STREAM OF COMMERCE

the official newsletter of the Bankruptcy and Commercial Law Section of the Alabama Bar • Spring 2020

A Message from the Chair

I hope this message finds you and your families safe. As you know, due to the COVID-19 pandemic, our 2020 Bankruptcy at the Beach seminar was cancelled. The decision was made with overwhelming concern for the safety of our members and with the support of our Judges, without whom our seminar would not be possible.

Notwithstanding these unprecedented times, we are already making plans for 2021! Our 2021 seminar will be held at The Henderson Resort June 4-5, 2021.

In order to continue with preparations for the annual seminar next year and to ensure continuity of the business of the Section, all of the Board and Committee members of the Bankruptcy and Commercial Law Section have agreed to serve an additional year. Please join me in thanking the Board and Committee members of the Bankruptcy and Commercial Law Section for their dedication and commitment to our Section and the annual seminar.

While our world is certainly a different place now, one thing remains the same: our ability to persevere. It occurs to me that bankruptcy attorneys are especially adept in helping their clients navigate the hardships of life while always keeping the goal of a fresh start firmly in view. I know that all of you will be prepared to meet the challenges of our ever-changing world with a renewed sense of strength and commitment to our profession.

It is an honor to serve as chair of the Bankruptcy and Commercial Law Section again this year and I look forward to seeing all of you soon! Please stay safe and know that our thoughts and prayers are with you during this difficult time.

Jamie A. Wilson
2020-2021 Chairman

In this Issue

Bankruptcy at the Beach

June 4-6, 2021 at the Henderson Resort
www.hendersonbeachresort.com

As Jamie mentioned in the Message from the Chair, the Bankruptcy at the Beach seminar will be June 4 through 6, 2021 at the Henderson Resort. The Bankruptcy and Commercial Law Section of the Alabama Bar officers and committee members have agreed to serve in her or his current capacity for an additional year. The officers are: Jamie Wilson, Chair; Kris Sodergren, Vice-Chair; Cathy Moore, Treasurer; Amy Tanner, Secretary; Mac Halcomb, Newsletter Editor; and Brad Caraway, Immediate Past Chair. The Henderson Committee members are: Diane Murray, Evan Parrott, and Reid Tolar.

We look forward to seeing you, post-pandemic, for eight hours of CLE, beautiful views, a cold one or two, and an opportunity to spend time, face to face, with the judges and your colleagues. Make your reservations.

SCOTUS Nixes Routine Use of *Nunc Pro Tunc* Orders

by Rob Landry

It is quite common for bankruptcy courts to routinely enter *nunc pro tunc* orders in bankruptcy cases. Perhaps the most common context for such type of relief are retention orders for professionals *nunc pro tunc* to the date the application to employ was filed or retention orders for debtors' attorneys and other professionals in Chapter 11 cases *nunc pro tunc* to the date the petition was filed. *Nunc pro tunc* orders are also seen in other contexts, such as rejection of contracts/leases. The routine entry of such orders is now suspect in light of a recent Supreme Court case of *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Yali Acevedo Feliciano, et al.*, 589 U.S. __, 2020 WL 871715 (Feb. 24, 2020). See, e.g., William Houston Brown and Lawrence Ahern, III, Two Supreme Court Decisions with Effects on Bankruptcy Practice, considerchapter13.org, March 1, 2020 (noting that reliance on *nunc pro tunc* orders to make something retroactively effective is in "doubt"); Bill Rochelle, *Supreme Court Bans Nunc Pro Tunc Orders*, Rochelle's Daily Wire, February 26, 2020.

The Decision and Holding

Feliciano involved a lawsuit that was removed from the Puerto Rico courts to U.S. District based on one of the defendants to the lawsuit having filed for Chapter 11 relief. Thereafter, the underlying Chapter 11 case was dismissed. Thus, the jurisdictional hook for U.S. District Court to have jurisdiction over the removed lawsuit ceased to exist with the dismissal of the Chapter 11 case. However, until there was a remand order by the U.S. District Court that court continued to have jurisdiction over the lawsuit and the Puerto Rico courts did not have jurisdiction. *See* 28 U.S.C. § 1446(d) ("the State court shall proceed no further unless and until the case is remanded").

