

**2021 ACBA Bankruptcy Symposium**

<b>Title:</b>	Great Debates: Cases and Controversies
<b>Synopsis:</b>	Attorneys from the greater Pittsburgh area will conduct three oral arguments before a panel of judges on issues and controversies currently circulating within the bankruptcy arena. After each side has presented their case, our panel of judges will discuss the arguments' merits and analyze how they anticipate the issue will or will not be resolved.
<b>Sponsor:</b>	 <p><b>ReedSmith</b> Driving progress through partnership</p>

<p><b>Organizer and Presenter</b></p>	<p align="center"><b>GWENYTH JARVI GAMBLE, CAMPBELL &amp; LEVINE, P.C.</b></p> <p>Gwenyth is an attorney in the Pittsburgh office of Campbell &amp; Levine, LLC where her practice focuses on the representation of debtors, creditors and trustees in Chapter 11 cases. Gwenyth represents both businesses and individuals in all matters related to insolvency and restructuring.</p> <p>Prior to joining Campbell &amp; Levine, Gwenyth was a judicial law clerk to the Honorable Gregory L. Taddonio of the United States Bankruptcy Court for the Western District of Pennsylvania and a law clerk in the Procedure and Administration Division of the Internal Revenue Service Office of Chief Counsel in Washington, D.C. She graduated from the University of Pittsburgh School of Law, where she was the Executive Editor of the University of Pittsburgh Tax review, one of the peer-reviewed legal journals in the country, and served as judicial intern to the Honorable D. Michael Fisher of the Third Circuit Court of Appeals, and graduated <i>summa cum laude</i> from Geneva College with a bachelors in writing. Prior to attending law school, Gwenyth served as a judicial intern to the Honorable Arthur J. Schwab of the United States District Court for the Western District of Pennsylvania.</p>
<p><b>Organizer</b></p>	<p align="center"><b>ALEXIS A. LEVENTHAL, ASSOCIATE, REED SMITH, LLP</b></p> <p>Alexis is an attorney in the Pittsburgh office of Reed Smith LLP. She is a member of the firm’s Financial Industry Group representing creditors and debtors in commercial restructuring and bankruptcy matters. Alexis is a graduate of the University of Florida law school, the University of New Orleans urban planning program, and Haverford College. Prior to joining Reed Smith in 2018, Alexis served as a law clerk in the United States Bankruptcy Courts for the Western District of Pennsylvania and, before that, the Middle District of Florida. Prior to attending graduate and law school, Alexis worked as a special education teacher with Teach for America in New Orleans, LA.</p>
<p><b>Judge</b></p>	<p align="center"><b>THE HONORABLE CARLOTA M. BÖHM, BANKR. W.D. PA.</b></p> <p>Judge Böhm is the Chief Judge of the United States Bankruptcy Court for the Western District of Pennsylvania. Chief Judge Böhm started her career as a law clerk to two Bankruptcy Judges and was in private practice in the bankruptcy/commercial law area since 1981. She was a Bankruptcy Trustee for over 30 years and a mediator. She practiced law at Houston Harbaugh, P.C. from 1992 – 2011 and was a partner in Schaffler &amp; Böhm prior to that.</p> <p>Chief Judge Böhm was appointed to the bench in 2011. She is fluent in Spanish, being born in Buenos Aires, Argentina; graduated from the</p>

