

# THE ABSOLUTE PRIORITY

The  
Absolute  
Priority

New Jersey Bankruptcy Lawyers Advisory Committee

Volume 3 Issue 2 December 2017



On June 14, 2017, Judge Kaplan received the 12th Annual Conrad B. Duberstein Memorial Award from the New York Institute of Credit .

## A Discussion With Judge Michael B. Kaplan

**By: Ross J. Switkes**

For over ten years, the Honorable Michael B. Kaplan has served as a Judge of the United States Bankruptcy Court for the District of New Jersey. I recently had the privilege of discussing a variety of topics with Judge Kaplan, including his unique perspective of New Jersey bankruptcy practice, tips for practitioners, and, obviously, his love of golf. The Lawyers Advisory Committee sincerely thanks Judge Kaplan for taking time out of his busy schedule to participate in this interview.

**It is well-known that you have a unique perspective of New Jersey bankruptcy practice as you have experienced the practice in many roles, including, private practitioner, panel Chapter 7 Trustee, Standing Chapter 13 Trustee, and U.S. Bankruptcy Judge. What were some of the challenges you faced in each role?**

My primary challenge as a panel trustee was actually the same as the challenge I face now as a judge - avoiding the nightmare case or event that makes the front pages of the newspapers and/or Twitter. In other words, back then I hoped never to be the trustee and now the judge for another HUB Recycling.... for all those too young to remember, HUB Recycling was the Chapter 11 debtor (overseen by a Chapter 11 trustee) allowed to illegally operate a garbage dump beneath Route 78. A fire one night burned down a substantial portion of Route 78, causing millions in damages, and raising question why the Court and the Trustee allowed continued illegal operations. I don't want to be on the receiving end of questions like that.... As a Chapter 13 trustee, the challenges were to assemble a trusteeship from scratch (employees, office space, IT and communications technology, etc.) while simultaneously being assigned over 7,000 cases and seeking to acquire a working

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knowledge of how the Chapter 13 practice and administration work. More importantly, I had to gain the confidence of a consumer bar in Trenton, where I was mostly unfamiliar, and establish an independent reputation apart from the icon, Robert Wood, whom I replaced.

**How does your varied experience help you on the Bench?**

Well, I would say my varied experience certainly helped me get ON the Bench at the outset (I think it is safe to say I am the only individual in our Court's history who has served as a Chapter 7, Chapter 11, Chapter 12 and Chapter 13 trustee). Once on the Bench, I believe in the early years it helped me more quickly establish credibility with the different groups of practitioners. Having both a consumer/trustee and commercial background was advantageous in that lawyers appearing in front of me did not always feel compelled to "educate the judge as to how things work...."

**You have now been on the Bench for over ten years, do you ever miss private practice?**

Candidly, no. I do not miss having to deal with clients or the hunt for new business. Besides, as a judge I never have to make a two foot putt...

**What is one thing you want practitioners appearing before you to know?**

Practitioners should understand that I read motion papers backwards - I read replies, opposition papers and then the initial moving papers in that order. I want to get to the heart of the contested issues. Thus, it is always useful to throw in some background and a **brief** summary of the initial arguments in reply papers, just to give me additional context. At oral argument, I expect the argument to continue from where the papers left off, not to rehash everything from the outset.

**What is the one thing your staff would want practitioners appearing before you to know?**

If you plan on arguing or raising issues, come to Court. We do not encourage CourtCall and abhor last minute requests to appear by phone. I've often question a lawyer's decision to forego the opportunity to see my facial expressions while arguing a point. I think it can be detrimental to the client's interests.

**Everyone knows your love of golf. I need to ask**

**you a few questions on this topic.**

**Who is your favorite golfer of all-time?**

Jack Nicklaus, not for his accomplishments, but for the class displayed in conceding a 3 foot putt to his adversary in a Ryder Cup match, where a miss would have given the US the cup and at the same time destroyed a career.

**What is your favorite golf course that you have played?**

Whistling Straits, Wisconsin.