Importantly, *after* dismissal of the Chapter 11 case and *before* a remand order by the U.S. District Court, the Puerto Rico courts entered substantive orders in the lawsuit. Some months later, the U.S. District Court entered a remand order *nunc pro tunc* to the date of the dismissal of the Chapter 11 case. This ostensibly would give the Puerto Rico courts jurisdiction to have entered the orders it had entered. The Supreme Court found that Puerto Rico courts did not have jurisdiction until the actual date of the entry of the remand order and, thus, the orders entered prior to remand were void.

The Supreme Court found that the *nunc pro tunc* remand order had no effect to the retroactive date. *Nunc pro tunc* must be a reflective of what actually happened on the retroactive date. In the case at bar, nothing happened in the U.S. District Court on the *nunc pro tunc* date. The Supreme Court noted that *nunc pro tunc* should reflect the reality of what has actually occurred. *Nunc pro tunc* cannot be used to "make the record what it is not."

Ramifications

The fast-moving pace of a bankruptcy case and delay, even if just a matter of days or weeks, to have an order entered on an application to employ a professional, makes the use of *nunc pro tunc* orders a near practical necessity. The concern is that there is a substantial body of caselaw interpreting the Bankruptcy Code that prohibits a bankruptcy court from awarding compensation prior to the entry of a retention order. If there is a delay —or gap period— from filing of the application to employ and entry of a retention order, the professional may not be entitled to compensation.

However, the practical use of *nunc pro tunc* orders in this context appears to run afoul of *Feliciano*. Unless the bankruptcy court made a ruling, orally or provisionally, on the *nunc pro tunc* date the bankruptcy court cannot use *nunc pro tunc* to make the retention order retroactively effective because this would make "the record what it is not." The use of *nunc pro tunc* orders in this way is effectively a legal fiction to create something—an order to an earlier date—when there was no such order.

The bench and bar will undoubtably find ways to reconcile the practical need for *nunc pro tunc* type orders with *Feliciano*. A few approaches will likely develop. *First*, practitioners and courts may distinguish the facts of Feliciano to routine *nunc pro tunc* orders. An important factual distinction is that in *Feliciano* the *nunc pro tunc* order was used to provide a jurisdictional basis for the Puerto Rico courts to enter the orders prior to the remand order. Recall, federal statutory law divests a state court of jurisdiction until a remand order. Thus, one can understand the Supreme Court's concern with using a *nunc pro tunc* order to retroactively confer jurisdiction. In the context of a routine *nunc pro tunc* order in a bankruptcy case, there is no question of the bankruptcy court jurisdiction to enter the underlying order. Thus, the jurisdictional concerns in *Feliciano* simply are not present in a routine bankruptcy case.

Secondly, as noted by commentator Bill Rochelle, courts may move away from *nunc pro tunc* orders and enter "retroactive orders." This would avoid using *nunc pro tunc* in a way that runs afoul of *Feliciano* and shift the legal analysis to the body of caselaw on the propriety of entering retroactive orders by federal courts. The focus is on prejudice and fairness in entry of such orders. *See,* *e.g., In re Colony Beach and Tennis Club, Inc.*, 2010 WL 746708 (Bankr. M.D. Fla. March 2, 2020)(Recognizing that bankruptcy courts "may enter retroactive orders of approval [i.e. rejection of a lease] and should do so when the balance of equities preponderates in favor of such remediation.").

Thirdly, courts consistent with *Feliciano* may enter retention orders without any *nunc pro tunc* effect. However, courts can revisit the *per se* rule developed in caselaw in some jurisdictions that prohibits compensation for services performed prior to the entry of a retention order. Since there is no statutory or rule prohibition of compensation for such services, courts may exercise discretion and approve compensation prior to the date of a retention order. *See, e.g., In re Hector Benitez*, 2020 WL 1272258 (Bankr. E.D. N.Y. March 13, 2020)(Bankruptcy court found that *nunc pro tunc* orders were prohibited for retention orders, but the question of compensation was separate and distinct. Importantly, there was no prohibition on awarding compensation prior to the date of a retention order.).

Rob Landry teaches business law and economics at Jacksonville State University and has over twenty years experience as an attorney for the U.S. Bankruptcy Administrator in the Northern District of Alabama. The views and opinions are those of the author.