	<p>University of Pittsburgh with a B.S.; and received an M.A. and J.D. Degree from Duquesne University.</p> <p>Chief Judge Böhm was admitted to the Pennsylvania Bar, the U.S. District Court for the Western District of Pennsylvania, and the Supreme Court of the United States. She is very active in numerous organizations, including: the Allegheny County Bar Association, Commercial Law League Association, The Judith K. Fitzgerald Western Pennsylvania Bankruptcy American Inn of Court, Turnaround Management Association, International Women’s Insolvency &amp; Restructuring Confederation, and the National Conference of Bankruptcy Judges. She is a frequent lecturer on various topics, including bankruptcy, legal ethics, and commercial law.</p>
<p><b>Judge</b></p>	<p style="text-align: center;"><b>THE HONORABLE TIIARA N.A. PATTON, UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO</b></p> <p>Judge Tiiara N.A. Patton was appointed as a bankruptcy judge for the United States Bankruptcy Court for the Northern District of Ohio (Eastern Division) sitting in Youngstown, Ohio in 2020.</p> <p>Prior to her appointment to the bench, Judge Patton worked for nine years as a trial attorney at the United States Department of Justice, Office of the United States Trustee in Cleveland, Ohio and Wilmington, Delaware. Before joining the Office of the United States Trustee, Judge Patton worked as an attorney in private practice at Calfee, Halter &amp; Griswold LLP (Cleveland, Ohio) with a practice focused on bankruptcy, and LeBeouf, Lamb, Greene and MacRae LLP (New York, New York) with a practice focused on business restructuring. Judge Patton also served as a law clerk to state and bankruptcy court judges: Judge Burrell Ives Humphreys (Ret.) of the New Jersey Superior Court, Passaic County, Civil Division, Judges Novalyn L. Winfield (Ret.), Donald H. Steckroth (Ret.), and Morris Stern (Dec.) of the United States Bankruptcy Court for the District of New Jersey, Judge Cornelius Blackshear (Ret.) of the United States Bankruptcy Court for the Southern District of New York, and Judge Randolph Baxter (Ret.) of the United States Bankruptcy Court for the Northern District of Ohio.</p> <p>Judge Patton received a J.D. from The Ohio State University Moritz College of Law. She received a B.S. in English Education from Central State University.</p> <p>Judge Patton is a member the Mahoning County Bar Association, a member of The Nathaniel R. Jones American Inn of Court, a member of the National Conference of Bankruptcy Judges (NCBJ) Public Outreach and The Honorable Cornelius Blackshear NCBJ Presidential Fellowship</p>

	<p>Committees, a member of the American Bankruptcy Institute, and a lifetime member of the Central State University Alumni Association.</p>
<p><b>Judge</b></p>	<p style="text-align: center;"><b>THE HONORABLE JOY FLOWERS CONTI, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA</b></p> <p>Judge Conti is a Senior District Judge. She served as the Chief Judge of the United States District Court for the Western District of Pennsylvania from 2013 until December 2018. Prior to her appointment, she was a shareholder with the Pittsburgh office of Buchanan Ingersoll, Professional Corporation, now Buchanan Ingersoll Rooney (“Buchanan”), and prior to joining Buchanan she was a partner with Kirkpatrick, Lockhart, Johnson &amp; Hutchison, now known as K&amp;L Gates LLP. Judge Conti was a Professor of Law at Duquesne University and taught courses on civil procedure, corporations, corporate finance, corporate reorganizations and bankruptcy. She authored several articles and chapters in treatises dealing with bankruptcy and corporate law and was a frequent lecturer at seminars on those matters. Judge Conti is a former President of the Allegheny County Bar Association (1993), is listed in Who’s Who in America and Who’s Who in American Law, and while practicing law was listed in The Best Lawyers in America. She is a member of the prestigious American Law Institute and the American College of Bankruptcy. She also was Governor-at-Large of the Pennsylvania Bar Association (“PBA”), was the Chair of the PBA’s Business Law Section, and received the PBA’s 1995 Anne X. Alpern Award, which annually recognizes one outstanding woman lawyer. She was the President of the Third Circuit Historical Society.</p> <p>Judge Conti is a summa cum laude graduate of the Duquesne University School of Law, where she served as Editor-in-Chief of the Duquesne Law Review. Judge Conti was a member of the Judicial Conference of the United States, and is a former Chair of the Judicial Conference Committee on the Administration of the Bankruptcy System. She served as the Chair of the Local Rules Committee for the United States District Court for the Western District of Pennsylvania from 2003 to September 2010 and as the Chair of the Alternative Dispute Resolution Committee for the United States District Court for the Western District of Pennsylvania from September 2010 until September 2013. She received the American Inns of Court 2009 Professionalism Award for the Third Circuit and the W. Edward Sell Business Lawyer Award on November 15, 2016.</p>
<p><b>Presenter</b></p>	<p style="text-align: center;"><b>GEORGE FITTING, ASSOCIATE ATTORNEY, DUANE MORRIS, LLP</b></p> <p>George W. Fitting is an associate in the Business Reorganization and Financial Restructuring Group at Duane Morris LLP. He has experience</p>

