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Derby, Thomas, and the Applicability of the FDCPA to Bankruptcy Cases

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Recently, Hon. Keith L. Phillips of the Richmond Division Bankruptcy Court issued his fourth and final written opinion in the *David Derby v. Portfolio Recovery Associates*[1] adversary proceeding, concluding two years of litigation over the proofs of claim filing practices of Portfolio Recovery Associates ("PRA"), one of the nation's largest debt collectors. In most respects, *Derby* was a carbon copy of the 2016 case, *Rachel Maddux v. Midland Credit Management, Inc.*[2], in which Judge Huennekens held that Midland's proofs of claim violated Bankruptcy Rule 3001(c)(2)(A) by falsely stating the claim amounts did not include interest or other charges and ordered it to pay attorney fees to debtor's counsel under Rule 3001(c)(2)(D)[3]. The final outcome in *Derby* was the same as *Maddux*—the claims were held to violate Rule 3001 and the creditor was ordered to pay attorney's fees—although, before it could decide the outcome under the Bankruptcy Rules, the court first had to resolve whether the Fair Debt Collection Practices Act ("FDCPA")[4] also applied to PRA's misconduct. In deciding that the FDCPA did not apply because the bankruptcy claims process provided the exclusive remedy, the *Derby* court contributed to a growing split among bankruptcy courts about how to apply the 2017 Supreme Court decision, *Midland Funding, LLC v. Johnson*[5].

Derby alleged that PRA's normal business practice was to file claims in bankruptcy cases throughout the Eastern District of Virginia for charged-off credit card accounts and, in those claims, PRA falsely declared the amounts owed consisted entirely of principal and

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Message from the Editor

Veronica Brown-Moseley

I hope this edition of the *Bankruptcy Law News* finds you well. I am very excited about my new role as the newsletter editor! I would like to sincerely thank Andrea Campbell Davison for her many years of service as the editor. Andrea has done a fantastic job of providing readers with informative, timely and enjoyable reading materials. I will work diligently to follow in her foot-steps.

We offer congratulations to the Honorable Elizabeth L. Gunn who was recently sworn in to serve as a United States Bankruptcy Judge for the District of Columbia. Judge Gunn has been an active contributor to the Bankruptcy Section for many years. We wish her the very best in her new position!

This edition features two substantive articles that highlight recent developments in bankruptcy case law. Mark C. Leffler, a shareholder of the Boleman Law Firm PC, submitted an excellent article that discusses recent decisions from the Bankruptcy Courts in the Eastern and Western Districts of Virginia regarding the applicability of the FDCPA to bankruptcy cases. Klementina V. Pavlova, an associate of Sands Anderson, submitted an exceptional article examining recent court decisions that contribute to the constantly evolving and ever-growing body of case law concerning the dischargeability of student debt.

Additionally, you will find in this issue:

- A welcoming Message from the Chair by Hannah W. Hutman of Hoover Penrod PLC.
- Important updates in the Clerks Corner by William C. Redden of the United States Bankruptcy Court Eastern District of Virginia.
- Informative Case Summaries by Kelly M. Barnhart of Roussos & Barnhart, PLC.

Thank you very much to those who contributed to this edition of the *Bankruptcy Law News*. I encourage readers to suggest topics and contribute to upcoming editions. If you are interested, please contact me via email at vdbrown-moseley@bolemanlaw.com or phone at 804-358-9900. I would love to hear from you!

I hope that you enjoy this edition of *Bankruptcy Law News*.

~ Veronica

Message from the Chair of the Section

Hannah W. Hutman

I hope this newsletter finds you safe and healthy! Who would have thought we would still be greeting each other in this fashion 8 months into the Covid-19 pandemic. When the world shut down last March it seems safe to say that no one knew what to expect next. As bankruptcy attorneys we are accustomed to acting quickly in the midst of less than ideal circumstances and the last few months prove that is true more than ever. We are a resilient group, who some might say thrive in a crisis. Without missing a beat our courts moved to telephonic or virtual hearings and attorneys set up shop out of the comfort and safety of their home. The economic realities of the pandemic meant that our services were needed more than ever and we rose to the challenge. Now this "new normal" is beginning to feel just "normal."

I am honored to serve as Chair of the Board of Governors of the Bankruptcy Section this year alongside Dylan G. Trache of Nelson Mullins (Washington D.C.) as vice-chair and Kelly Barnhart of Roussos & Barnhart, PLC (Norfolk) as secretary. I am also pleased to welcome our new members, Andrea Campbell Davison of Bean, Kinney & Korman PC (Arlington), Janice Hansen of Cox Law Group (Lynchburg), and Michael Hastings of Woods Rogers PLC (Roanoke). In addition, Veronica Brown-Moseley of Boleman Law Firm, P.C. (Richmond) has taken on the role of Newsletter Editor.

The Board would like to thank Erika Morabito for her leadership and dedication to the Board of Governors in her role as Chair last year. In addition, we would like to recognize and thank Andrea Campbell Davison for her service as Newsletter Editor over the last five years. If you are interested in serving on the Board of Governors or contributing the newsletter, please reach out to me or any of the Board members. We are always looking for energetic and enthusiastic attorneys with a passion for the practice of bankruptcy law to serve on the Board.

While we certainly don't know what this year will hold or when things will return to the "old normal," we are committed to serving you and helping connect the bar during a time when connecting is especially difficult. One of my goals as Chair is that the efforts of the Board of Governors benefit and improve the practice of law for *all* bankruptcy practitioners in *all* areas of the Commonwealth. Dylan Trache is already hard at work planning the annual Bankruptcy Practice Seminar. Like most seminars, it will be held virtually this year. I miss live in-person seminars, but there are advantages to a virtual world. Hopefully even more of you can attend, since travel won't be an issue! If you have suggestions for topics or would like to be a speaker please don't hesitate to contact Dylan.

Despite the very unusual times and circumstances, we are looking forward to a productive year serving as your Board of Governors. Stay safe, take care, and keep up the good work.

~ Hannah

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contained $0.00 in pre-charge-off interest and other finance charges.[6] This, the plaintiff alleged, was a violation of Bankruptcy Rule 3001(c)(2)(A), which requires that claims in individual cases contain an itemization of "interest, fees, expenses, or other charges incurred before the petition was filed"[7]. Likewise, the plaintiff alleged this same conduct violated § 1692e of the FDCPA for "using false, deceptive, and/or misleading representations or means in connection with collection of a debt, including but not limited to the false assertion that no interest or fees were included in the amount."[8] Claims were also brought that PRA violated § 1692f of the FDCPA "by using unfair and unconscionable means to collect a debt, including but not limited to a standard practice of filing Proofs of Claim without intending to comply with Federal Rule of Bankruptcy Procedure 3001(c) and by not providing the writings underlying its Proofs of Claim."[9]

Maddux served as a roadmap to which Judge Phillips hewed closely in evaluating PRA's violations of Bankruptcy Rule 3001, which PRA eventually admitted[10], and the determining of the appropriate sanction under Rule 3001[11]. In the settlement that ended the litigation, PRA agreed to pay Mr. Derby $2,250.00 and pay his attorneys the reasonable fees as determined by the Court under Rule 3001(c)(2)(D), amend hundreds of claims, and conform all future claims in the Eastern District of Virginia to the requirements of Rule 3001, as interpreted by the Court in *Maddux*.[12] In the end, the court justified awarding attorney fees against PRA squarely upon the authorization provided by the Bankruptcy Rule and *Maddux*[13], a decision that it explained put PRA on notice that its claims violated Rule 3001[14].

Where the *Derby* case broke new ground was in its first opinion, *Derby I*, on PRA's motion to dismiss the FDCPA counts. After the 2017 Supreme Court decision, *Midland Funding, LLC v. Johnson*[15], questions remain whether bankruptcy courts may consider remedies under the FDCPA for post-bankruptcy debt collection abuses where a remedy already exists under the Bankruptcy Court and/or Rules. The *Derby* court dismissed the FDCPA causes of action, citing the "two separate but related rationales" of *Midland v. Johnson*—"the Court's analysis of the broad definition of 'claim' under the Bankruptcy Code and its recognition of the differences between the purposes and structural features of the Bankruptcy Code and the FDCPA"[16]—and holding,

> The logical conclusion is that the Supreme Court has determined that when a creditor's alleged misconduct involves the filing of a proof of claim in a bankruptcy case for a debt that would be enforceable under state law, the Bankruptcy Code and Rules provide the exclusive means for addressing the allowance of the claim and the creditor's misconduct. [ ]. The Supreme Court's ruling in *Midland* resolved a split among the circuit courts over the applicability of the FDCPA to the claims process in bankruptcy . . . .[17]

Midland v. Johnson was one of a series of cases brought in various circuits that alleged a debt collector's filing of a proof of claim to collect a stale debt (one in which the statute of limitations has run) was a violation of the FDCPA. As Chief Judge Connelly from the Bankruptcy Court in the Western District of Virginia recently explained the case,

> The Supreme Court of the United States addressed whether the filing of a proof of claim which "on its face indicates that the limitations period has run" violates the FDCPA in *Midland Funding, LLC v. Johnson* . . . . Ultimately, the Supreme Court determined that the filing of proofs of claim for time-barred claims was neither "false, deceptive, or misleading" nor "unfair" or

> "unconscionable" under the FDCPA. [ ]. Even though the chapter 13 debtors had the ability to assert the statute of limitations as an affirmative defense to the claims, the applicable state law "provide[d] that a creditor has the right to payment of a debt even after the limitations period has expired." [ ]. Based on the broad definition of "claim" under the Bankruptcy Code, the Supreme Court found that the creditor had a claim (i.e., a "right to payment") and so filing a proof of claim when the debtor had available defenses to the debt was not "within the scope of any of the five relevant words of the Fair Debt Collection Practices Act."[18]