Ritzen: US Supreme Court Reviews Finality of Stay Relief Orders

by Wes Bulgarella

On January 14, 2020, the United States Supreme Court issued an important decision in *Ritzen Group, Inc. v. Jackson Masonry, LLC* 140 S.Ct. (2020) regarding the "finality" of orders on motions for relief from automatic stay and the timing to appeal such orders. In *Ritzen*, the Supreme Court held that orders on motions for relief from the automatic stay constitute "final" orders for purposes of appeal such that they are immediately appealable and subject to the 14-day deadline to appeal set forth in Rule 8002 of the Federal Rules of Bankruptcy Procedure (the "Rules") and 28 U.S.C. § 158. *Id*. at 583. This decision has important ramifications for practitioners and deserves special attention to avoid pitfalls when wading the waters of appealing orders from bankruptcy courts.

The factual background is relatively straightforward. Ritzen Group, Inc. ("Ritzen") agreed to buy land in Nashville, Tennessee from Jackson Masonry, LLC ("Jackson"). *Id*. at 587. However, the land sale was never effectuated and Ritzen ultimately sued Jackson for breach of contract in Tennessee state court. *Id*. Before trial could begin, Jackson filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Tennessee (the "Bankruptcy Court"), thereby staying the state court litigation. *Id*. Ritzen filed a motion for relief from the automatic stay in the Bankruptcy Court, arguing that relief to allow Ritzen to continue the state court litigation against Jackson would promote judicial economy and was appropriate because Jackson had filed the bankruptcy petition in bad faith. *Id*. The Bankruptcy Court denied the motion. *Id*. Despite the 14-day appeal deadline set forth in Rule 8002 and 28 U.S.C. § 158(c)(2), Ritzen did not appeal from the Bankruptcy Court's order. *Id*.

Ritzen also filed a proof of claim in Jackson's bankruptcy proceeding arising out of its breach of contract claim. *Id*. Following an adversary proceeding on such claim, the Bankruptcy Court disallowed the claim and held that Ritzen had, in fact, breached the contract at issue by failing to secure financing by the closing date. *Id*. The Bankruptcy Court then confirmed Jackson's plan of reorganization, which included a blanket injunction against commencing or continuing any proceeding against Jackson on account of claims arising before the confirmation of the plan. *Id*. at 588.

After plan confirmation, Ritzen filed two notices of appeal in the United States District Court for the Middle District of Tennessee (the "District Court") challenging (i) the Bankruptcy Court's order denying relief from the automatic stay and (ii) the Bankruptcy Court's resolution in the adversary proceeding of Ritzen's breach of contract claim. *Id*. The District Court rejected Ritzen's appeal related to the motion for relief from automatic stay as untimely and rejected the appeal related to the breach of contract claim on the merits. *Id*. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision. *Id*.

The Supreme Court granted certiorari to "resolve whether orders denying relief from bankruptcy's automatic stay are final, [and] therefore immediately appealable under § 158(a)(1)." *Id*. Section 158(a)(1) of title 28 provides that appeals to federal district courts from bankruptcy courts may arise from "final judgments, orders, and decrees" entered by bankruptcy courts "in cases and proceedings." 28 U.S.C. § 158(a)(1). The Court first noted, in civil litigation, a "final" decision is "normally limited to an order that resolves the entire case." *Ritzen*, 140 S.Ct. at 586. However, the Court noted that this "ordinary understanding of 'final decision' is not attuned to the distinctive character of bankruptcy litigation," in which a number of controversies often arise over the course of a bankruptcy case, "many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor." *Id*. (quoting *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015)). Creating an important distinction, the Court reasoned that while "the usual judicial unit for analyzing finality in ordinary civil litigation is the case, in bankruptcy it is often the proceeding." *Id*. at 587.

The Court held a bankruptcy court's order on a motion for relief from the automatic stay constitutes a "final" order in a particular "proceeding" that is immediately appealable. In so doing, the Court first reasserted its reasoning in its 2015 opinion, *Bullard v. Blue Hills Bank*. In *Bullard*, the Court held that an order rejecting a proposed plan was not "final" because "it did not conclusively resolve the relevant 'proceeding.'" *Bullard*, 575 U.S. at 502. The Court reasoned that such an order is not "final" because "[p]lan proposal rejections may be followed by amended or new proposals" and do not modify or alter any parties' rights. *Id*. Plan confirmation, on the other hand, constitutes a "final" order by the bankruptcy court because it "alters the status quo and fixes the rights and obligations of the parties." *Id*.

