supreme Court decided *Taggart*. As a result, the District Court remanded the case back to the Bankruptcy Court to examine the facts under the *Taggart* standard.

***In re Bentley*, 2019 WL 4879330 (Bankr. E.D. Ky. Oct. 2, 2019)**

Facts: The Chapter 7 debtor filed a motion for contempt alleging the Creditor violated the discharge injunction by refusing to release its lien on his nearly valueless vehicle. The Debtor contended the Creditor should be found liable for violating the discharge

injunction since its action were an attempt to coerce the Debtor to pay the Creditor. [13]

The Court found the Creditor's conduct in its dealings with the Debtor was not objectively coercive; therefore, no discharge injunction violation occurred. As a result, the Court did not find it necessary to apply the standard in *Taggart* and consider whether an objectively reasonable basis exists to conclude that Creditor's conduct was lawful.

BUT, A CASE FACTUALLY SIMILAR TO *IN RE BENTLEY* THAT WENT THE OTHER WAY

In re Deemer, 602 B.R. 770, 775–76 (Bankr. M.D. Ala. 2019)

Facts: The Debtor wanted to surrender her vehicle which was inoperable. The Debtor contacted the Creditor multiple times requesting it repossess the vehicle. The Creditor informed the Debtor it would release the title to the vehicle in exchange for a payment. The Debtor contended this was an attempt to coerce the Debtor to repay a discharged debt in violation of the discharge injunction.

The Court found the Creditor's failure to either repossess the vehicle or release the lien was objectively coercive, and therefore a violation of the discharge injunction. The Court cited but did not analyze the *Taggart* standard. The Court concluded that the Creditor's action had the objective effect to pressure a debtor to repay a discharged debt by failing to either timely repossess the vehicle or cancel the lien, and found sanctions were appropriate.

In re Laudato, 2019 WL 4458368 (Bankr. N.D. Ohio Sept. 17, 2019)

Facts: Chapter 7 debtors alleged that the Lake County Department of Utilities and the Lake County Treasurer violated the discharge injunction by posting a statement online that included unpaid pre-petition water and sewer charges that had become a lien against the Debtors' real property under Ohio law.

The Court, citing *Taggart* and *In re Roth*, held that Lake County's actions did not violate the discharge injunction. The Court found that the Debtors did not demonstrate that the Creditor was acting in a way that had the objective effect of harassing or coercing the Debtors. The County had not solicited payment of these charges, but simply posted the online statement. The Court found the Creditor had not taken any action intended to collect in violation of the discharge injunction. [16] The Court stated that even if it found that the Creditor technically violated the discharge injunction by the online posting of the delinquent charges, this would not warrant any sanction under *Taggart*'s "no fair ground of doubt" standard since the Debtors did not show that there was no objectively

reasonable basis for concluding that the Creditor's conduct might be lawful.

***In re Shuey*, 606 B.R. 760 (Bankr. N.D. Ill. 2019)**

Facts: Chapter 7 debtor moved to impose sanctions on her former father-in-law for violating the discharge injunction. The Creditor argued that his pre-petition, contingent claim essentially was equivalent to an educational benefit, and presumptively excepted from discharge under § 523(a)(8). The Bankruptcy Court disagreed and found the debt to be discharged.

The Creditor argued that even if he was found to have violated the discharge injunction, such a conclusion did not lead to inevitable imposition of civil sanctions. The Court applied *Taggart* and did not impose sanctions for violation of discharge injunction, finding that the Creditor's legal theories were reasonable given that several courts had held that claims in the nature of Creditor's were excepted from discharge pursuant to § 523(a)(8)(A)(ii). Given the lack of controlling authority the Creditor would not necessarily have known exactly what the court intended to "require and what it means to forbid." With no guiding authority, the Court stated "It is difficult to state with conviction that Creditor's belief was objectively unreasonable given that he can cite to authority that supports his position." The Court found a fair ground of doubt that did not warrant the imposition of sanctions against Creditor, since the facts showed that the Creditor had an objectively reasonable basis for believing that his conduct did not violate the discharge injunction. While the Creditor was stayed from proceeding in his collection action against the Debtor, the Court declined to impose any sanctions for the Creditor's prior actions.