Courts have struggled with how—or if—the FDCPA applies to debt collectors who take part in bankruptcies, especially given the complete system of rules that already exists to govern bankruptcy cases. The two systems seem to overlap one another, they are not entirely congruent, and, sometimes, "the application of one system is jarring against the background of another."[19] To date, no issue has better demonstrated the apparent incongruity between the Bankruptcy Code and Rules and the FDCPA than that presented for review in *Midland Funding, LLC v. Johnson*: Is it "false, deceptive, or misleading" under the FDCPA for a debt collector to file a proof of claim to collect a debt that is time-barred under a statute of limitations, where the debt collector has followed the requirements of the Bankruptcy Rules for filing claims, and truthfully identified the date of the last payment on the debt such that it is clearly identifiable as a time-barred debt?[20]

Those who hoped the Supreme Court would determine, once and for all, the applicability of the FDCPA to debt collection taking place in bankruptcy cases—whether or not the FDCPA is precluded by the Bankruptcy Code—would be disappointed. The *Derby* court's opinion is that the FDCPA is precluded, at least "when a creditor's alleged misconduct involves the filing of a proof of claim in a bankruptcy case for a debt that would be enforceable under state law"[21], but courts remain split even as to this limited view of *Midland v. Johnson*. Even the Bankruptcy Courts of the Eastern and Western Districts of Virginia disagree[22]. Indeed, a decision just issued by Chief Judge Connelly in the Bankruptcy Court for the Western District of Virginia takes a decidedly different approach than *Derby*[23].

In *Thomas v. Midland*, the creditor (the same creditor that was the defendant in *Maddux* and the successful appellant in *Midland v. Johnson*)was filing claims for defaulted credit card accounts in the Western District of Virginia that, like those in *Maddux* and *Derby*, "contained false statements about whether interest or fees were embedded in the claim amounts."[24] Judge Connelly was called upon to rule on Midland's Motion for Partial Summary Judgment, which the court noted "relies heavily upon *In re Derby*"[25] in arguing that "the FDCPA is inapplicable to the allegations raised in the amended complaint because the Bankruptcy Code and Federal Rules of Bankruptcy Procedure provide the exclusive means to address the purported misconduct."[26] The court further described Midland's position as follows: "The defendants argue that false representations on a proof of claim are merely violations of Rule 3001 and should exclusively be addressed through the remedies afforded debtors under the Federal Rules of Bankruptcy Procedure."[27] The plaintiffs see the issue differently: "the plaintiffs insist the systemic practice of filing proofs of claim with false statements, designed to avoid Rule 3001, violates the FDCPA and cannot be resolved through Rule 3001."[28]

Although the *Thomas* court was emphatic that the Bankruptcy Code and Rules govern any contest regarding the amount or validity of a claim, it said this case was not "just about determining allowance of the amount of the claim".[29] As a result, it

explained that, nonetheless, "the FDCPA [claims] are not precluded by the claims-administration process prescribed by the Bankruptcy Code and Rules."[30] The court described the nature of the plaintiff's claims and why the Bankruptcy Rules did not apply:

> The plaintiffs allege false representations made on the *original* proofs of claim along with the practice described to obstruct enforcement of Rule 3001. These allegations do not fall *within* Rule 3001 and so it is not clear how Rule 3001 provides the exclusive means to remedy the misconduct. Put differently, because the plaintiffs have described conduct that could violate 15 U.S.C. § 1692e and § 1692f and is not specifically addressed under Rule 3001, Count I of the plaintiffs' amended complaint is not precluded by the claims administration process prescribed by the Bankruptcy Code and Rules.[31]

This decision, the court explained, "is not irreconcilable" with *Midland v. Johnson*.[32] In *Midland v. Johnson*, the Supreme Court had emphasized that the claim at issue "contained no false representations"[33] and, thus, was not "false, deceptive, or misleading, and the filing of the proofs of claim was not unfair or unconscionable".[34] Even though the *Thomas* court noted that *Midland* held a valid claim—just like the creditor in *Midland v. Johnson*—"[t]he difference with *Midland* in the instant adversary proceeding is that it filed proofs of claim with false representations, not merely that it filed claims to which there may be a valid affirmative defense."[35]

The different views expressed by the *Derby* and *Thomas* courts are not surprising, considering the concern the Supreme Court expressed regarding the potential that creditors could be subject to liability under the FDCPA for merely doing what the Bankruptcy Code allows by filing a claim.[36] The Supreme Court used the term "delicate balance" to describe how the bankruptcy process invites creditors with even unenforceable claims to file proofs of claim, while also allowing parties in interest to object to those claims.[37] The Court reasoned that, given the process set out in the Bankruptcy Code for filing unenforceable claims and objecting to those claims, and the protections provided by the "knowledgeable trustee," it would upset this "delicate balance" to apply liability under the FDCPA against claimants who were merely doing what the Bankruptcy Code and Rules allow.[38] This discussion has led to a new split in context of the claims filing process in bankruptcy. The *Derby* and *Thomas* courts are certainly not alone in reaching different conclusions, as other courts have also expressed different views of the applicability of the FDCPA to claims-related conduct.[39]

It remains to be seen whether the Fourth Circuit—much less the Supreme Court itself—will ever clarify how courts should apply *Midland v. Johnson*. It appears the *Derby* court may currently be in the majority in its viewpoint that the claims process, including a robust application of the court's power to impose sanctions under Bankruptcy Rule 3001(c)(2)(D)[40], is the exclusive means of addressing misconduct like that of Midland in *Maddux* and PRA in *Derby*. Or, perhaps the insightful analysis of *Thomas v. Midland* will begin to convince other courts that the "delicate balance" of the bankruptcy system is not upset by application of the FDCPA when the creditor's claim filing is false, deceptive, misleading, unfair, or unconscionable. One thing is clear, however, at least in Virginia: creditors should take care to itemize the interest, fees, and other charges embedded in their claims.

Endnotes

1. Adv. Pro. No. 18-03097-KLP, 2020 Bankr. LEXIS 2589 (Bankr. E.D.Va. Sept. 29, 2020) ("*Derby IV*").

2. Even the legal representation was the same in *Derby* as in *Maddux*: the debtor/plaintiff was represented by lawyers from

Boleman Law Firm, Consumer Litigation Associates, and Dale W. Pittman, Esquire, and the creditor/defendant was represented by Hunton Andrews Kirth.

3. 567 B.R. 489, 499-500 (Bankr. E.D.Va. 2016).

4. 15 U.S.C. §1692 *et seq*.

5. 137 S. Ct. 1407 (2017).

6. Adv. Pro. No. 18-03097-KLP, 2019 Bankr. LEXIS 945 at *4-5 (Bankr. E.D.Va. March 28, 2019) ("*Derby I*").

7. Fed. R. Bankr. P. 3001(c)(2)(A).

8. *Derby I* at *8.

9. *Id.*

10. Adv. Pro. No. 18-03097-KLP, 2019 Bankr. LEXIS 882 at *4-5 (Bankr. E.D. Va. March 31, 2020) ("Derby III").

11. *Derby III* at *12 ("PRA has stipulated that its proof of claim did not comply with Bankruptcy Rule 3001(c)(2)(A) as interpreted in *Maddux*. The Court finds that an award of attorney's fees and expenses is the 'appropriate' relief, particularly given PRA's violation of the Rule in the aftermath of *Maddux*.").

12. *Derby III* at 4-5.

13. *Derby III* at *12.

14. *Derby III* at *10-11 ("PRA was aware of this Court's decision in *Maddux* as early as December 2016 yet chose to continue filing proofs of claim that violated its mandates. [ ]. The Court must conclude that PRA filed proofs of claim that it knew were improper under *Maddux*.").

15. 137 S. Ct. 1407 (2017).

16. *Id.* at *9.

17. *Derby I* at *13-14.

18. In re Thomas, 2020 Bankr. LEXIS 3019, *16-17 (Bankr. W.D. Va. October 28, 2020), citing *Midland v. Johnson* at 1411-12 (internal citations omitted).

19. *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004)

20. 137 S.Ct. at 1411.

21. *Derby I* at *13-14.

22. See *Thomas v. Midland Funding, LLC (In re Thomas)*, 578 B.R. 355 (Bankr. W.D. Va. 2017).

23. *Thomas v. Midland Funding, LLC (In re Thomas)*, Adv. Pro. 17-05010-RBC, 2020 Bankr. LEXIS 3019 (Bankr. W.D.Va. October 28, 2020).

24. *Thomas* at *7.

25. *Id.* at *17.

26. *Id.* at *15.

27. *Id.* at *18.

28. *Id.* at *18-19.

29. *Id.* at *22.

30. *Id.* at *24.

31. *Id.* at *23.

32. *Id.* at *24.

33. *Id.*, citing *Midland v. Johnson* at 1411.

34. *Id.*

35. *Id.* at *24-25.

36. *Midland v. Johnson* at 1415.

37. *Id.* at 1412.

38. *Id.* at 1415.

39. See *Morris v. Midland Funding, LLC*, No. 19-cv-795, *2019 WL 4142714 (D. Minn. Aug. 29, 2019)*; *Gibbs v. Resurgent Capital Servs., L.P.*, No. 19-cv-1844, *2020 WL 319657 (D. Minn. Jan. 21, 2020); In re Martin, 617 B.R. 866 (Bankr. S.D. Miss. 2020)*; and *Yavorka v. Midland Credit Mgmt., Inc.*, No. 19-122, 2020 WL 5747832 (W.D. Pa. Sept. 25, 2020) (FDCPA is precluded by the bankruptcy claims process). But see *Howard v. LVNV Funding, LLC*, Case No. 3:19-cv-93, *2020 WL 978653 (W.D. Pa. Feb. 28, 2020)* (FDCPA counts are not precluded by the Bankruptcy Code).