**What is your favorite piece of golf equipment?**

My NJBLF 60 degree wedge, of course.

**Where did you play your best round?**

Fiddlers Elbow.

**Have you had a hole-in-one? If so, where?**

Well, yes and no. At Yardley Country Club on hole 15 (145 yards), I put the first shot in the water, and then re-hit from the tee right into the hole. Technically, a gorgeous par.

**Everyone also knows you enjoy a good meal. I have a few questions for you on this topic as well.**

**What is your favorite restaurant of all-time?**

Peter Lugers.

**Favorite meal?**

Tomahawk steak with crabmeat au gratin.

**I have been told that you enjoy Chinese cuisine. Do you have a favorite Chinese restaurant?**

I don't have a favorite, but I have a least favorite - Hakkasan in San Francisco, picked by your colleague, Shoshana Schiff, who managed to find the only Chinese restaurant in the country that did not offer spare ribs, fried noodles, or fortune cookies.

**Do you happen to have a favorite Wawa location?**

Route 202 North.

**What are some of your interests or hobbies besides golf and good food?**

I am happy to hear that you believe I have hobbies other than golf and food. I love to read biographies, especially ones on obscure Supreme Court Justices (e.g., just finished a biography on Justice Peter Daniel). My wife and I also love exploring NYC history by taking walking tours virtually everywhere in the five boroughs.

**You recently became a grandfather - congratulations! Have you been asked to babysit on your own yet?**

Yes, sat for five hours by myself with my 6 month old grandson, Benjamin. Was that too long to go without a diaper change?

### In Memoriam

The Honorable William H Gindin  
(9/1/1931-5/24/2017)



The Honorable William H. Gindin passed away on May 24 at his home in Redding, Connecticut with his wife, Emily, by his side. He was a lawyer and a Bankruptcy Judge who advocated for understanding the increase in rates of bankruptcy as a consequence of underlying social problems.

Judge Gindin was born on Sept 1, 1931 in Perth Amboy, New Jersey to Jac and Belle (Steinberg) Gindin. He graduated from Brown University and Yale Law School. He was deeply proud of his distinguished career as a Judge, ultimately becoming the Chief Judge of the United States Bankruptcy Court for the District of New Jersey. He was appointed on January 11, 1985 and served the Court until his retirement on January 17, 2004.

Judge Gindin was a member of numerous professional associations, including the New Jersey State and American Bar Associations. He was involved in the Inns of Bankruptcy and played a key role in the development of the Bankruptcy Law Section, and was honored by having the annual William H. Gindin Bench Bar Conference named for him.

### Registry of Governmental Units

#### **REMINDER/ NOTICE TO THE BAR:**

***DUE PROCESS = NOTICE+OPPORTUNITY TO BE HEARD. KNOW YOUR NOTICE/SERVICE REQUIREMENTS.***

#### **PLEASE ENSURE TO PROPERLY SERVE**

***INTERESTED PARTIES (AND THEIR COUNSEL: i.e. State Attorney General and United States Attorney as well as governmental agencies)***

***IN ACCORDANCE WITH THE BANKRUPTCY CODE AND RULES.***

***THE COURT PUBLISHES THE REGISTRY OF GOVERNMENTAL UNITS, SEE WEBLINK:***

***<http://www.njb.uscourts.gov/content/register-governmental-units>***



#### **Profile: Eamonn O'Hagan, Assistant U.S. Attorney**

Assistant U.S. Attorney Eamonn O'Hagan represents the United States and its agencies in bankruptcy proceedings in the District of New Jersey. One exception to the scope of Mr. O'Hagan's responsibilities has included IRS-related bankruptcy matters in the Camden vicinage. In those cases, the IRS has historically been represented by the Tax Division of the United States Department of Justice in Washington, D.C. Effective October 1, 2017, Mr. O'Hagan and the U.S. Attorney's Office for the District of New Jersey will assume responsibility for IRS-related bankruptcy matters in Camden. Eamonn's contact information is included below and practitioners are encouraged to reach out to him in connection with bankruptcy matters involving the IRS and all other federal agencies.