Applying *Bullard* to the case at bar, the Court, in siding with the majority of circuits on the matter, held that the "stay-relief adjudication" is a "proceeding" for appellate purposes such that once a court enters an order on stay relief, that order constitutes an immediately appealable "final" order. *Ritzen*, 140 S.Ct. at 589. In supporting its decision, the Court contrasted stay relief proceedings to claim-resolution proceedings, both of which were present in Jackson's bankruptcy case. *Id*. Unlike the claims-adjudication process, "[a]djudication of a stay-relief motion . . . occurs before and apart from proceedings on the merits of creditors' claims[.]" *Id*. at 589. This is true because the initiation of a stay relief motion "initiates a discrete procedural sequence, including notice and a hearing, and the creditor's qualification for relief turns on the statutory standard, *i.e.*, 'cause' or the presence of specified conditions[,]" rather than adherence to state law principles which ordinarily occurs in the claims-adjudication process. *Id*. Because the process of attempting to obtain stay relief constitutes a "proceeding" in and of itself within a bankruptcy case, orders on stay relief are immediately appealable "final" orders subject to the 14-day appeal deadline set forth in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. *Id*.

The reasoning for the Court's decision is practical. The Court reasoned that "[d]elaying appeals from discrete, controversy-resolving decision in bankruptcy cases would long postpone appellate review of fully-adjudicated disputes." *Id*. What's more, "controversies adjudicated over the life of a bankruptcy case may be linked, one dependent on the outcome of another." *Id*. Delaying the resolution of these controversies through the appeal of a bankruptcy court's order could result in an appeal of an order at the end of the case, which "could require the bankruptcy court to unravel later adjudications rendered in reliance on an earlier decision." *Id*. The fact that a stay relief motion initiates a standalone "proceeding" within a bankruptcy case, plus the practicality of allowing final orders on such matters to be immediately appealed to promote judicial economy and to avoid unraveling of previous decisions, ultimately led to the Court's decision to find that stay relief orders are "final" and immediately subject to the 14-day appeal deadline.

The *Ritzen* decision has immediate and crucial importance for bankruptcy practitioners and deserves attention to ensure that attorneys are well-aware of when an appeal must be filed before such right lapses. In *Ritzen*, the Court provides clear direction with regard to a discrete area of bankruptcy law – an order concluding a contested matter (regardless of whether it grants or denies the requested relief) is a final order that must be immediately appealed to prevent the loss of such appellate right. This directive is clear from the Court's decision and must be adhered to carefully.

However, *Ritzen* does not address some important nuances that may arise in a particular case. For example, *Ritzen* does not decide whether an order issued "without prejudice" would impact whether such order must be immediately appealed. Bankruptcy courts often issue orders "without prejudice" if the order may be revisited by the bankruptcy court if circumstances change over the course of a proceeding. In such an event, it is unclear whether the order would be eligible for immediate appeal, since that order is subject to change and does not have the same finality as an order entered "with prejudice". Wise creditors may benefit from the Court's decision not to address this issue by requesting that an order denying stay relief be entered "without prejudice" such that the creditor would not have to immediately appeal the order and may revisit the same stay relief question later in the bankruptcy proceeding when the circumstances are more favorable to the creditor.

Another uncertainty that could stem from *Ritzen* arises from a discrete passage in the Court's opinion. The Court notes that "disputes over minor details about how a bankruptcy case will unfold" should not be considered "proceedings" subject to immediate appeal upon an order of the bankruptcy court. However, the Court chose not to further explain what "disputes" exactly encapsulates. There is little doubt that the definition of "disputes over minor details about how a bankruptcy case will unfold" will be litigated by bankruptcy courts in the future.

While *Ritzen* does not provide a laundry list of orders that may be immediately appealed, the Court's approach in *Ritzen*, and earlier in *Bullard*, suggests that courts and parties should focus on whether an order disposes of a matter that constitutes a "procedural unit". In *Ritzen*, the Court determined that a contested matter constitutes a "procedural unit" whereas in *Bullard* the Court concluded that a plan objection is not a "procedural unit." While the Court did not delineate a list of orders that may and may not be immediately appealed, the Court does provide a roadmap through its analysis of which matters in a bankruptcy proceeding constitute "procedural units" that should be analyzed by counsel in other circumstances. This framework will undoubtedly guide bankruptcy courts in analyzing the same issue in the future.

Ritzen is a helpful opinion for bankruptcy practitioners engaging in contested matters and appeals therein and should be adhered to by such practitioners to avoid the loss of the valuable right to appeal in the event of an unfavorable order.