40. The court ordered PRA to pay attorneys fees in the amount of $114,407.44 to counsel for Mr. Derby in *Derby IV* at *14.

Discharging Student Loan Debt: The Devil's in the Details

By Klementina V. Pavlova[1]

A lot has been written about the dischargeability of student loans through bankruptcy, or rather the lack thereof.[2] And for good reason, the student loan debt in 2020 is now about $1.67 trillion and quickly rising.[3] Unlike other types of personal debt, most types of student loans are nearly impossible to discharge even in bankruptcy, including government-backed loans. The obligation to repay has overarching effects on the economy, which leave the borrower with less income available to build savings or purchase a home. While there is a consensus among bankruptcy practitioners and the general public, that student loans are non-dischargeable, courts are starting to recognize limited but significant exceptions to the general rule.

On August 31, 2020, the U.S. Court of Appeals for the Tenth Circuit, sided with borrowers who sought discharge of private student loans after filing for bankruptcy.[4] The ruling in *In re McDaniel* centers on a couple, Byron and Laura McDaniel, who sought chapter 13 bankruptcy relief for debts including about $200,000 of private student loans. The student loans were issued by the private lender, Navient Solutions LLC (formerly known as Sallie Mae or SLM Corporation), through the Tuition Answer loan program.[5] The Tuition Answer Program is a direct-to-consumer loan product outside the confines of the financial aid office and in excess of the school's published "Cost of Attendance" ("COA").[6] From 2004-2007, the McDaniels' borrowed $107,467 in six Sallie Mae Tuition Answer Loans.[7] The total balance of these Tuition Answer Loans is now $245,264, "despite consistent monthly payments of more than $2,000 for several years."[8] The issue raised in the case is whether this type of a private loan, the Tuition Answer Loan, constitutes "an obligation to repay funds received as an educational benefit," within the meaning of § 523(a)(8)(A)(ii).[9] The Court held that it does not.

As the Court stated, "the types of debt § 523(a)(8) excepts from discharge are the following: "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit"; "any other educational loan that is a qualified education loan"; and—the exception at issue here—"an obligation to repay funds received as an educational benefit, scholarship, or stipend.""[10] Educational debts that fall within the statutory exceptions are presumptively non-dischargeable absent a finding of "undue hardship." But educational debts that do not fall within the statutory exception do not enjoy the same protection from § 523(a)(8).

The McDaniels argued that these Tuition Answer Loans were discharged through their bankruptcy because they do not meet the types of debt enumerated in § 523(a)(8), i.e. they are not a loan guaranteed by the federal government, not a qualified educational loan and not an obligation to repay funds received as an education benefit. Navient argued that the Tuition Answer Loans fall under § 523(a)(8)(A)(ii) because they enabled Ms. McDaniel to attend college and she certified that the loan proceeds are to pay for expenses directly related to attending college. In essence, Navient's

argument is that by "enabling Ms. McDaniel to enroll in and attend college and support her personal decision to improve her life through higher education, the loans conferred 'educational benefits' on her and are therefore excepted from discharge in bankruptcy."[11] In response, the McDaniels reasoned that although all loans may be obligations to repay funds that does not mean all obligations to repay funds are loans.

The Tenth Circuit reasoned that the type of private loan issued by Navient, which didn't meet the Tax Code's definition of a qualified student loan, doesn't enjoy the same protections against cancellation, because it does not fit under the definition on "an obligation to repay funds received as an educational benefit."[12] The Court's analysis focused on the statutory language of § 523(a)(8) and concluded that the statutory terms "obligation to repay funds received as an educational benefit" and "educational loan" mean separate things.[13] In support, the Court cited to *In re Crocker* standing for the proposition that "if Congress wanted the exception set forth in § 523(a)(8)(A)(ii) to cover student loans, it would have used the term "educational loan" or an iteration thereof in that provision, just as it used the term in defining the scope of the exceptions in the statute's adjoining subsections."[14] The Court distinguished an "obligation to repay funds received as an educational benefit" and "educational loan" by noting that "when normal speakers of English refer to things like a health benefit, unemployment benefit, or retirement benefit, it is using a definition of "benefit" that implies a "payment," "gift," or "service" that ordinarily does not need to be repaid."[15] The Court rejected all of Navient's arguments or found them unpersuasive.

While the ruling is limited to loans that are issued by private lenders for certain non-accredited schools or loans that exceed the cost of attendance, this is significant for consumers qualified to discharge their shares of roughly $130 billion in private educational debt.[16] The Tenth Circuit joins a growing number of courts holding a narrower view of § 523(a)(8)(A)(ii) and providing tangible relief to a small but significant constituency of student loan borrowers. For example, in *In re Campbell*, the Bankruptcy Court for the Eastern District of New York, held that § 523(a)(8)(A)(ii) does not encompass a private bar study loan.[17] The *Campbell* court reasoned that if § 523(a)(8)(A)(ii) applied to loans, it would "swallow" the other sections of § 523(a)(8).[18] And similar to the *McDaniel* court, it employed the canon of statutory construction known as *noscitur* a sociis (when a statute contains a list, each word in that list presumptively has a "similar" meaning).[19] The Court stated that because § 523(a)(8)(A)(ii) lists the nondischargeable obligations, as follows: "an obligation to repay funds received as [1] an educational benefit, [2] a scholarship, or [3] a stipend", then "educational benefit" must be understood to refer to something other than a loan, especially given that Congress uses the word "loan" elsewhere in § 523(a)(8).[20] In *Dufrane*, the court agreed with the reasoning of *Campbell* and found that § 523(a)(8)(A)(ii) excepts from discharge educational debts other than loans, which it found is consistent with the canons of statutory construction and the policy of the Bankruptcy Code to strictly construe exceptions to discharge.[21] The Dufrane court also noted that in 2005 Congress made § 523(a)(8)(A)(ii) an independent category that is detached from the obligations described by the phrase "educational benefit overpayment" or "loan" in § 523(a)(8)(A)(i) and "any other educational loan" in § 523(a)(8)(B).[22] Similarly, in *In re Christoff*, the bankruptcy appellate panel noted that § 523(a)(8)(A)(ii) is not a "catch-all" provision designed to include every type of credit transaction that creates an educational benefit for a debtor.[23] The U.S. Bankruptcy Court for the District of Maryland has also ruled on the issue and determined that the phrase "obligation to repay funds received as an educational benefit" should be interpreted narrowly by examining its

grammatical structure.[24] The Court noted that the word "as" conjoins the subject "obligation to repay funds received" with the predicate "an educational benefit, scholarship, or stipend."[25] In *Essangui*, the court found that because Congress used the preposition "as" rather than "for" to connect the subject with the predicate, the words "benefit, scholarship, or stipend" are to be treated as examples of the "funds received" rather than being descriptions of the purpose of the "funds received."[26]

This developing caselaw applies to a small subset of all student loans, but it provides an opportunity for debtors who went through the bankruptcy process and who still have some private student loan debt, to rely on the decisions described above to re-open their cases and try to obtain discharge of the debts. The private student loan market stands at roughly $130 billion, which might seem insignificant compared to the $1.67 trillion student debt, but for individuals affected, it could make the difference between having savings to weather an economic downturn or buying their first home.

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Endnotes

1. This article was prepared by Klementina V. Pavlova in her personal capacity. The opinions expressed in this article are the author's own and do not reflect the view of Sands Anderson PC.
2. Volume XXIV, No 30 and Volume XXIV, No 31.
3. *See* Board of Governors of the Federal Reserve, Consumer Credit - G.19, October 7, 2020, https://www.federalreserve.gov/releases/g19/current/; *see also* Current Student Loan Debt in the United States, College Debt, http://collegedebt.com (keeping a running tally of the total outstanding student loan debt).
4. McDaniel v. Navient Sols. LLC (In re McDaniel), 973 F.3d 1083 (10th Cir. 2020)
5. *Id.*
6. *McDaniel v. Navient Solutions Inc. (In re McDaniel)*, Adversary No. 17-01274 KHT, Complaint, ¶17.
7. *Complaint*, ¶20.
8. *Complaint*, ¶21.
9. § 523(a)(8) of the Code reads as follows: (a) A discharge . . . does not discharge an individual debtor from any debt—(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
(A)(i) 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 nonprofit institution; or
(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;
10. *Id.*
11. *McDaniel v. Navient Solutions Inc. (In re McDaniel)*, Adversary No. 17-01274 KHT, Motion to Dismiss, p.20.
12. *In re McDaniel* at 1085.
13. *Id.*
14. *Crocker v. Navient Sols., L.L.C. (In re Crocker)*, 941 F.3d 206, 218-19 (5th Cir. 2019).
15. *In re McDaniel* at 1093.
15. *See* Annie Nova, The Private Student Loan Market Has Grown. During the Pandemic, its Borrowers see Little Relief, CNBC (Sept. 15, 2020), https://www.cnbc.com/2020/09/15/during-the-pandemic-private-student-loan-borrowers-see-little-relief-.html.
17. *Campbell v. Citibank, N.A. (In re Campbell)*, 547 B.R. 49 (Bankr. E.D.N.Y. 2016).
18. *In re Campbell*, 547 B.R. at 55
19. *Id.*
20. *Id.*
21. *Dufrane v. Navient Solutions, Inc.* 566 B.R. 28, 30 (C.D. Cal. 2017)
22. *Id.*
23. *In re Christoff*, 527 B.R. 624, 634 n.9 (B.A.P. 9th Cir. 2015).
24. *Essangui v. SLF V-2015 Trust (In re Essangui)*, 573 B.R. 614 (Bankr. D. Md. 2017).
25. *Id.* at 623.
26. *Id.*

Clerk's Corner

William C. Redden, Esq.
United States Bankruptcy Court
Eastern District of Virginia

1. Attorney Admissions

The United States Bankruptcy Court for the Eastern District of Virginia ("Eastern District" or the "Court") originally had required all Bankruptcy Court Bar members also to be members of the Bar of the United States District Court for the Eastern District of Virginia ("District Court"), or, if applicable, the Bar of the United States District Court for the Western District of Virginia. To remain in good standing in the Bankruptcy Court Bar, certain actions were to have been completed no later than September 1, 2020. While many members of the Bankruptcy Court Bar met this deadline, some have not.