Notwithstanding this change in staffing, parties must continue to serve the United States as required by applicable Federal Rules of Bankruptcy Procedure, including Rules 9014(b), 7004(b)(4)-(5), 2002(j), and 5003(e). Those rules require service on the United States and its agencies at the following three locations: (i) the respective agency itself, (ii) the United States Attorney General in Washington, D.C., and (iii) the U.S. Attorney's Office for the District of New Jersey. Service addresses for the United States are maintained by the Bankruptcy Court pursuant to Rule 5003(e) at:

***<http://www.njb.uscourts.gov/content/register-governmental-units>***

## Local Bankruptcy Forms - a Problem Solving Approach

By: Chief Judge Kathryn C. Ferguson

The Bankruptcy Court for the District of New Jersey is dramatically expanding the number of Local Forms available. During my 2+ year tenure as Chief we have added or substantially revised 99, bringing the total number of available Local Forms to 147. What's going on?

There are 5 (or 6, depending on your source) questions that are considered basic to information gathering or problem solving. You know them: Who-what-where-when-why and sometimes how. Let's use this approach to drill down on Local Forms.

**WHAT** are Local Forms? They are PDF documents with fillable blanks on various topics and procedures. They are different than the Official National Forms promulgated by the Judicial Conference, although there is some overlap. We currently have 145 Local Forms available on our website. Seventy five were created in association with the substantial revision of the Local Rules in 2015. Some of the Local Forms are mandatory forms (check the local rules—if a form is mentioned in the rule, it's mandatory) and others are recommended, intended to aid practitioners. They range in levels of complexity from a simple form Order of Dismissal to a form Chapter 11 Plan and Disclosure Statement.

**WHERE** are they? On the web site for US Bankruptcy Court District of New Jersey web site, <http://www.njb.uscourts.gov/forms/all-forms> Click the "Forms" button from the red menu bar, then select "All Local Forms." The forms are listed alphabetically. **Useful tip:** the forms are searchable! Hit "Control f" and type in the key word for the form you are looking for or the form that you hope exists. I think this is the easiest way to search for the form you want.

A click on each title pulls up not only the form, (always in pdf, but sometimes in MS Word as well) but also has hot links to any related Local Rules, any related forms, and e-filing instructions. It is one stop shopping!

**WHY** are we creating so many Local Forms? A couple of reasons. **First** and foremost, we have been working very hard on smoothing out any procedural inconsistencies among the vicinages and among the judges. One of the things we are coming to realize is

that consistency is a two way street—if we get similar requests presented in a similar fashion, we are much more likely to be able to respond in a way that is perceived as and actually is more consistent. Forms help both members of the bar and self-represented litigants to submit requests in a manner that allows the court to provide the consistency that the bar has requested. **Second**, forms are an invaluable practice aid. There is no need for attorneys to reinvent the wheel each time something arises. It may be new to you, but perhaps not new to the bar. An officially sanctioned form is a streamlined education, a tiny little pedagogic haiku. The non-mandatory Local Forms are envisioned as a convenience to the parties. **Finally**, as court staffing dwindles, increasing the number of forms at least theoretically reduces the number of calls to the clerk's office for advice on how to proceed.

**WHO** should use them? You! Whether you are an experienced practitioner or a newbie, using the form is the surest way to get the relevant information to the judge and the quickest way to get the relief you are seeking. If you use a recommended form, you are much less likely to have the request for relief, whatever it is, adjourned because your papers do not address everything that the judge needs. You are likewise less likely to have your order held for extra review by the judge.

**WHEN** should you use them? Certainly whenever a Local Rule designates a form as mandatory. For example, D.N.J. LBR 5071-1 (a)(i) provides that a party seeking an adjournment in advance of a scheduled hearing in a chapter 7 or 11 case must submit Local Form *Adjournment Request* to the chambers's email address. It is also a good idea to see if there is a sanctioned Local Form before you make any request to the court or call for procedural advice. If a form is not mandatory, you can start with the form and tweak it to make it work for you, as long as you bring any modifications that you make to the form to the attention of the judge.