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CARES Act and Bankruptcy

by Alyssa Ross

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was signed into law by the President on March 27, 2020 as Public Law No. 116-136. The full text of the act along with its history is available at https://www.congress.gov/bill/116th-congress/house-bill/748. The CARES Act was "Phase 3" of the stimulus response, and includes emergency spending as supplemental appropriations, along with a multitude of provisions as part of a $2 trillion effort to mitigate the devastating impact of COVID-19 "on the economy, public health, state and local governments, individuals, and businesses." *Id*. This article summarizes a few key provisions of Section 1113 of the CARES Act that amend the Bankruptcy Code as part of that effort, as well as sections of the CARES Act regarding mortgages and evictions that may impact bankruptcy cases. Section references herein are references to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless the context indicates otherwise.

First, the CARES Act amends the Small Business Reorganization Act (the "SBRA"), found at subchapter V of Chapter 11, to increase the debt limit for qualification thereunder from $2,725,625 to $7.5 million in noncontingent, liquidated, secured, and unsecured debts. The increased debt limit applies to cases commenced on or after the date of enactment (March 27, 2020) and will sunset one year after the date of enactment. This likely means cases filed before March 27, 2020 cannot take advantage of the increased debt limit, even if the jurisdiction allowed a case filed before that date to make the election to proceed under SBRA after that date.

Second, the CARES Act amends the definition of "current monthly income" ("CMI") in Bankruptcy Code § 101(10A) to exclude "payments made under Federal law relating to the national emergency declared by the President [regarding COVID-19]." This would exclude from CMI any direct payments received by debtors as part of the stimulus package, but would it also exclude an increase or extension in unemployment compensation under the other provisions of the CARES Act even though they come from the state? For instance, a self-employed debtor who did not qualify for state unemployment benefits before may now do so under the CARES Act. Would the entire amount of unemployment compensation be excludable from CMI in that scenario? The calculation of CMI as amended will impact chapter 7 cases by virtue of the means test under § 707(b), by excluding qualifying payments from the means test calculation. For cases under chapter 13, CMI is the starting point for the disposable income calculation under § 1325(b)(2) and for the above- or below-median determination for purposes of the applicable commitment period calculation under § 1325(b)(4). The calculation of "projected disposable income" for individual chapter 11 debtors under § 1129(a)(15)(B) will also not include COVID-19 payments because § 1129(a)(15)(B) expressly incorporates the definition of "disposable income" set out in § 1325(b)(2). The amended definition of CMI applies to any case commenced before, on, or after March 27, 2020 and will cease to be effective on March 27, 2021. Thus, qualifying stimulus payments for COVID-19 will not be a factor in making the means test calculation under chapter 7, or in determining the required plan payment or plan term under chapter 13, or in determining projected disposable income under chapter 11, for any case filed before

March 27, 2021. The CARES Act does not address whether those same stimulus payments may nonetheless be property of the estate.

Third, and in duplication of the amendment to the definition of CMI, the CARES Act amends § 1325(b)(2) to repeat the exclusion of "payments made under Federal law relating to the national emergency declared by the President [regarding COVID-19]" from the disposable income calculation. This appears to be an "abundance of caution" redundancy. The disposable income calculation under § 1325(b)(2) expressly uses CMI (as defined in § 101(10A)) as its starting point. Therefore, the definition of disposable income under § 1325(b)(2) would necessarily not include COVID-19 payments because those payments are not included in CMI to begin with, notwithstanding the amendment to now "double exclude" them from § 1325(b)(2). This provision also applies to any case commenced before, on, or after March 27, 2020 but will sunset on March 27, 2021.

Fourth, the CARES Act amends § 1329 by adding a new subsection (d)(1) to provide that the debtor (and only the debtor) may, after notice and a hearing, modify a plan confirmed before March 27, 2020, to extend the payment term up to 7 years from the date the first payment under the original confirmed plan was due, if "the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to [the COVID-19 pandemic]." Any modification under the new § 1329(d)(1) is still subject to § 1322(a) and (b), § 1323(c), and § 1325(a). The parameters of what constitutes "a material financial hardship" and how closely related the hardship must be tied to the pandemic in order to qualify as being "due, directly or indirectly" to COVID-19 will be factual determinations, but it seems likely that the word "indirectly" broadens the coverage to such an extent that disputes are unlikely. Subsection 1329(d)(1) only applies to cases for which a plan was confirmed before March 27, 2020 and will sunset on March 27, 2021.