By amendments to Local Bankruptcy Rule 2090-1, the Court is extending its September 1, 2020, deadline to no later than January 8, 2021, for attorneys to undertake certain actions to remain in good standing in the Bankruptcy Court Bar. A Public Notice to this effect was released on October 16, 2020, wherein comments have been invited to amendments to this Local Bankruptcy Rule, which are due on November 12, 2020, at 5:00 PM, local time. Local Bankruptcy Rule 2090-1, as amended, will take effect on November 16, 2020. The Public Notice and its accompanying attachments provide additional important information. That Notice can be accessed at the Court's internet website, at www.vaeb.uscourts.gov, under Virginia Eastern News. Affected attorneys are strongly encouraged to meet this final January 8, 2021, deadline. On October 16, the Court also released a broadcast email, via the U.S. Courts' govDelivery service, advising recipients of the Public Notice's release. The following important **"NOTE"** was included in that email, which also has been incorporated into the Public Notice:

> The incorporation of the Court's new Continuing Practice Protocol into amended Local Bankruptcy Rule 2090-1(B)(1) and (E)(2) (new Exhibit 14 to the Local Bankruptcy Rules) does not alter the substantive requirements for compliance, as applicable, under those subparagraphs. Rather, the amendments to Local Bankruptcy Rule 2090-1(B)(1) and (E)(2) provide additional time for the attorneys to whom these subparagraphs apply to come into compliance, no later than January 8, 2021, by completing the necessary requirements, which are now set forth

in the Continuing Practice Protocol. Attorneys who have already completed the necessary actions under current Local Bankruptcy Rule 2090-1(B)(1) and (E)(2), as applicable, are not required to take any further action. Amended Local Bankruptcy Rule 2090-1 does, however, impose new requirements as to certain *pro hac vice* admittees and government attorneys as set forth in subparagraphs (E)(3)(d) and (F), respectively.

2. Coronavirus 2019 Pandemic

Unlike other emergencies or disasters, the Coronavirus 2019 ("COVID-19 pandemic") remains national and global in scope rather than being restricted to a single area or region. Within the judiciary, the COVID-19 pandemic has brought about a significant disruption to all court programs including the Bankruptcy Program. Beginning in the first half of March 2020, the Eastern District acted with dispatch to address rapidly evolving social distancing requirements by shifting away from in-person to remote court hearings, making use of available technologies, reducing foot traffic to the bankruptcy clerk's office's public areas at each affected courthouse, and expanding the use of telework for Court personnel. The Court has implemented numerous district-wide standing and division-specific orders and approved procedures to meet public, litigant, attorney, United States trustee, panel and standing trustees, judiciary, and other needs. Currently, the Court is in Phase 1 of its COVID-19 Phase Recovery Plan.

The Court entered Standing Order 20-5 on March 13, 2020, which provided that all pending § 341 meetings of creditors scheduled to be held through March 31, 2020, would be continued. Standing Order No. 20-5A thereafter was entered on March 17, 2020, extending that continuance date through April 10, 2020. All deadlines that ran from a § 341 meeting of creditors' original date instead would run from the meeting's continued date. Standing Order No. 20-14, which the Court entered on April 2, 2020, implemented a temporary protocol for the implementation of telephonic § 341 meetings of creditors in conjunction with procedures created by the United States Trustee Program. The bankruptcy clerk's office developed procedures to address providing notices to debtors, claimants, and others in addition to attorneys in cooperation with the United States Trustee Program. The Court also approved the same through the entry of Standing Order No. 20-14.

On March 17, 2020, the Court entered Standing Order No. 20-6, which suspended the requirement for original signatures on documents. In this respect, an attorney either could obtain a client's digital signature through signature authentication software or obtain written consent from the client (*i.e.*, via email) to affix the client's electronic signature.

On March 18, 2020, the Court entered Standing Order No. 20-7, which temporarily extended all deadlines in bankruptcy cases, as set forth therein.

Pursuant to the March 27, 2020, entry of Standing Order No. 20-9, which later was extended, until further notice, on May 27, 2020, by Standing Order No. 20-19, authorized unrepresented persons, at their option, also until further notice, to file documents by mail, by lock box located inside each courthouse location, or electronically by email.

To reduce foot traffic in the public areas of the bankruptcy clerk's office, through the March 27, 2020, entry of Standing Order No. 20-10, those public areas were closed until further notice. As an alternative, lock box table stations were created in each courthouse's first floor atrium-lobby areas for use by unrepresented persons. A Public Notice was released on May 21, 2020, which provides a mechanism for the public to access the judiciary's Public Access to Court

Records ("PACER") system as they currently do not have access to the public computer terminals located in the public areas at each location of the bankruptcy clerk's office.

The Court addressed temporary homestead exemption filing procedures through Standing Order No. 20-11, which was entered on March 27, 2020, and made effective March 30, 2020, until further notice. That order provides that any such exemption would be deemed perfected under Va. Code § 34-17 by claiming the exemption on Schedule C and thereafter filing the same in the proper county or city before June 30, 2020, or within 5 days after the § 341 creditors' meeting, whichever occurred later. The order sets forth other applicable related provisions, as well.

To allow sufficient time for the parties in interests, litigants, attorneys, and others to address virtually all filings and a number of payment deadlines originally set to fall on April 1, 2020, through and including April 10, 2020, while the Court transitioned to a remote hearings and social distancing environment, those deadlines were extended to April 17, 2020. This was implemented by the March 31, 2020, Court entry of Standing Order No. 20-12. Additional applicable provisions also are set forth in the order. (Other deadlines had been modified by Standing Order No. 20-7.) The Court's entry of Standing Order No. 20-24 on August 31, 2020, implemented, until further notice, an amended protocol for cases under chapter 13 of the Bankruptcy Code, which permits a debtor represented by counsel to obtain a suspension of plan payments for a period of time with the consent of the chapter 13 trustee assigned to the debtor's case.

Various division-based orders have been entered to address division-specific needs.

Standing Order No. 20-13, entered on March 31, 2020, extended, for 6 weeks, deadlines for petition filing fees, in consumer chapter 7 and 13 cases, originally due between April 1, 2020, and May 31, 2020. That order also excepted payment of such filing fees from the terms set forth in Standing Order No. 20-12. Installment payments for cases filed during this period also were extended through use of a modified payment schedule. These filing and installment periods were extended, until further notice, through the May 27, 2020, entry of Standing Order No. 20-20.

On April 9, 2020, the Court entered Standing Order No. 20-15, which addressed a prohibition on audio/visual publication of court proceedings. Prohibitions included broadcasting, televising, recording, or photographing of any bankruptcy court proceedings. That order, however, "excludes . . . use by the Court of audio and audio-visual recording equipment to make the official record of court proceedings." On May 29, 2020, the Court entered Standing Order No. 20-21, which mandated that until further notice all bankruptcy court proceedings be conducted remotely unless ordered otherwise on a case-by-case basis. The Court continues to use Zoom for Government (ZoomGov) for hearings requiring video-teleconference functionality. The Court also has been using Court-Solutions.com for audio hearings. The Court is initiating a pilot program to make exclusive use of ZoomGov for all remote hearings and discontinue use of the Court-Solutions.com product. Information to this effect has been communicated to the Bar via the U.S. Courts' govDelivery email service. Additional information as to this pilot program will follow. All required security protocols are in place regarding the use of these technologies. Information and job aids have been placed variously on the Court's internet website to provide direction, guidance, and assistance to those making use of these technologies. A COVID-19 Court Operations and Information page is located prominently on the Court's internet website.

The Eastern District's District Court has

established protocols through the entry of various standing orders to address face covering and social distancing requirements for each of its courthouse locations, where the Court's Norfolk, Newport News, and Richmond Divisions are also located. The Court has done the same for the Martin V.B. Bostetter, Jr. United States Courthouse in the Alexandria Division, which has two bankruptcy judges' chambers and a staffed bankruptcy clerk's office presence in addition to a staffed court of appeals judge's chambers.

Additional standing orders, division-based orders, procedures, and the like will be entered on an as-needed basis.

Much of the Court's chambers and bankruptcy clerk's office staff members perform assigned duties substantially via telework while reporting on-site on an as-needed basis.

3. Amendments to the Federal Rules of Bankruptcy Procedure; Amended Official Bankruptcy Forms; and Revision to the Bankruptcy Court Miscellaneous Fee Schedule

On April 27, 2020, Chief Justice Roberts, for the United States Supreme Court, caused the transmittal of several amended Federal Rules of Bankruptcy Procedure to Congress (Rules 2002, 2004, 8012, 8013, 8015, and 8021), which will take effect on December 1, 2020, absent intervention by Congress. For information regarding these impending rule changes, see the Pending Rules and Forms Amendments webpage that is located on uscourts.gov.