And for extra credit—

**HOW** did these forms come about? Different forms came into existence through different routes. Judi LeCompte of the Clerk's Office has done a tremendous amount of work drafting, reviewing and implementing the forms. Some forms were drafted by members of the Rules Revision Committee to complement the new Local Rules and to encourage



easy compliance. Some were drafted by members of the Lawyers Advisory Committee. Some were drafted by individual judges. All were reviewed and many were modified by the entire Board of Judges. Many were revised even after BOJ approval and publication, after usage unearthed areas for practical improvement. We are constantly smoothing and polishing the forms, so be sure to check the web site periodically to make sure that you have the most up to date form. I know that some of you are quite attached to forms that you may have kicking around in your word processing program—I still occasionally see a Notice of Motion reference Local Rule 3 even though there has not been a Local Rule 3 for over 15 years—but try to keep up! We never change a Local Form on a whim. If we have made changes, we have done so because we truly think the modifications will improve the form or fill a previously unseen gap.

So, now you know that our Local Forms are a powerful tool to make your professional life easier. Do you have any suggestions for other forms that might be helpful to the bar or to the court? Please pass them on to your friendly, neighborhood Lawyers Advisory Committee representative. We would be happy to continue expanding our list.

It may not always seem like it, but we aim to please.

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Footnote:

1 - A word of warning: You may not get the usual sunny response from court staff if you continually call with procedural advice about things that could easily be ascertained with a romp through the Local Rules and Local Forms.

2 - See footnote 1



### **From the Editor**

#### **BANKRUPTCY ATTORNEYS GIVE BACK**

Bankruptcy attorneys in the District of New Jersey have several outlets in which they generously donate their time to bettering the world around them. For over 13 years, The New Jersey Bankruptcy Lawyers Foundation (the “NJBLF”) has been providing support to those in vital need of basic living services. Additionally, there are 3 organizations that provide

for clinical chapter 7 bankruptcy services for indigent residents in our state: (i) NJ Volunteer Lawyers for Justice; (ii) The Hon. Judith H. Wizmur Pro Bono Project in coordination with Rutgers Law School in Camden; and (iii) The Hon. Morris Stern Pro Bono Bankruptcy Project in coordination with Rutgers Law School in Newark. *Information on how you can participate in these clinics is below.*

Many New Jersey bankruptcy practitioners take time out of their busy schedules to give back to their communities. For example, attorneys from the Trenk, DiPasquale, Della Fera & Sodono law firm have demonstrated commitment to giving back. *The Absolute Priority* would like to congratulate the Firm for the two awards detailed below:

#### **Richard Trenk Receives Partner in Hope Award**

On May 3, 2017, Partners for Women and Justice, a non-profit organization that provides free legal assistance to low income victims of domestic violence in New Jersey, held its annual Spring Benefit at Mayfair Farms in West Orange, NJ. **Richard D. Trenk**, from the Trenk, DiPasquale, Della Fera & Sodono law firm, received the Partner in Hope Award from Partners for Women and Justice. The Partner in Hope Award honors leadership and dedication to public service. The award was presented by Trenk DiPasquale partner, **Shoshana Schiff**, who has served as a Trustee of Partners for Women and Justice for many years.

Partners for Women and Justice honored Mr. Trenk for his leadership in the legal field and in the community. In his acceptance speech, Mr. Trenk acknowledged this, “violence and disrespect for women around the globe are at epidemic proportions.” As a result, he recognized the need for people, and lawyers in particular, to effect change. He declared: “Lawyers have a unique role to play in advocating for cultural change, and I am committed to supporting lawyers who do this work.” He added that “lawyers who volunteer their time and skills to improve the lives of victims of domestic violence have a significant impact on families and their communities.”