The Advisory Committee on Bankruptcy Rules has made conforming changes to five official forms to account for the CARES Act amendments to the Bankruptcy Code. Official Forms 101 (Voluntary Petition for Individuals) and 201 (Voluntary Petition for Non-Individuals) were amended to account for the change to the definition of a "debtor" under subchapter V of chapter 11. Official Forms 122A-1 (Chapter 7 Statement of CMI); 122B (Chapter 11 Statement of CMI); and 122C-1 (Chapter 13 Statement of CMI and Calculation of Commitment Period) have been amended to exclude payments made under federal law related to the COVID-19 emergency from the CMI calculation. The updated forms and committee notes are available at https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments/pending-changes-bankruptcy-forms.

Additionally, while not "bankruptcy" specific, the CARES Act at Section 4022 contains several provisions related to federally backed residential mortgages that could have a tremendous impact on existing and to-be-filed chapter 13 and chapter 11 cases. Federally backed mortgages are defined as "any loan which is secured by a first or subordinate lien on residential real property . . . designed principally for the occupancy of from 1- to 4- families" that is insured by FHA, guaranteed by HUD, guaranteed by the VA, guaranteed by the Department of Agriculture, made by the Department of Agriculture, or purchased or securitized by Fannie Mae or Freddie Mac. By some estimates, up to 70% of all mortgages currently fall under this definition, with Fannie Mae and Freddie Mac owning or backing approximately half the nation's mortgages. See https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406472; and https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/ (each last visited April 13, 2020).

As an initial matter, Section 4022 does not define the "covered period" during which the Act's residential mortgage relief provisions may be utilized. The term "covered period" might be implicitly understood as the duration of the national emergency declaration issued by the President on March 13, 2020 and declaring that the national emergency began on March 1, 2020, because the borrower must attest to financial hardship during the emergency. Section 4023 of the CARES Act deals with forbearance of federally backed multi-family mortgage loans, with limitations on eviction if the forbearance is granted, and in contrast to Section 4022, provides a definition of "covered period" that may be relevant to the fill that gap in Section 4022. Under Section 4023, the "covered period" begins on March 27, 2020 (the date of enactment) and ends on the sooner of the termination of the emergency under the National Emergencies Act ("NEA") or December 31, 2020, whichever is sooner. (Under the NEA, the declaration of national emergency terminates automatically one year from its issuance unless it is terminated sooner by the President or Congress, and unless the President extends it).

During the covered period, a borrower with a federally backed mortgage loan experiencing a financial hardship as a direct or indirect result of the COVID-19 emergency may request forbearance, without regard to delinquency, by submitting a request to the loan servicer and affirming that the borrower is experiencing a financial hardship "during the COVID-19 emergency." The forbearance so requested and attested by the borrower must be granted for up to 180 days and must be extended for another period of up to 180 days at the borrower's request provided that the request is made during the covered period. No additional fees, penalties, or interest will accrue during the forbearance period, other than the contract interest that would have accrued had payments been made timely. The borrower may request that either the initial or extended forbearance period be shortened. It is not clear in the text of the Act who has the discretion to determine the length of the forbearance period—must the servicer forbear for whatever period the borrower requests up to 180 days, or does the servicer have some say in the period length?

It is also unclear exactly how such a forbearance request will impact a chapter 13 plan that deals with a federally back residential mortgage. This will be particularly relevant in jurisdictions that allow pass-through mortgage payments through the chapter 13 Trustee. If forbearance is requested and granted, the servicer may utilize existing forms and docket events, and file a notice of mortgage payment change, showing that the ongoing payment has been covered by a forbearance agreement so that the due date has been postponed (with another notice of mortgage payment change then being filed 21 days prior to the time when the forbearance period ends and payments will resume). But technically, forbearance may not actually be a "change in payment" as contemplated under Rule 3002.1(b) and thus the payment change procedures under that rule are not a perfect fit. This could likely be overcome by an explanatory attachment to a payment change notice that informs the court and trustee of the forbearance terms, which would also allow servicers to utilize the docketing events already in place for notices of payment change. There is no deadline for requesting an extension of the forbearance period, other than the requirement that it be made during the covered period, so the 21-day advance filing for notices of payment change would also not be workable in most instances, with forbearance being sought and granted on a much shorter turn-around. Each jurisdiction may develop its own procedures and docket codes as the forbearance procedure becomes widely utilized. Confirmed plans will likely be amended to reduce payments, and extend the term where possible, to account for the forbearance in the ongoing mortgage payments and provide room in the life of the plan to cure when the forbearance period ends.