The Judicial Conference of the United States' ("Judicial Conference") Advisory Committee on Bankruptcy Rules approved technical changes to correct a hyperlink embedded in Official Bankruptcy Forms 309A-I, inclusive. Instructions regarding this change along with a Committee Note have been created, as well. In addition, the Advisory Committee approved an instructions change to Official Bankruptcy Form 410A. These changes took effect on October 1, 2020. The Court has made the necessary changes to the 309A-I series of forms. Additional information is accessible on uscourts.gov at its Pending Changes in the Bankruptcy Forms webpage.

The Judicial Conference has approved a recommendation to make certain inflation-based adjustments to the Bankruptcy Court Miscellaneous Fee Schedule, which will take effect December 1, 2020. A Public Notice released on October 19, 2020, provides additional information of interest, which is accessible on the Court's internet website under Virginia Eastern News. The following item numbers are being adjusted: 2, 3, 4, 5, 7, 8, 19, 20, and 21. The Court's internet website's Fee Schedule web page will be updated on December 1.

4. Status of Eastern District of Virginia Temporary Bankruptcy Judgeship

The Judicial Conference of the United States' ("Judicial Conference") Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee") reviews and makes recommendations to the Judicial Conference about the number and locations of bankruptcy judgeships. In 2018, the Bankruptcy Committee selected the Eastern District for a survey of its bankruptcy judicial resources. A survey team conducted an on-site visit on June 17-21, 2019. Following the visit, the survey team prepared a report discussing the Eastern District of Virginia's bankruptcy judicial resources, which was submitted to the Bankruptcy Committee—presently for information purposes. The report advised that the Court continues to require "six bankruptcy judges to operate effectively, with two judges stationed at each staffed division." The report further advised of there being "a very strong case for requesting the extension of the lapse date of the district's temporary bankruptcy judgeship [which currently is due to expire on October 26, 2022]. If/when weighted filings return to normal levels, it likely will become necessary to convert

the temporary judgeship to permanent status."

Since then, the United States District and Bankruptcy Courts for the Eastern District of Virginia respectfully requested that the Judicial Council of the United States Court of Appeals for the Fourth Circuit "approve and forward to the Committee on the Administration of the Bankruptcy System of the Judicial Conference [of the United States] the need to retain and extend the temporary bankruptcy judgeship in this district beyond its current lapse date of October 26, 2022." The Fourth Circuit Judicial Council has considered this request and approved the District and Bankruptcy Courts' joint request and recommended "to the JCUS Bankruptcy Committee that the Eastern District of Virginia's temporary bankruptcy judgeship be extended past its current lapse date of October 26, 2022."

5. Automation Initiatives

The Court's Automation staff has created an Attorney Admission application database developed for internal use by the Bankruptcy and District courts to administer the new attorney admission process set forth in Local Bankruptcy Rule 2090-1(B), (E), and (F). This internal application is web-based, allows for an internal search to display each attorney's status in both District and Bankruptcy courts, and continues to perform well in meeting this need. (Please see Item 1, above, Attorney Admissions.)

Due to the COVID-19 pandemic, and the need to conduct hearings remotely, the Court continued and expanded the use of Court-Solutions.com in the first several months of the pandemic. Since then, the Court secured licenses for ZoomGov, which provided the Court with the ability to conduct video conference hearings. As the Court gained experience in using this new technological tool, consideration was given to expanding its use to all Court hearings thereby obviating the need to continues use of Court-Solutions.com for audio-only hearings. In this regard, the Court has initiated a pilot program. As of this writing, Bankruptcy Judge Kevin R. Huennekens, in the Court's Richmond Division, has begun to conduct all of his Honor's hearings via ZoomGov. Initial results are quite encouraging. Before going live on ZoomGov's expanded use, a practice session was scheduled beforehand for the benefit of the Bar. Soon, Judge Klinette H. Kindred, in the Court's Alexandria Division, is scheduled to begin using ZoomGov for all of her Honor's hearings. A practice session has been held for the Bar's benefit. Also, soon, Judge Keith L. Phillips, in the Court's Richmond Division, is scheduled to begin using ZoomGov for all of his Honor's hearings. Before doing so, a practice session will be scheduled for the benefit of the Bar. Announcement email messages, via the U.S. Courts' govDelivery service, have been transmitted to the Bar to keep the membership informed. Additional information will be provided as the switch-over from Court-Solutions.com for remote audio hearings to the sole use of ZoomGov to conduct all Eastern District remote hearings continues.

The Court's internet website's Hearings: Appearing by Telephone (Alexandria, Norfolk-Newport News, and Richmond) web page is being updated as each judge of the Court determines whether, when, and how to make use of ZoomGov for all of that Judge's remote hearings. The Court's Temporary Emergency Provisions Regarding ZoomGov Remote Proceeding Access Information web page is being updated, in this regard, as well.

Recently, the final phase of the Bankruptcy Orders Processing Solution ("BOPS") application upgrade project, as developed by the Court's Automations Staff, was completed. It is an entirely browser-based product. Although these changes are fully transparent to external users, the application has a new look-and-feel for internal Court users in addition to internal functional enhancements—all of which makes use of new

technologies for an improved product.

Several years ago, the Court's Automation Staff created a Bankruptcy Court Unclaimed Funds application ("UCFL application") that displays participating bankruptcy courts' public-facing unclaimed funds data. The Court has made this application available to other bankruptcy courts. Currently, there are 79 participating bankruptcy courts. In April 2019, the Court unveiled significant enhancements to the application and web site, including: (1) universal search functionality, which allows users to search for unclaimed funds owed to a specific individual, business, and/or governmental unit from (a) a specific court district, (b) multiple court districts, or (c) across all participating bankruptcy courts within the entire Judiciary; and (2) improved search functionality, which allows users to initiate a search based on the entry of a name into the Creditor Name and/or Debtor Name fields. Recently, in cooperation with the Administrative Office of the U.S. Courts ("AOUSC"), development of a two-tiered architecture cloud-based virtual servers set-up was completed and is available for use by all participating courts. This overall initiative is part of a major effort being undertaken by the Judicial Conference's Bankruptcy Committee, through the creation of an Unclaimed Funds Task Force, which is considering ways, among other things, to provide the public with enhanced visibility regarding the availability of unclaimed funds being held by the bankruptcy courts. The Court is continuing to provide national support for this effort.[1]

6. Fiscal Year 2021 Appropriations Situation and Outlook

For fiscal year ("FY") 2021, the funding situation has become even more challenging for the judiciary than was last fiscal year's budget environment. Through December 11, 2020, the judiciary and the rest of the United States Government is operating under a Continuing Resolution ("CR") in addition to a judiciary-approved interim financial plan for the bankruptcy, district, and appellate courts. That plan provides for significant a reduction in monies allotted to all affected Court Programs including the Bankruptcy Program and our Court. The Court has undertaken a number of cost-containment actions over the past several years to mitigate shortfalls in funding based on overall monies allocated to the judiciary by final appropriations legislation enacted into law. The judiciary is awaiting action by Congress to pass FY 2021 full-year appropriations, which, because of the impending November 3, 2020, elections, may well not occur until the second or third quarters of the current fiscal year. (One or more CR extensions are possible absent final action being taken in the anticipated post-elections congressional lame duck session of the current Congress.)[2]

7. Bankruptcy Statistics

Due to the Federal Government's response to the COVID-19 pandemic, a massive amount of money has been infused into the American economy. This action likely has forestalled, for the time being, an increase in new bankruptcy petitions and other filings. Additional governmental actions taken, to date, have reinforced this filings forbearance including moratoriums on rental evictions and payment suspensions on most residential mortgages. Like a receding tide before the coming of a possible tsunami wave of unknown height and duration, filings have declined over the past several months from their like periods in 2019.

In the past, bankruptcy filings have tended to increase gradually following the start of an economic downturn. In the Great Recession of the last decade, which was financial in nature, new filings escalated over a two-year period until they peaked in 2010. Here, however, the current situation is the result of a health pandemic-

induced recession, which very much remains uncharted terrain for the country and for the world.

One consequence of the COVID-19 pandemic is an increase in chapter 11 mega case filings in the Eastern District's filings, as of this writing, beginning in February 2020. **Table 1**, below, shows five such filings:

Virginia Eastern Bankruptcy Chapter 11 Mega Case Filings February through August 2020, Inclusive

TABLE 1

CASE NAME	CASE NUMBER	FILING DATE
Le Tote, Inc. (Lord & Taylor)	20-33332-KLP	August 2, 2020
Ascena Retail Group, Inc. (Ann Taylor)	20-33113-KRH	July 23, 2020
Intelsat S.A.	20-32299-KLP	May 14, 2020
Chinos Holding, Inc. (J Crew)	20-32181-KLP	May 4, 2020
Pier 1 Imports, Inc.	20-30805-KRH	February 17, 2020

To date, the Eastern District also has seen some debtors filing chapter 11 Subchapter V petitions, although such total filings, for now, remain small in number. This may change, however, as more small businesses decide to make use of this new subchapter if other financial relief options become unavailing to them.[3]

As seen since March of this year, national bankruptcy filings have declined significantly as have filings in the Eastern District. **Table 2**, below, shows the impact of the COVID-19 pandemic on Eastern District Bankruptcy filings through the 12-month period ended June 2020, which is the last period in which official data is available from the AOUSC. Like data through September 30, 2020, should be released by the AOUSC to the public and courts by the end of October 2020.