***Moore v. Auto. Fin. Corp.*, 2019 WL 3323328 (M.D. Ala. July 24, 2019)**

Facts: After the Debtor obtained a discharge, his new company attempted to obtain credentials to gain access to automobile auction websites through an entity known as AuctionAccess, which allows dealers to purchase wholesale automobiles at hundreds of auctions across North America. AuctionAccess denied the Debtor, his partner, and his new company access based on a creditor who blocked them from obtaining buyer credentials by advising AuctionAccess that the Debtor owed it a substantial amount of money. When the Debtor advised that the debt was discharged in the bankruptcy, the Creditor advised that it was under no obligation to allow the Debtor to obtain buyer credentials from AuctionAccess. The Creditor suggested that it would remove its block for an amount of money.

The Debtor sued the creditor for violating the bankruptcy discharge. The Bankruptcy Court dismissed the Complaint with prejudice for failure to state a claim. The Court found that under the facts as alleged by the Debtor, there was an objectively reasonable basis to conclude that the Creditor's conduct was lawful. The Court noted that a

creditor is not required to do business with a debtor just because the debtor has received a discharge in bankruptcy. Therefore, a creditor can require a debtor to pay a discharged debt as a condition of continuing a business relationship. The Court examined *Taggart*, and concluded there was "an objectively reasonable basis for concluding that the creditor's conduct might be lawful." [17]

***In re DiStefano*, Case No. 18-05001 (Bankr. W.D. Mich. Oct. 30, 2019)**

Facts: The Debtor surrendered a car after filing Chapter 7. The lender sold the car at auction, but sent the Debtor a notice demanding payment of a deficiency, even though the Debtor had received a discharged. While the Court found that the demand letter made an "equivocal demand", it decided the letter "served no obviously lawful purpose, and was not simply informational." [14] The Court held that the letter was an attempt to collect a discharged debt and thus violated the discharge injunction. Nevertheless, while finding a discharge violation, the Court did not impose sanctions.

The Creditor made what the Court deemed "non-frivolous arguments" in defending its conduct. The Court gave three reasons why there was a "fair ground of doubt" about violating the discharge injunction. First, there was some case law in the District holding that a proper bankruptcy disclaimer on a letter immunizes a creditor from a contempt citation. Second, the Creditor sent the demand letter to the debtor and her counsel.[15] Third, the Creditor sent only one demand letter. While the Creditor violated the discharge injunction, the Court did not hold the lender in contempt because "there was — at the time [the lender] sent [the deficiency notice] — fair ground of doubt in our district as to whether sending the communication was lawful, given the disclaimer and context ...." The Court said it had "no appetite or authority for employing the contempt power in a game of 'gotcha'".

Bill Rochelle's Analysis of Taggart and its Impact

Bill Rochelle, who writes a great daily column for the ABI examining important cases, reviewed the impact of *Taggart* in the *In re DiStefano* case and found that:

> "The October 30 decision by Judge Dales shows that the Supreme Court's "objectively reasonable" standard is a creditor-friendly test that can subject debtors to attempted collection of discharged debts. Because a bankrupt's prepetition retainer won't cover legal fees for enforcing discharge, a debtor after *Taggart* who has no counsel may decide to pay a debt that no longer exists".

Rochelle concludes:

> "Lenders may escape contempt citations until several courts around the country rule, like Judge Dales, that ambiguous demand letters do violate the discharge injunction.
>
> On the other hand, some courts may take a tougher approach than Judge Dales and find a lender in contempt if the lender cannot show a demonstrably legitimate purpose for sending a similar letter to someone who received a discharge. Can there be a legitimate reason for telling a debtor the amount of a debt that was discharged, unless the notice says, in bold letters up front, "Do Not Pay This Debt"?
>
> Cases such as this show how the Supreme Court has tilted the scale in favor of lenders. Unsophisticated debtors may not understand they no longer owe a debt. And debtors who know their liabilities evaporated may pay the lender rather than pay a lawyer to enforce their discharges.
>
> Debtors will have a tougher time finding counsel because lawyers may decline to take cases on contingency, since contempt citations and monetary sanctions will be more difficult to obtain.
>
> When (if) Congress undertakes bankruptcy reform, enforcement of the discharge injunction should be on the table. In terms of protecting debtors, the federal Fair Debt Collection Act provides a potentially useful standard.
>
> Under the FDCPA, a communication from a creditor is evaluated using the "least sophisticated consumer" test. A similar standard for alleged violations of discharge injunctions would go a long way toward stopping lenders from using confusing language to dupe debtors into paying debts that no longer exist".