#### **Trenk, DiPasquale, Della Fera & Sodono Honored by VLJ on November 1**

On November 1, 2017, Trenk, DiPasquale, Della Fera & Sodono, P.C., was honored by Volunteer Lawyers for Justice at the annual Arts and Eats for Justice

Dinner at the Valley Regency in Clifton, New Jersey. Trenk DiPasquale lawyers are long-time VLJ volunteers and supporters. They have been leaders in the VLJ Bankruptcy Program since its inception in 2001 and continue to be extraordinary defenders of justice.

### **THE NEW JERSEY BANKRUPTCY LAWYERS FOUNDATION**

The New Jersey Bankruptcy Lawyers Foundation is now in its fourteenth year. Originally, the Foundation's focus was to address costs of filing fees for those who had no other source for the payments. The NJBLF was the brain child of our dearly departed Judge Mickey Stern, the Clerk of the Court Jim Waldron, Attorney Gary Noorgard and a small group of other dedicated members from our bankruptcy community.

Over the years, the organization has given more than half a million dollars in grants to applicants, many of whom come through our clinics to cure rent arrears, to restore a utility service and to make car repairs in order to get the applicants back to work. For most applicants the Foundation is their last resort. They have exhausted savings, family support and other sources of financial aid.

Many individuals who apply for assistance are disabled and on limited income and the small grants that the Foundation provides means the difference between homelessness and having a roof over their heads. The Foundation provides much needed relief.

The grants typically average \$750. Thus far, this year more than 50 grants have been authorized.

The Foundation recently re-vamped its application process to clarify its standards for approving applications, in particular those applications for filing fee reimbursement in situations where the applicant does not qualify for a waiver of the filing fee through the bankruptcy court.

In addition to the grant program, the Foundation provides support for the pro-bono programs at Rutgers-Newark and Rutgers-Camden. Those programs are named in honor of Judges Judith Wismur and Mickey Stern. In addition, the Foundation provides financial assistance to Seton Hall Center for Social Justice which works with the Volunteer Lawyers for Justice. The Foundation funds a law school student intern who works with one of the

clinics for purposes of intake and interviews of the financially disadvantaged.

From its early days the Foundation has run a financial literacy program where members of the Board and its Advisory Committee work with high schools to help students manage their finances in a responsible manner.

Our bankruptcy community of New Jersey should be proud of the NJBLF. Our lawyers, financial advisors, volunteers from the Clerk's Office and other professionals support the only such organization of its kind in the country.

To learn more about the NJBLF, please visit the following website: [www.njblf.org](http://www.njblf.org)

### **NJBLF 5K**

On September 14, the NJBLF held its 4<sup>th</sup> Annual 5k Run on the Reservoir in West Orange. There were approximately 80 runners and many spectators. The event raised money to help prevent homelessness, provide utility services and other financial assistance for the truly indigent. Joshua Raymond, from Trenk DiPasquale, and Sean Raquet, from Bederson & Co., chaired the event.



(Right to Left Below: Organizers of the NJBLF 5K, Sean Raquet, Joshua Raymond)



### **NJBLF 14th Annual Dinner and Golf and Tennis Classic**

This year the annual Golf and Tennis Outing was held on October 12, 2017 at the Maplewood Country Club. The event honored our former Clerk of the Court, James J. Waldron, with a touching performance by the Newark Boys Chorus conducted by Music Director Donald Morris. It was a memorable event for all.



(NJBLF Annual Outing Tennis Players: Left to Right  
Back Row: Carrie Boyle, Steven Serna, Jill Bienstock, Sari Placona, Christopher Hemrick, Mitch Hausman, Sydney Darling, Mark Hall, Ross Switkes.  
Front Row: David Edelberg, Karl Norgaard)



(Jim Waldron speaking at the NJBLF Dinner on Oct. 12, 2017)

### **SIGN UP TO VOLUNTEER FOR BANKRUPTCY PRO BONO LEGAL SERVICES**

Earn your *Madden* credits doing something you know and enjoy!