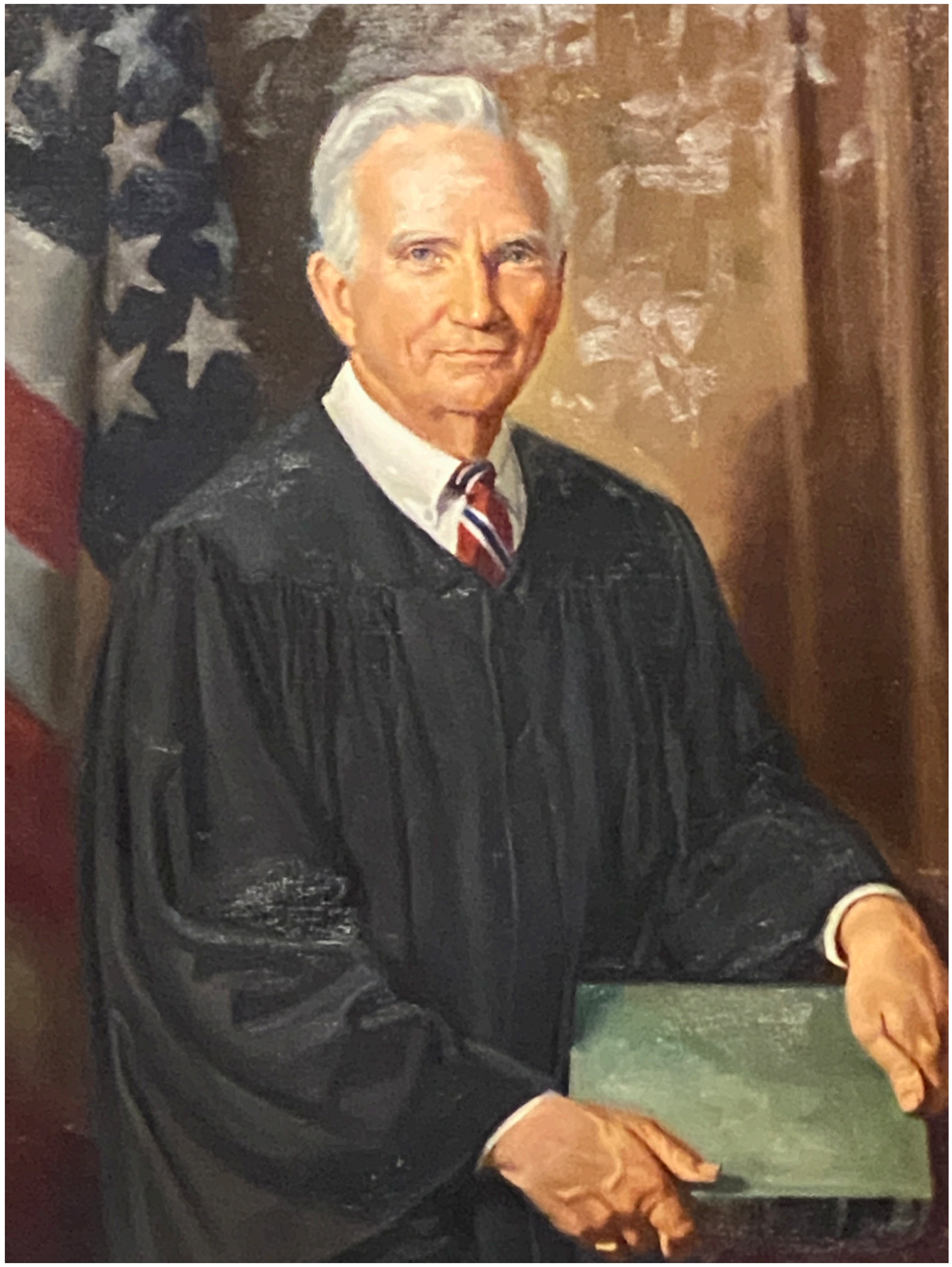
However, just what happens when the forbearance period ends is another open issue. The CARES Act does not address what the parties' rights are at the end of the forbearance period relative to the amounts that come due under the contract for principal and interest during the forbearance period. Are those amounts immediately due and payable when the forbearance period ends? Will debtors attempt to add them to the plan via modification as post-petition arrears, assuming the remaining term of the plan is long enough for them to be feasibly paid (and with the possibility that the plan term could go as long as 7 years if the case was confirmed prior to March 27, 2020)? Will they be excepted from the discharge and paid outside the plan as the servicer and debtor may agree? Federally backed mortgage servicers, chapter 13 trustees, and debtors' counsel are already working to find answers to these questions, and ideally, administrative guidance will be issued quickly. In fact, Fannie Mae and Freddie Mac have each issued statements to clarify that while borrowers may repay the forbearance amount lump-sum, that is only an option and will not be required (if Fannie Mae and Freddie Mac own the loans). Other options may include repayment plans to address the amount in forbearance specifically in addition to the regular contract payments, resuming regular contract payments and extending the term of the loan, or doing a formal modification to lower ongoing contract payments.