	<p>representing debtors and creditors, including insurance companies, financial institutions, trade creditors, and commercial lessors, in chapter 11 bankruptcies, receiverships, article 9 foreclosures, and out-of-court liquidations and wind-downs. He frequently serves as counsel to insurance companies providing prepetition and/or postpetition coverage to debtors in complex chapter 11 cases. George has additional experience representing financial institutions in workouts and debt restructurings as well as buyers, sellers, and chief restructuring officers in distressed mergers and acquisitions. He has also represented current and former directors and officers, registered representatives, and other professional and corporate defendants in adversary proceedings, related bankruptcy litigation, and civil litigation. George is programming chair of the Judith K. Fitzgerald Western Pennsylvania Bankruptcy American Inn of Court and secretary of the Bankruptcy and Commercial Law Section of the Allegheny County Bar Association.</p> <p>Prior to joining Duane Morris, George worked in the Restructuring and Insolvency Group of an international law firm in Pittsburgh and served as a law clerk for the Hon. Gregory L. Taddonio at the U.S. Bankruptcy Court for the Western District of Pennsylvania. He graduated with distinction in 2017 from The University of Iowa College of Law, earning the American Bankruptcy Institute Medal of Excellence and serving as an articles editor for the Iowa Law Review, a research assistant for Prof. Arthur E. Bonfield, and a judicial extern for the Hon. Celeste F. Bremer at the U.S. District Court for the Southern District of Iowa. He graduated <i>cum laude</i> with a bachelor's degree in English from Dickinson College in 2010.</p>
<p><b>Presenter</b></p>	<p style="text-align: center;"><b>SLOANE B. O'DONNELL, ASSOCIATE, FROST BROWN TODD, LLC</b></p> <p>Sloane B. O'Donnell is an associate with Frost Brown Todd's Pittsburgh Office. She is in the firm's Bankruptcy &amp; Restructuring and Litigation Practice Groups. Sloane has a broad general business practice and can handle most litigation matters ranging from mechanic's liens litigation to collections and contract disputes. Prior to joining Frost Brown Todd, in addition to her bankruptcy practice, Sloane was a member of an ERISA withdrawal liability team, which represented multiemployer pension funds in both federal and state courts.</p> <p>With respect to her bankruptcy practice, Sloane represents parties, both creditors and debtors, in all phases of bankruptcy proceedings and has handled preference and fraudulent transfer actions, reclamation demands, debtor-in-possession financing, assumption and rejection of executory contracts, and consumer bankruptcy matters.</p>

<p><b>Presenter</b></p>	<p style="text-align: center;"><b>MASON SHELTON, JUDICIAL LAW CLERK, UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA</b></p> <p>Mason is originally from Tennessee, where he graduated from Lipscomb University (BA, 2014) and the University of Tennessee College of Law with a Concentration in Business Transactions (JD, 2021). While attending law school, he served as an Acquisition Editor for Transactions: The Tennessee Journal of Business Law, participated in the school’s Community Economic Development Clinic, and worked as an intern for the Honorable Charles M. Walker in the U.S. Bankruptcy Court for the Middle District of Tennessee. Since graduating law school, he currently clerks for the Honorable Gregory L. Taddonio in the U.S. Bankruptcy Court for the Western District of Pennsylvania. Before law school, he worked in the automotive manufacturing industry. He resides in Pittsburgh (Bloomfield), Pennsylvania with his partner and their three cats.</p>
<p><b>Presenter</b></p>	<p style="text-align: center;"><b>AARON J. WALAYAT, ASSOCIATE ATTORNEY, TUCKER ARENSBERG, P.C.</b></p> <p>Aaron J. Walayat is an Associate Attorney at Tucker Arensberg, P.C., practicing in the Insolvency and Creditor’s Rights Group. He was previously a judicial law clerk for the Hon. William S. Stickman IV of the United States District Court for the Western District of Pennsylvania and is a member of adjunct faculty at Washington &amp; Jefferson College in the Spring of 2021. He received his law degree from Emory University School of Law and his bachelor’s degree from Washington &amp; Jefferson College.</p>
<p><b>Presenter</b></p>	<p style="text-align: center;"><b>SARAH E. WENRICH, ASSOCIATE ATTORNEY, BERNSTEIN-BURKELY, P.C.</b></p> <p>Sarah is an associate at Bernstein-Burkley, P.C. in the firm’s Bankruptcy &amp; Restructuring practice group.</p> <p>She primarily handles commercial bankruptcy and related issues. Sarah is a member of the Allegheny County Bar Association Bankruptcy and Commercial Law Section and the Western Pennsylvania chapter of the International Women’s Insolvency &amp; Restructuring Confederation. She also serves on the Judith K. Fitzgerald Bankruptcy Inns of Court executive committee as co-chair of the publicity and outreach committee. Prior to joining Bernstein-Burkley, Sarah served as an extern for the Honorable Kevin R. Huennekens of the United States Bankruptcy Court for the Eastern District of Virginia while attending law school at the University of Richmond.</p>