Virginia Eastern Bankruptcy Court Bankruptcy Filings for the 12-Month Periods Ending June 30, 2020, March 31, 2020, and December 31, 2019, Over the Same Previous 12-Month Periods in 2019 and 2018

TABLE 2

Bankruptcy Filings 12-Month Period vs Previous 12-Month Period, Ending	Virginia Eastern Percentage Change over Previous 12-Month Period	National Filings over Previous 12-Month Periods	Percentage Differences In Virginia Eastern Bankruptcy Filings and National Filings Over Previous 12-Month Periods
June 30, 2020: 15,723 vs. June 30, 2019: 17,338	- 9.3%	-11.8%	+2.5%
March 31, 2020: 17,303 vs. March 31, 2019: 17,329	-0.2%	-0.9%	+0.7%
December 31, 2019: 17,738 vs. December 31, 2018: 17,275	+2.7%	+0.2%	+2.5%

Due to the COVID-19 pandemic, year-over-year, Eastern District chapter 7 petition filings have decreased somewhat. For the statistical year ending June 30, 2020, 9,329 new chapter 7 cases were filed, compared with 9,950 for the twelve-month period ended June 30, 2019, a difference of 621 filings, or minus 6.2 percent. For the 12-month period ended June 30, 2020, the Eastern District ranked 13th nationally in total chapter 7 case filings. Chapter 7 filings accounted for 59.3% of total Court filings for that 12-month period.

Also, due to the COVID-19 pandemic, chapter 13 petition filings have decreased in the Eastern District. For the 12-month period ended June 30, 2020, 6,278 new chapter 13s were filed, compared with 7,312 for the 12-month period ended June 30, 2019, a difference of 1,034 filings, or minus 14.1%. For the 12-month period ended June 30, 2020, the Eastern District ranked 6th in total chapter 13 case filings nationally. Chapter 13 filings accounted for 40.0% of total filings for that 12-month period.

The Eastern District's AP filings decreased somewhat in the 12-month period ended June 30, 2020, over the same period in 2019. For the 12-month ended June 30, 2020, 281 APs were filed compared with 326 AP filings for the 12-month period ending June 30, 2019, a difference of 45

filings or minus 13.8%. For the 12-month period ending June 30, 2020, the Eastern District ranked 22nd nationally in AP filings.

Regarding "nature of suit" AP filings in the Eastern District, the top three categories, by percentage of filings to total filings for the 12-month period ended June 30, 2020, were: (1) Recover Money or Property, at 43.8%; (2) Dischargeability, at 29.5%; and (3) Validity of Lien, at 12.9%.

Pro se filers place a particularly heavy burden throughout the judicial and case administration process. Such filings in the Eastern District have declined year-over-year from 12.1% of total filings for the 12-month period ended June 30, 2019, to 9.6% of total filings for the 12-month period ending June 30, 2020. That decline in *pro se* filings is at least partially attributable to the COVID-19 pandemic and related financial relief efforts. To address the unique needs of *pro se* filers during the COVID-19 pandemic, on March 27, 2020, the Court entered Standing Order No. 20-9, titled, Order Establishing Temporary Protocol for Filings in Bankruptcy Case by Unrepresented Persons. On May 27, 2020, the Court entered Standing Order No. 20-19, which extended the expiration date of this temporary protocol, in its entirety, until further notice.

Endnotes

1. The UCFL application is a component of the Eastern District's locally-created and otherwise internal Judiciary Financial System ("JFinSys") Product Suite. The Eastern District has shared JFinSys with other bankruptcy courts nationally. Currently a total of 88 bankruptcy courts are using JFinSys with the remaining courts in the queue to do so. The Eastern District maintains, supports, and enhances JFinSys.

2. The longer-term impact of the COVID-19 pandemic is expected to result in a possibly significant increase in bankruptcy filings in Calendar Year 2021 and beyond. For this reason, in FY 2021, the Judicial Conference has taken measures to keep bankruptcy clerk's office staff funding levels from falling below a specified "floor" number for each judicial district.

3. It is anticipated that more eligible debtors will make use of the new Small Business Reorganization ("SBRA") Act of 2019 (Pub. L. No. 116-54, and provisions of the more recently enacted Coronavirus Aid, Relief, and Economic Security ("CARES") Act (Pub. L. No. 116-136)), which made a number of changes to render assistance to small businesses under the provisions of the SBRA.

Case Summaries[1]

By Kelly Barnhart, Esq.

Recent Fourth Circuit Decisions

***Bender v. Elmore & Throop, et al.*, 963 F.3d 403 (Fourth Cir. 2020) (Keenan, J.)**

Background: Elmore & Throop, PC were hired by the Benders' homeowners' association regarding an alleged past due amount owed. The firm posted a notice on their front door, stating that they owed the association approximately $77 in assessments and demanded they pay more than $1,000 for the assessments and related legal fees and costs. The Benders showed the firm copies of cancelled checks showing they had paid the assessments, but the firm continued to demand they pay late fees, legal fees, and costs. The dispute went on for over two years and the legal fees continued to grow. Eventually, the Benders sued the firm, arguing that it had engaged in unfair debt collection practices and that it continued to communicate with them after the Benders had requested that such communication stop. The District Court dismissed the suit, concluding that the FDCPA barred the claims.

Holding: Vacated and remanded. While some of the claims made by the Benders fell outside of the one-year statute of limitations, other alleged violations occurred within the requisite time period. The Court of Appeals noted that adopting the District Court's approach would mean that a debtor who does not initiate suit within one year of the first violation could not pursue FDCPA violations, but the statutory text does not support such a conclusion and this was not Congress's intent.

Recent District Court Decisions

***Craig v. Bendall*, 2020 U.S. Dist. LEXIS 104919 (W.D. Va. June 16, 2020) (Kiser, J.)**

Background: Chapter 13 debtor sought to modify the mortgage recorded against her home in her chapter 13 plan, although she was not on the note (the property had been quitclaimed to her by the maker of the note). The plan also proposed for her to sell or refinance the property within 2 years of confirmation of the plan and the proceeds would be used to pay off the balance owed. The lender filed an objection to the plan, arguing that its interest in the note and the property was not subject to the automatic stay.

The Bankruptcy Court entered an order modifying the stay and denied the debtor's request for stay pending appeal. The debtor appealed. The District Court held a hearing on the debtor's motion to stay the Bankruptcy Court's order, and granted a temporary stay pending the resolution of the appeal.

Holding: Appeal dismissed for lack of jurisdiction. The District Court held that the Bankruptcy Court's order modifying the stay was not appealable as it was not a final order given that it provided that the stay would be terminated if the debtor failed to fulfill certain requirements.

***Hurston Law Offices, PLLC v. Briggman*, 2020 U.S. Dist. LEXIS 128381 (W.D. Va. July 21, 2020) (Urbanski, J.)**

Background: Pre-petition, the chapter 7 debtor had a claim against Nexus Services Inc. ("Nexus"), along with other individuals. He hired an attorney to pursue the claims and the attorney represented him in several federal and civil claims against various defendants. After the litigation was filed, the debtor disclosed

the claims against Nexus and the chapter 7 trustee reached a resolution with Nexus as to all the claims and proposed a settlement of $20,000. The attorney handling the litigation for the debtor objected to the proposed settlement, arguing that the $20,000 was an insufficient sum for the pending litigation since it only included the wiretapping claims that were pending. At the hearing on approval of the settlement, the attorney withdrew its objection but asserted an attorney's lien on the proceeds pursuant to Va. Code Ann. § 54.1-3932. The attorney argued that the lien had been perfected post-petition by the filing of a proof of claim (which claim listed $0.00) and the filing of the objection. The Bankruptcy Court granted the attorney an opportunity to brief the issue regarding the attorney's lien claim, which he did. After reviewing the brief, the Bankruptcy Court concluded that the attorney had not perfected the lien because it did not provide written notice to the opposing parties prior to the filing of the bankruptcy petition, which was required pursuant to Va. Code Ann. § 54.1-3932. Alternatively, the Bankruptcy Court found that providing notice by the filing of the claim and objection to the proposed settlement was too late to establish priority over the debtor's other unsecured claims in the distribution of the funds. Even if sufficient, the notice was done post-petition and was void to perfect any lien on property pursuant to the automatic stay provisions of § 362. The Bankruptcy Court concluded the attorney only had an unsecured claim for the fees and that such claim was $0.00 (as filed). The attorney appealed.

Holding: Affirmed. First, the District Court considered whether the attorney had a valid attorney lien pursuant to § 54.1-3932 and concluded that post-petition such lien could not have attached due to §362 and pre-petition any such lien was not perfected as there was no notice provided of same. Second, as to the Bankruptcy Court's determination that the claim filed by the attorney was late and was $0.00, the District Court found that ample evidence supported the Bankruptcy Court's findings. The claim filed listed $0.00 and he did not amend it and withdrew the objection. Finally, the Bankruptcy Court did not abuse its discretion in denying the attorney lien in finding that the lien was not properly perfected and if it had found that the lien was properly perfected, it would have been at the cost of the other creditors. The firm could pursue a claim against the estate as an unsecured creditor.

***Rogers v. Barrett* (In re Lawrence), 2020 U.S. Dist. LEXIS 123676 (E.D. Va. July 14, 2020) (Novak, J.)**

Background: The chapter 7 trustee for the estates of Oliver Lawrence ("O Lawrence") and Chamberlayne Auto Sales & Repair, Inc. ("CASR") initiated an adversary proceeding against an attorney and her firm (the "Defendants"), substitute trustee under deeds of trust on business property owned by O. Lawrence and CASR, asserting claims for breach of fiduciary duty, violating the automatic stay provisions of § 362 and civil conspiracy. The chapter 7 trustee filed a motion for partial summary judgment on the counts for breach of fiduciary duty and violating the automatic stay, which the Bankruptcy Court granted. The Defendants filed a motion for leave to appeal pursuant to Fed. R. Bankr. P. 8004 and 28 U.S.C. § 158(a)(3) for leave to appeal the Bankruptcy Court's order and seeking a determination on a number of points regarding the Bankruptcy Court's ruling. The Defendants argued that the issues were ripe for appeal because the Bankruptcy Court's order was a final order "for all practical purposes" and thus requested permission for an interlocutory appeal.