### **The Bankruptcy Program at Volunteer Lawyers for Justice (VLJ)**

The Bankruptcy Program at Volunteer Lawyers for Justice (VLJ) has seen a recent increase in client demand and is in need of additional bankruptcy attorneys to take cases! VLJ's Bankruptcy Program serves low-income clients who require assistance with Chapter 7 bankruptcies. VLJ staff evaluate each client's eligibility for Chapter 7 relief and then work with the clients to collect relevant documents (including credit reports, tax returns, pay stubs, and bank statements) before referring the case to a volunteer attorney. VLJ also assists clients in completing their required credit counseling and debtor education courses. In addition, VLJ (a certified pro-bono provider) offers malpractice insurance, meeting space, and other benefits to volunteers. If you are able to take on a pro bono Chapter 7 bankruptcy case, please contact Jessica Limbacher ([jlimbacher@vljnj.org](mailto:jlimbacher@vljnj.org) or 973-645-1951 ext. 119), the staff attorney in charge of the program. We greatly appreciate all of your support!

### **The Hon. Judith H. Wizmur Pro Bono Project**

For more information on volunteering to represent low income and indigent residents of South New Jersey, you may contact Pam Mertsock-Wolf at [pmertsoc@camden.rutgers.edu](mailto:pmertsoc@camden.rutgers.edu). This value regional provider of pro bono legal services works in coordination with South New Jersey Legal Services and pairs law students with local practitioners to assist in learning practical experience in the practice of bankruptcy law.

### **The Honorable Morris Stern Pro Bono Bankruptcy Project**

To volunteer for the Newark Project, please contact Susan Feathers, Director of Public Interest and Pro Bono, Rutgers Law School, 123 Washington Street, Newark, New Jersey, 07012, 973-353-5555. Similar to the project in Camden, the Newark project pairs law students with local practitioners to assist in learning practical experience in the practice of bankruptcy law.



**Meet the Clerk's Office: Judi LeCompte, Administrative Analyst.**



1. **Where were you born?** I was born in Voorhees, NJ.
2. **Where did you go to school?** I graduated with a paralegal degree from Burlington County College.
3. **What was your first job?** Ready for this... a barber.
4. **When did you start working with the Bankruptcy Court?** I started my career with the Court in June, 1991 as a Case Manager.
5. **How has the Bankruptcy Court changed since you began working with the Court?** All I can say is, how didn't it change? Back in 1991, chapter 11 ballots were docketed on paper dockets using a typewriter, and we were only two years into our first "electronic" docketing system: Bancap. We used another "electronic" system called Bans for noticing, and we were in the midst of a filing/hiring boom... at that time we had about 150 staff for the district. We've gone from Bancap (dummy terminals running a customized DOS program) to nearly 100% electronic filing and noticing via the BNC. Did I mention paper? When I started, we had a file room that held approximately 100,000 paper files (each

office had their own file room) and I would spend approximately an hour EVERY day filing the papers I docketed the day before (often 200 to 300 hundred of them). Today, we have two conference rooms where the file room once was... one for staff and one for attorneys.

6. **What is your favorite Bankruptcy Court memory?** That's hard to say... there are so many. I've worked with many great people over the years, had a lot of laughs and have enjoyed every second of it. But if I had to choose, I'd say Jim Waldron's retirement dinner. It was a wonderful night for a man who dedicated his life to the Court, and who played a huge role in my life. One other thing I'd like to mention, I lost both my parents and a brother during my time with the court, and I can't thank Jim and our new Clerk, Jeanne Naughton enough for their kindness and understanding during those difficult times. Although one wouldn't think I would include tragedies as a favorite memory, I am forever grateful for the compassion shown to me and my family and consider myself beyond lucky to have spent the last 26 years working for folks who put family first.