## Overview and Authority for Arguments

### **Argument One:**

**Issue:** Whether an educational loan constitutes “an obligation to repay funds received as an educational benefit,” within the meaning of section 523(a)(8)(A)(ii) as examined in *McDaniel v. Navient Solutions*, 973 F.3d 1083 (10th Cir. 2020).

Section 523(a)(8) describes three student-loan related exceptions to discharge:

1. educational benefit overpayment and governmental and nonprofit funded loans, as provided in subsection (a)(8)(A)(i);
2. obligation to repay funds received as an educational benefit, scholarship, or stipend, per subsection (a)(8)(A)(ii); and
3. any other qualified educational loan, as provided for in subsection (a)(8)(B).

To discharge debts covered by these subsections, a debtor must prove that excepting these debts from discharge would impose an “undue hardship on the debtor and the debtor’s dependents.”

There is a circuit split on the extent to which private student loans fall within the scope of section 523(a)(8). The Second Circuit in *Desormes v. United States* held that a private student loan, which was backed by the Charlotte School of Law, “was excepted from discharge under § 23(a)(8)(A)(ii).” The court determined “[s]tudent loans are presumptively nondischargeable in bankruptcy,” and it is not necessary for funds to be transferred directly to a debtor to establish a loan. Conversely, the Fifth Circuit held in *Crocker v. Navient Solutions, LLC* that statutory interpretation and legislative history demonstrate that private student loans do not fall under section 523(a)(8)(A)(ii). The debtors scheduled the debts as “Educational Private loan[s]” and the court held that section 523(a)(8)(A)(ii) does not include the word loan and instead refers to “payments with contingent obligations” that “may not need to be repaid.” In *In re McDaniel*, the Tenth Circuit held that debtors can discharge private student loans that are not exclusively used to meet the costs of education without requiring debtors to demonstrate undue hardship under 11 U.S.C. § 523(a)(8).

### **See additional resources:**

1. Madlaine N. Farmer, MYTH BUSTER: PRIVATE STUDENT LOANS MAY NOW BE DISCHARGED IN STATES WITHIN THE TENTH CIRCUIT, 60 Washburn L.J. Online 69 (2021), <https://washburnlaw.edu/wljonline/farmer-private-student-loans>.
2. *In re Navient Solutions, LLC*, 625 B.R. 801 (Bkrtcy.S.D.N.Y. 2021).
3. *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595 (2nd Cir. 2021).
4. *Loggins v. Norwood*, 854 Fed.Appx. 954 (10th Cir. 2021).
5. *Markowski v. Markowski*, 2021 WL 5283879 (D.Colo. 2021).

6. *In re Las Uvas Valley Dairies*, 2021 WL 4472933 (D.N.M. 2021).
7. *In re Las Uvas Valley Dairies*, 2021 WL 3834988 (D.N.M. 2021).
8. *Martinez v. FedEx Ground Package System, Inc.*, 2021 WL 1026732 (D.N.M. 2021).
9. *In re Love*, 2021 WL 1732255 (Bkrtcy.D.Kan. 2021).
10. *In re Anderson*, 2020 WL 6821796 (Bkrtcy.D.Kan. 2020).
11. *In re Monyak*, 2021 WL 371753 (Bkrtcy.N.D.Ohio 2021).
12. *In re Bannister*, 2021 WL 219525 (Bkrtcy.S.D.N.Y. 2021).