Holding: Motion denied. First, the District Court found that the Bankruptcy Court's order granting the motion for summary judgment was not a final order subject to appeal as of right. Given that only two of the three counts of the complaint

were resolved by the order granting the partial summary judgment, such order could be revised at any time before entry of judgment pursuant to Fed. R. Bankr. P. 7054 and thus the order was not final. The Court noted that "'[w]hen deciding whether to grant leave to appeal an interlocutory order or decree of a bankruptcy court, the district court may employ an analysis similar to that applied when certifying interlocutory review by the circuit court of appeals under 28 U.S.C. § 1292(b).'" *Rogers v. Barrett*, 2020 U.S. Dist. LEXIS 123676 (E.D. Va. July 14, 2020) (*quoting KPMG Peat Marwick, LLP v. Estate of Nelco, Ltd.,* 250 B.R. 74, 78 (E.D. Va. 2000) (*citing Atlantic Textile Group v. Neal*, 1919 B.R. 652, 653 (E.D. Va. 1996)).

Accordingly, if the Court concluded that the order at issue "'[1] involves a controlling question of law [2]as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation'", then certification of the interlocutory appeal may be appropriate. *Id.* (*quoting* § 1292(b)). Here, the Defendants did not meet this standard since the question presented turned on a genuine issue of fact and were not questions of law but instead required the Court to consider the asserted facts of the matters and other issues involved the Bankruptcy Court's application of settled law to the facts of the case. The Defendants also failed to show a substantial ground for a difference of opinion by courts on the issues. Finally, the District Court was not inclined to take an interlocutory appeal of a question that had not yet been resolved by the Bankruptcy Court.

***Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S., LLC*, 2020 U.S. Dist. LEXIS 111962 (E.D. Va. June 25, 2020 (Novak, J.)**

Background: Mar-Bow Value Partners, LLC ("Mar-Bow") appealed a number of orders issued by the Bankruptcy Court, which dealt with its objections to disclosures of McKinsey Recovery & Transformation Services U.S. LLC ("McKinsey"). Both the Bankruptcy Court and District Court had previously ruled that it lacked standing to challenge the matters it sought to challenge.

Mar-Bow filed a motion for Rule 60(b) relief, asking the Bankruptcy Court to reconsider the Bankruptcy Court's prior decisions, which relief was denied. Mar-Bow appealed.

Holding: Denied. Mar-Bow lacked standing to appeal decisions to which it was not an aggrieved party as it had no financial stake in the orders being appealed. Since it was not seeking "to enhance its recovery below, stop the diminution of property, lift its pecuniary burden or vindicate its rights" it could not be described as an aggrieved party to whom standing would be conferred. Rather, Mar-Bow wanted to punish McKinsey for alleged fraud on the Court and to harm its future business, which does not create any type of financial stake in the outcome.

***Milic v. McCarthy*, 2020 U.S. Dist. LEXIS 135478 (E.D. VA. June 29, 2020) (Ellis, J.)**

Background: The chapter 7 debtor objected to the trustee's application to employ a real estate broker, which objection was overruled, and the Bankruptcy Court also entered an order denying the debtor's motion to reconsider. The debtor appealed and the trustee filed a motion to dismiss on the grounds that such appeal was interlocutory in nature and the debtor had not sought leave to do so as required by Fed. R. Bankr. P. 8004.

Holding: The District Court found that the order was interlocutory in nature and considered whether the appeal should be granted. In making this determination, the Court turned to 28 U.S.C. § 1292. The District Court dismissed the appeal given that the issue before

it, the employment of a realtor, did not involve any controlling question of law and considering the order would not advance the termination of the bankruptcy proceeding. In fact, if the appeal were permitted to go forward, it could cause a delay in the administration of the case rather than moving it forward and the case had already been pending for 7 years.

***Solomon v. Equifax Info. Servs., LLC*, 2020 US. Dist. LEXIS 99382 (E.D. Va. June 5, 2020) (Gibney, Jr., J.)**

Background: Chapter 13 debtor converted her case to one under chapter 7 and received her discharge. The discharge included both the debt she owed prior to filing for relief, as well as new debt she had incurred after filing for chapter 13 relief but prior to converting her case to one under chapter 7. Equifax, however, did not reflect that she had received a discharge of the debt incurred between filing for chapter 13 relief and the conversion of her case. The debtor filed suit against Equifax. The parties reached a resolution as to her claim but also had elements common to class action settlements. Although she originally filed the case as a class action on her behalf and those similarly situated, she did not request the Court to certify the case as a class action. While the parties did not present the entire settlement to the Court, they did present two of the provisions: (a) Equifax is to adopt certain coding procedures for its computers in order to capture the discharge of debt incurred between the filing and conversion of cases, as would be set forth in a consent decree containing an injunction requiring Equifax to abide by the procedure previously approved of in another proceeding with added terms to capture this "new" debt and containing a finding that Equifax's future procedures comply with FCRA; and (b) Plaintiff's counsel would be restricted from bringing further claims similar to the one before the Court in this case for a period of 18 months (the amount of time the terms of the proposed decree would be in effect).

Holding: Request denied. The District Court would not approve a settlement that proposed approval of a plan in advance that was not fully explained to the Court and would not approve a restriction on the practice of the plaintiff's counsel, as that would be a violation of public policy.

***Tulip Thermasteel, LLC v. Thermasteel, Inc.* (In re Thermasteel, Inc.), 2020 U.S. Dist. LEXIS 122005 (W.D. Va. July 13, 2020) (Dillon, J.)**

Background: Tulip Thermasteel, LLC ("Tulip") loaned Thermasteel, Inc. (the "Thermasteel") $1.9 million in 2016. After failure to pay, Tulip attempted to foreclose on Thermasteel's property, and Thermasteel filed a lawsuit in state court, seeking an injunction to stop the foreclosure. While the state court litigation was proceeding, Thermasteel filed for bankruptcy relief, and initiated an adversary proceeding against Tulip. Tulip filed its own complaint against Thermasteel, resulting in another adversary proceeding. As to this latter matter, *Tulip v. Thermasteel*, Thermasteel sought a withdrawal of the reference from the Bankruptcy Court.

Holding: Motion denied. In reaching its decision, the District Court applied a six-part test and found that when applying these factors, the relief sought in the motion should be denied. The following are those factors: (1) whether the proceeding is core or non-core; (2) the uniform administration/ application of bankruptcy law; (3) the promotion of judicial economy; (4) the efficient use of the parties' resources; (5) the reduction of forum shopping; and (6) the preservation of the right to a jury trial. Weighing heavily against granting the relief was Thermasteel's litigation conduct and that such conduct suggested that it was shifting the dispute from forum to forum to

hold off a foreclosure for as long as possible.

***Patterson Dental Supply, Inc. v. Aesthetic Dentistry of C'ville, P.C.*, 2020 U.S. Dist. LEXIS 175660 (Bankr. W.D. Va. Sept. 24, 2020) (Conrad, J.)**

Background: Patterson Dental Supply, Inc. ("Patterson Dental") sold some dental equipment to Aesthetic Dentistry of Charlottesville, P.C. ("ADC"), whose sole shareholder is Dr. Stewart. This sale of equipment was evidenced by a customer order, identifying ADC as the customer at its corporate office and the equipment was delivered to ADC's corporate address in October of 2015 and generated an invoice and a credit memorandum, listing ADC and its address as the Equipment's buyer. The sale was also memorialized by an Installment Sale Contract – Security Agreement (the "Contract"), which was drafted by Patterson Dental and governed by Minnesota law. That Contract refers, in separate places, to the buyer as Dr. Stewart and ADC but continues to use the corporate address of ADC as the address of the buyer. Dr. Neel was listed as the buyer at the signature line. In November of 2015, Patterson Dental filed its UCC-1 with the Virginia SCC, listing the equipment as the collateral and Dr. Stewart as the debtor. ADC made monthly payments to Patterson Dental and did so for 3 years, all of which were made from ADC's corporate account.

In 2016, ADC and Dr. Stewart also executed a "CEREC Club Agreement" by which Patterson Dental was to provide maintenance and software updates to the equipment, amongst other services. ADC was listed as the Customer and the equipment was listed as being "sold to Customer by Patterson" and Patterson Dental assigned a customer number to ADC.

ADC filed for chapter 11 relief in November 2018 and listed Patterson Dental and its affiliate, Patterson Financial Services, as creditors with general unsecured claims. The deadline for filing claims was provided to the creditors and Patterson Dental did not file a proof of claim. It did, however, file a motion seeking relief from the automatic stay in July 2019, arguing that Dr. Stewart purchased the equipment from it, not ADC and that cause for relief existed since ADC had no right to the equipment (based on its not having any interest in it) and therefore the equipment was not necessary for reorganization because it had no equity in the collateral. ADC opposed the relief sought in the motion, arguing among other things, that it had purchased and owned the equipment, not Dr. Stewart, and that Patterson Dental did not have a security interest in the equipment because it had not perfected a security interest in the equipment. The Bankruptcy Court held the confirmation hearing on the proposed plan of ADC, and the plan was confirmed and approximately two months later conducted a hearing on the motion for relief filed by Patterson Dental and the objection to the motion. The Bankruptcy Court found that the contract was ambiguous, allowing it to consider extrinsic evidence to determine whether ADC or Dr. Stewart had entered into the contract with Patterson Dental. The bankruptcy Court found that ADC was most likely the purchaser of the equipment, found that Patterson Dental failed to prove it had a security interest in the equipment, and also found that Patterson Dental had not filed a claim, and therefore no cause existed to grant the relief sought by Patterson Dental in the motion. Patterson Dental filed a timely appeal.