7. **What is the typical process you go through when creating a Local Form?**

Forms may be created or modified for many different reasons: consistency purposes, requests from the Bar or our staff, changes in procedures, Local or National Rules changes, etc. Sometimes I draft a form by myself and the Clerk reviews it for formal approval. Other times I work with a committee - whether it's one made up of Chief Judge Ferguson, Clerk Jeanne Naughton and me, or the Forms sub-committee of the LAC. At other times the entire Board of Judges must review and approve a proposed new form or changes to an existing form.

Once the language of the form is agreed upon, I convert it to PDF and make it fillable. When the form is ready for publication I work with our systems staff to have it posted to our web site (we're working on making more of our forms available in Microsoft Word format). Depending on the extent of the changes or the importance of a new form, we may also post a Notice to the Bar announcing the new form or changes to an existing form and send out a Notice to Efilers via email.



## Interesting Recent Cases

**By: Ramanjit Chawla & Brian W. Hofmeister**

*In re Klaas, 3rd Cir. Case Nos: 15-3341 & 16-3482* (Decided June 2017); The United States Court of Appeals for the Third Circuit in affirming the rulings of the District Court and judgment of the Bankruptcy Court ruled that the Bankruptcy Court properly granted a grace period for the Debtors to cure a small arrearage in their payment plan shortly after the plan term. In this case the Appellee/Trustee filed a motion to dismiss debtors' case under 11 U.S.C. §1307(c) as the debtors still owed \$1,123 sixty-one months after the start of their plan. Another creditor had joined the Trustee's motion. The debtors cured the arrears within 16 days of the Trustee's motion. While the Trustee withdrew her motion after the cure, the other creditor pressed forward arguing that the late payment was invalid because the Plan and the Code required all payments to be completed within sixty months. 11 U.S.C. §1322. The Bankruptcy Court in providing the grace period and discharge to the debtors ruled that section 1307 has no express restriction on term length and provides that the court "may"-not must dismiss a case upon a material default. The Court noted that §1322 (d) does not contain a drop dead provision that mandates dismissal after five years. Applying the non-exhaustive list of factors applied by the bankruptcy court, the Third Circuit Court had no trouble concluding that the Bankruptcy Court had properly exercised its discretion. Notably, the Debtors had diligently and timely made each of their sixty monthly payments; the cure was feasible and the arrearage was small relative to the plan base; Debtors were financially able and willing to cure in a prompt manner; the curative payment did not adversely affect any creditor; the shortfall was not due to an unreasonable or culpable delay by the Debtors as the arrearage was due to Trustee's own fee increase; and a conversion or a hardship discharge would be nonsensical in this situation.

*In re Giacchi, 3rd Cir. Case Nos: 15-376* (Decided May 2017); The debtor failed to file his US-1040 forms for tax years 2000 through 2002 in a timely manner. In 2004, the IRS estimated tax liability against the debtor for tax years 2000 and 2001. Debtor filed the two delinquent returns in 2004. The IRS estimated tax liability for tax year 2002 in 2005, and Giacchi filed his 2002 return in 2006. In 2010 Giacchi filed a Chapter 7 bankruptcy petition and received a discharge of his Pennsylvania tax liability.

In 2012 Debtor filed a Chapter 13 bankruptcy petition and filed an adversary proceeding against the IRS alleging that his 2000 through 2002 tax liabilities were discharged in his prior Chapter 7 bankruptcy. The Bankruptcy Court concluded that the tax debt was non-dischargeable under 11 U.S.C. §523(a)(1)(B) because the late filed returns were not returns within the meaning of §523(a)(1)(B) and applicable law. The district court affirmed the Bankruptcy Court. The Third Circuit adopted the four factor test adopted by *Beard v. Commr.*, to determine whether the debt is dischargeable, namely, (1) it must purport to be a return, (2) it must be executed under penalty of perjury, (3) it must contain sufficient data to allow calculation of tax, and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. In affirming the District Court, the Third Circuit concluded that Giacchi's belated filings after assessment were not an honest and reasonable effort to comply with the tax law under the *Beard* test and, as such, the filings did not constitute returns. Because Giacchi's tax debts for tax years 2000, 2001, and 2002 were debts for tax obligations for which no return was filed, the debts were not dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(1)(B).