DOES THE *TAGGART* STANDARD APPLY TO WILLFUL VIOLATIONS OF THE AUTOMATIC STAY UNDER SECTION 362

Section 362(k)(1) of the Bankruptcy Code directs a Bankruptcy Court to award damages upon injury to the Debtor from a creditor's "willful violation" of an automatic stay. The Supreme Court in *Taggart* stated that due to the different language of the statutes, its standard under Section 524 was not applicable to examining stay violations under Section 362. While the Supreme Court found that the "no fair ground of doubt" standard was not applicable to automatic stay violations, this has not stopped creditors from arguing this standard in Section 362 sanctions cases. Some Courts have considered (but not necessarily adopted) the

new *Taggart* standard while considering stay violations:

***California Coast Univ. v. Aleckna,* 2019 WL 407240 (M.D. Pa. Aug. 28, 2019)**

***In re Caldwell*, 2019 WL 5616908 (Bankr. E.D. Mich. 2019)**

***In re Jones*, 2019 WL 5061166 (Bankr. S.D. Miss. July 22, 2019)**

***In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019)**

Faculty

Jeffrey S. Ainsworth is an attorney with BransonLaw PLLC in Orlando, Fla., where he practices primarily in the areas of bankruptcy, creditors' rights and dischargeability issues, and has represented individual debtors, corporate debtors, unsecured creditors, committees, secured creditors and trustees. He is a member of ABI, the Orange County Bar Association and the Central Florida Bankruptcy Law Association. Mr. Ainsworth is admitted to practice in all Florida courts and the U.S. District Courts for the Northern, Middle and Southern Districts of Florida. He received his B.A. in political science in 2004 from the University of Central Florida and his J.D. in 2008 from Florida State University, where he also received a Certificate in Environmental and Land Use Law.

Hon. Caryl E. Delano is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the Middle District of Florida in Tampa, initially appointed on June 25, 2008, and named Chief Judge on October 1, 2019. She also was appointed Presiding Judge of the Fort Myers Division in July 2012. Previously, Judge Delano practiced before the bankruptcy courts of the Central District of California for 14 years. In 1994, she returned to Tampa and most recently practiced law with the firm of Addison & Delano, P.A., where she concentrated her practice on bankruptcy and commercial litigation. Judge Delano has represented debtors and creditors in numerous chapter 11 cases and related adversary proceedings. She is a member of the Florida Bar, the State Bar of California, the National Conference of Bankruptcy Judges, ABI, the Business Law Section of The Florida Bar (Executive Council, CLE Committee), the Hillsborough County Bar Association and the Tampa Bay Bankruptcy Bar Association. In addition, she serves as the liaison judge to the Middle District of Florida's Local Rules Lawyers' Advisory Committee and is a member of the National Conference of Bankruptcy Judges Federal Rules Advisory Committee. In 2017, Judge Delano received the Southwest Florida Bankruptcy Professionals Association's Alexander L. Paskay Professionalism Award. In addition, she is the former executive director and past-president of the J. Clifford Cheatwood American Inn of Court. Judge Delano received her B.A. in English *cum laude* in 1976 from the University of South Florida and her J.D. in 1979 from Indiana University School of Law, having completed her final year of law school at Emory University School of Law.

Dennis J. LeVine is a partner in the Tampa, Fla., office of Kelley Kronenberg, where he represents creditors in bankruptcy, handles commercial and consumer collection litigation throughout Florida, and advises clients on vehicle towing, storage and repair liens. He is one of only seven attorneys in Florida to be Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification (ABC). Prior to joining the firm, Mr. LeVine was founder and president of Dennis LeVine & Associates, P.A. in Tampa for 19 years where he primarily represented creditors and chapter 7 trustees in all bankruptcy courts and creditors in commercial and consumer collection actions. He is licensed to practice in the federal courts in the Northern, Middle and Southern Districts of Florida. Mr. LeVine is a past president of the Tampa Bay Bankruptcy Bar Association and an active member of ABI, for which he served on its Board of Directors, and the Florida Bar's Business Law Section. He has published numerous articles on consumer bankruptcy law in the *ABI Journal*, the *Florida Bar Journal*, the ABI Consumer Bankruptcy Committee e-newsletter and *The Cramdown*, the monthly publication of the Tampa Bay Bankruptcy Bar Association. He has also been a guest speaker on bankruptcy and collection law throughout the U.S. Mr. LeVine is the Florida editor for the annual *West Exemption Manual*. He received his undergraduate degree from Tulane

University, where he was elected Phi Beta Kappa, and his J.D. from George Washington University's National Law Center.