Section 4022 of the CARES Act also provides for a moratorium on foreclosures of federally backed residential mortgages during a period "not less than the 60-day period beginning on March 18, 2020." The moratorium forbids the initiation of judicial or non-judicial foreclosure process, forbids a motion for a judgment of foreclosure or a motion for an order of sale, and forbids the execution of a foreclosure-related eviction or foreclosure sale during that period. Notably, the foreclosure moratorium does not apply to vacant or abandoned properties.

Section 4024 of the CARES Act imposes a moratorium on evictions from covered properties that participate in housing programs under the Violence Against Women Act of 1994, the HUD rural housing voucher program, or that are covered by a federally backed mortgage loan or federally backed multi-family mortgage loan. The moratorium extends to covered properties that are occupied by a tenant, pursuant to a residential lease, or without a lease, or with a lease terminable under state law. The eviction moratorium began on March 27, 2020 (the date of enactment) and lasts for 120 days. During that time, the lessor of a covered dwelling cannot initiate any legal action to gain possession "for nonpayment of rent or other fees or charges." This leaves open the possibility of eviction for other reasons. In addition, the lessor may not "charge fees, penalties, or other charges . . . related to such nonpayment of rent." Finally, the lessor may not issue a notice to vacate until after the moratorium period and may not then require the tenant to vacate without providing at least 30 days' notice. The limitations on the notice to vacate are not explicitly limited to situations where the nonpayment of rent is the underlying cause.

It is anticipated that filings under all chapters, but particularly chapters 13 and 11, will increase sharply in the coming months, particularly when the forbearance and foreclosure moratorium periods end. Attorneys with debtor-clients in current chapter 13 cases particularly need to be aware of the CARES Act and how it can help their clients, provided they act quickly to take advantage of the law's provisions for mortgage forbearance and plan term modification up to 7 years. Creditor counsel should also be alert to the CARES Act's potential impact on their clients' rights under all chapters.

Alyssa Ross is the career law clerk for the Honorable James J. Robinson, Chief United States Bankruptcy Judge for the Northern District of Alabama. The views expressed herein are the author's.



Honorable George S. Wright

by Mac Halcomb

Retired U.S. Bankruptcy Judge George S. Wright passed away February 10, 2020. Judge Wright, a Tuscaloosa native, was graduated from the United States Naval Academy in 1948. After ten years of active duty, he returned to Tuscaloosa to attend the University of Alabama School of Law. Judge Wright was a founding member of the Rosen, Wright and Harwood firm.

In 1961, Judge Wright was appointed as a bankruptcy referee to the United States Bankruptcy Court for the Northern District of Alabama. In 1979, he was appointed as the first United States Bankruptcy Judge for the Western Division of the Northern District of Alabama.

I first encountered Judge Wright while I was a young attorney at Sirote & Permutt. Each Friday, I travelled to Tuscaloosa for 341 hearings and turnover complaints on behalf of the firm's finance clients. The turnover complaints did not take long, I would lose, Judge Wright would graciously send me on my way with the reminder, "Mr. Halcomb, tell your client it is called debtor's court."

Joe Bulgarella often shares a turnover complaint story in which he came to court to argue his client received insufficient notice of the hearing. Judge Wright smiled patiently at Joe and quipped, "you're here aren't you. Notice was good." He taught many of us in the creditor's bar how to be good losers.

Judge Wright retired from the bench on December 31, 1994.