*Weinberg v. Scott E. Kaplan, LLC, 2017 WL 3588277 (3rd Cir. Aug. 21, 2017)* (Decided August 2017); Plaintiffs appealed the district court's dismissal of their malpractice complaint against defendant, their former bankruptcy counsel. Plaintiffs alleged that defendant committed 2 incidents of malpractice: first, defendant made an allegedly deficient response to a creditor's relief from the automatic bankruptcy stay, although defendant ultimately had the relief from stay overturned on reconsideration; second, defendant allegedly failed to file Chapter 11 monthly operating reports, which resulted in plaintiffs' case being converted to Chapter 7 liquidation, after which plaintiffs terminated defendant and retained substitute counsel who had the conversion overturned on reconsideration. Following the overturning of the relief from stay, defendant had a fee application approved. Later, substitute counsel filed a plan of reorganization that included defendant's fees. Although plaintiffs objected to defendant's motion to compel payment, the bankruptcy court dismissed plaintiffs' objections, finding that defendant had an approved fee application and that plaintiffs neither objected to nor appealed from either the fee application or the reorganization plan that listed defendant's fee. Plaintiffs then filed the present malpractice action, which was dismissed by the

district court on res judicata grounds. On appeal, the court affirmed the dismissal of plaintiffs' complaint, agreeing with defendant and the district court that the rulings in the bankruptcy court precluded plaintiffs' claims. The court ruled that plaintiffs' allegations of malpractice should have been raised in objection to defendant's fee application, when the bankruptcy court was obligated to review defendant's performance, or to the plan of reorganization that provided for payment of defendant's fee. The court held that by approving defendant's fee application, the bankruptcy court implicitly found that defendant's services to plaintiffs were reasonable and acceptable. The court noted that judicial economy favored litigating malpractice claims against bankruptcy estate counsel in the bankruptcy court.

*In re Jevic (Czyzewski v. Jevic Holding, 580 U.S. \_\_2017)* (Decided March 22, 2017); Two years ago, on May 21, 2015, the Third Circuit held that structured dismissals that did not follow the priority distribution scheme under the Bankruptcy Code were permitted in rare instances where no other options are available. However, in a recent decision, the U.S. Supreme Court reversed the Third Circuit's decision and held that a structured dismissal attached to a final disposition that did not strictly adhere to the Code's priority scheme "does not preserve the debtor as a going concern; it does not make the disfavored creditor better off; it does not promote the possibility of a confirmable plan; it does not help to restore the status quo ante; and it does not protect reliance interests." The Supreme Court concluded that Congress did not intend to authorize a "rare case" exception to the distribution of estate assets in violation of the Code's priority scheme. Therefore, a structured dismissal that does not follow the Code's priority rules, cannot be approved by a Bankruptcy Court without the consent of all affected creditors.



### In Memoriam

#### **William Mackin**

(July 22, 1961 – November 26, 2017)

It is with a heavy heart that the LAC is mourning the passing of its most recent past Chairperson William "Bill" Mackin who died on Sunday morning, November 26, after a courageous fight against cancer. After serving as a member of the LAC and then the Vice Chairperson of the LAC, Bill served as the Chairperson of the LAC from 2015 until his term ended in June 2017. Now sitting Chairperson, Catherine Youngman, offered condolences on behalf of the LAC after learning of Bill's passing: "Bill's dedication, hard work and enthusiasm for the LAC and our profession will be sorely missed." Bill was a skillful advocate with a keen intellect and quick wit, and the LAC, together with the bankruptcy bench and bar, mourns his loss.

For further details on the arrangements for Bill's memorial services, please visit the website for the funeral home:

[www.smithfhmantua.com](http://www.smithfhmantua.com)



Bill with members of the LAC in 2016 while he served as Chairperson.

#### **LAC Officers:**

Catherine Youngman (LAC Chairperson);  
David G. Beslow (LAC Vice-Chair);  
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