Holding: Affirmed. The District Court also found that the contract at issue was open to more than one reasonable interpretation, supporting the Bankruptcy Court's conclusion that the contract was ambiguous and therefore extrinsic evidence could be considered. The record contained significant evidence supporting the Bankruptcy Court's conclusion that ADC

was most likely the purchaser, including Patterson Dental's customer order, the invoice, the credit memorandum, and the use of ADC's corporate address and the CEREC Club Agreement identifying it as the customer and that the equipment was sold to the customer. Given the amount of evidence that supported the Bankruptcy Court's ruling, the District Court could not conclude that the Bankruptcy Court had committed clear error. In addition, since the UCC-1 financing statement only identified Dr. Stewart as the debtor, and having concluded ADC was the purchaser of the equipment, the District Court agreed with the Bankruptcy Court that Patterson Dental failed to show a perfected interest in the equipment, and therefore the Bankruptcy Court did not commit clear error in finding that it was not a perfected interest. Finally, since Patterson did not have a security interest in the equipment and ADC owned it, the Bankruptcy Court did not commit clear error when it granted relief from the stay.

Recent Bankruptcy Court Decisions

***In re Briggman, Case No. 18-50121* (Bankr. W.D. Va. July 6, 2020) (Connelly, C.J.)**

Background: Pre-petition, chapter 7 debtor had a claim, along with others, against Nexus Services Inc. The debtor's chapter 7 trustee settled the claim for $20,000, which settlement was approved by the Bankruptcy Court. The debtor then claimed that the proceeds were derived from a personal injury matter, thereby exempt under Va. Code Ann. § 34-28.1. The trustee objected, arguing that because the settlement derives from a suit stemming from alleged violations of the federal Electronic Communications Privacy Act and because the complaint did not plead any physical or emotional harm, such exemption should fail. The complaint focused on statutory violations and sought penalties pursuant to the statutes, not recovery for physical or emotional harm. The debtor countered that he did not have to plead physical or emotional harm nor pray for such damages in order for the proceeds to be considered stemming from an action for personal injury. The trustee also argued that the debtor should be barred by the doctrine of laches based on the filing of the exemption so late in the case.

Holding: Objections overruled. The claims fall within the characterization of claims for physical or emotional harm and therefore the exemption was validly claimed. The Court found that the action for damages was akin to a traditional tort claim seeking redress for personal harm and the Court could not conclude that the settlement was not a settlement of an action for personal injury. The Court found that the doctrine of laches did not preclude the debtor from claiming the exemption since the bankruptcy rules have no limit as to when a debtor must claim exemptions while the case remains pending.

***In re Hilgartner*, 2020 Bankr. LEXIS 2094 (Bankr. E.D. Va. Aug. 5, 2020) (Kenney, J.)**

Background: Pre-petition, the debtor entered into a settlement agreement related to an incident that resulted in the debtor accepting responsibility for injuries and agreeing to pay $415,000, some of which was payable to the injured party's attorneys. The agreement further required the debtor to maintain life insurance to secure the payments due under the agreement. The agreement also provided a release of claims and a confidentiality provision. After the creditor believed that the debtor breached the agreement, she initiated a lawsuit against him in District Court, alleging default in payments and moved for default judgment. However, prior to the hearing on that motion, the debtor filed for bankruptcy relief under chapter 13.

The creditor initiated an adversary proceeding against the debtor, seeking a determination

that the debt owed to her was nondischargeable. The debtor filed a motion to dismiss, or in the alternative, for summary judgment, arguing that the creditor did not have an award of damages and that the agreement barred the claim for nondischargeability. The debtor also objected to the claim filed by the creditor.

Holding: Objection overruled. The Court concluded that § 1328(a)(4) did not require that damages be awarded in the civil action prior to the bankruptcy filing in order for a debt to be deemed nondischargeable (the adversary proceeding was the vehicle for that determination) and that the pre-petition agreement did not bar the creditor's seeking a determination of nondischargeability of her debt since there was no reason for her to have asserted any claim other than the breach of the agreement in her case before the District Court.

***In re Johnson*, 2020 Bankr. LEXIS 1969 (Bankr. W.D. Va. July 27, 2020) (Black, J.)**

Background: Chapter 13 debtor, pre-petition, entered into a business arrangement with James D. Carter ("Carter"), which involved investing Carter's money in a real estate venture. Over time, the relationship declined and after the debtor experienced certain financial difficulties, she filed for bankruptcy relief. In her case, Carter filed a claim, alleging that she was liable to him for reimbursement of sums paid, including capital contributions made in the joint venture, unpaid real estate taxes, attorney's fees, commissions that were taken that should not have been paid, and other items related to their real estate investment. Making things more complicated, the parties had not, for the most part, documented the venture.

Holding: Objection sustained in part and overruled in part. Carter failed to carry his burden of proving, by a preponderance of the evidence, the validity and amount of the rent claimed owed. The Court did not find credible his methodology for accounting and he could have asked the debtor years before why he was not receiving rent checks or checks in the appropriate amount but did not so. Carter did carry his burden of establishing the validity and amount of management fees.

***In re Rosenberger*, 2020 Bankr. LEXIS 2580 (Bankr. W.D. Va. Sept. 29, 2020) (Connelly, C.J.)**

Background: Mary Ellen Rosenberger (the "Debtor") filed for bankruptcy relief under chapter 12 of the Bankruptcy Code. The executors of the estate of Floyd E. Baker (the "Executors"), as a party in interest/creditor, filed a motion asking the Bankruptcy Court to dismiss the case because the Debtor was not a "family farmer" for purposes of § 101(18) nor was she a "farmer" as that term is defined in the Bankruptcy Code and thus was ineligible to seek relief under chapter 12, based upon § 109(f) of the Bankruptcy Code. The Debtor filed an answer, denying the assertions made in the motion, and the Bankruptcy Court conducted a hearing on the matters, allowing the parties to present evidence on the issue of eligibility.

Holding: Motion denied. The Debtor produced sufficient evidence to overcome the Executors' arguments against her eligibility. The Debtor provided evidence showing that she was engaged in a farming operation at the time of the bankruptcy filing and received at least 50% of her gross income in 2019 from the farming operation (her social security income was excluded and therefore without that income, her farm income exceeded non-farm income). The Debtor and a related debtor held an equal interest in a joint farming venture and she was physically involved in the farm and the business-management side of this operation. Her inconsistent reporting of her share of the gross income derived from this operation did not disprove her engagement in a farming operation.

***Derby v. Portfolio Recovery Assocs., LLC* (In re Derby), 2020 Bankr. LEXIS 2589 (Bankr. E.D. Va. Sept. 29, 2020) (Phillips, J.)[1]**

Background: Debtor in a Chapter 13 case objected to a proof of claim filed by Portfolio Recovery Associates ("PRA"), and then filed an adversary class-action complaint against PRA, alleging violations of Fed. R. Bankr. P. 3001 ("Rule 3001") and the Fair Debt Collection Practices Act ("FDCPA"). Upon consideration of PRA's motion to dismiss the complaint, the Bankruptcy Court issued a memorandum opinion and accompanying order dismissing debtor's FDCPA claims. In its order, the Court also dismissed debtor's request for declaratory relief with leave to amend, but the Court denied PRA's request to dismiss the Rule 3001 count of the complaint. The debtor amended his complaint, and the parties eventually reached an agreement to resolve the debtor's claim objection and Rule 3001 claims in the amended complaint. The agreement was memorialized in a stipulation and consent order entered by the Bankruptcy Court, in which the parties stipulated, among other things, that PRA's original proof of claim did not comply with Rule 3001, and that debtor's counsel may file an application for compensation.

Counsel for the debtor subsequently filed a fee application seeking compensation for work performed in connection with the adversary proceeding. PRA opposed the fee application. In its memorandum opinion and accompanying order, the Court ruled that, because PRA's proof of claim did not comply with Rule 3001, debtor's counsel was entitled to reasonable attorney's fees and expenses caused by PRA's failure. Further, the Court found that debtor's counsel's hourly rates were reasonable, and a 10% reduction in fees would sufficiently account for any duplication of efforts by the three law firms representing debtor in the adversary proceeding. However, the Court instructed debtor's counsel to revise its fee application to include only attorney's fees attributable to PRA's failure to comply with Rule 3001, and to exclude fees incurred solely in connection with debtor's dismissed FDCPA claim.

Debtor's counsel submitted a revised fee application, seeking a total award of $152,543.25, plus costs, which was accompanied by declarations from debtor's counsel asserting both that the requested amount no longer included fees related solely to the FDCPA claim and that the revised award request included a 10% reduction in total hours to account for any duplication of efforts by the three law firms. PRA opposed the revised fee application, arguing that the reduction did not eliminate charges related to the dismissed FDCPA claim or sufficiently account for duplication of efforts.

Holding: Debtor's counsel's revised fee application was approved as modified by the Bankruptcy Court. The Court found that, although debtor's counsel was entitled to an award of reasonable fees for its success in connection with the Rule 3001 violation, the revised fee application did not sufficiently exclude all fees incurred solely in connection with debtor's dismissed FDCPA claim. The Court also found that it was inappropriate to award attorney's fees for counsel's travel time at the full hourly rate. For those reasons, the Court reduced the attorney's fees award by an additional 25% to $114,407.44.

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1. Thank you to Stephen F. Relyea of the Boleman Law Firm PC for compiling the case summary for *Derby v. Portfolio Recovery Assocs., LLC*.

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