### **Argument Two:**

**Issue:** *Dura Automotive* held that Delaware law precludes committees from obtaining derivative standing in chapter 11 where the debtor is a Delaware LLC or LP. Other courts have rejected this, such as the Bankruptcy Court for the Southern District of New York in *The McClatchy Co.* The Bankruptcy Court for the District of Delaware recently skirted the issue in *The Collected Grp., LLC* prepack.

1. *In re Dura Automotive Sys., LLC*, Case No. 19-12378, Dkt. No. 1115 at 44–50 (Bankr. D. Del. June 9, 2020).
  - a. Holding that the UCC cannot pursue state or Bankruptcy Code claims including preferential transfer, equitable subordination, and recharacterization. *See* Dkt. No. 1115 at 46 ll. 5–12.
2. *In re Citadel Watford City Disposal Partners, LP*, 603 B.R. 897, 902–05 (Bankr. D. Del. 2019).
  - a. Holding that the UCC cannot pursue state fiduciary duty claims
  - b. *But see* order granting derivative standing to pursue chapter 5 claims [Dkt. No. 351]
    - i. The court appears to imply that the UCC improperly asserted fiduciary duty claims when it was only granted standing to pursue chapter 5 claims. *See* 603 B.R. at 907; *id.* at 907 n.50
3. *In re HH Liquidation, LLC*, 590 B.R. 211, 285 –85 (Bankr. D. Del. 2018).
  - a. Holding that the UCC cannot pursue state fiduciary duty claims
  - b. *But see* order approving stipulation granting standing to pursue all claims of the estate
    - i. The stipulation reserved all defenses to any action brought by the UCC, and the court observed that the order approving it did not bar defendants from raising the issue of standing. *See* 590 B.R. at 284.

- ii. However, the defendants only challenged the UCC’s standing to pursue state claims, implying that they believed the UCC could properly pursue Bankruptcy Code claims
  - iii. The court agreed with the defendants but only referenced the state claims they had challenged
- 4. *In re PennySaver USA Pub., LLC*, 587 B.R. 445, 466–67 (Bankr. D. Del. 2018).
  - a. Holding that a chapter 7 trustee could not bring state fiduciary duty claims on behalf of creditors because “derivative claims can only be brought by members or assignees of LLCs.” 587 B.R. at 467.
- 5. *CML V, LLC v. Bax*, 28 A.3d 1037, 1041–43 (Del. 2011).
  - a. Holding that the Delaware LLC Act precludes derivative standing for creditors of Delaware LLCs. *See* 28 A.3d at 1041.
- 6. *Off. Comm. of Unsecured Creditors v. Meltzer*, 589 B.R. 6, 16 n.4 (D. Me. 2018).
  - a. In denying a motion for leave to appeal the bankruptcy court’s order granting the UCC derivative standing to pursue claims of the Delaware LLC debtor as an interlocutory order, observing that it would have affirmed the order even if it had ruled on the merits because debtors may stipulate to representation by a committee.
- 7. *In re Pursuit Cap. Mgmt., LLC*, 595 B.R. 631, 657–60 (Bankr. D. Del. 2018)
  - a. Holding that creditors of a Delaware LLC debtor could be granted derivative standing to bring avoidance actions in chapter 7.

**See additional cases:**

1. *In re The McClatchy Co.*, No. 20-10418, Dkt. No. 641 at 30–31 (Bankr. S.D.N.Y. July 6, 2020).
2. *In re Comcar Industries, Inc.*, No. 20-11120-LSS, Dkt. No. 87 at 69-76 (Bankr. D. Del. May 21, 2020).
3. *In re Carbonlite Holdings LLC*, No. 21-10527 (JTD), Dkt. No. 276 at 49-52 (Bankr. D. Del. Apr. 12, 2021).
4. *Wardman Hotel Owner, L.L.C.*, No. 21-10023 (JTD), Dkt. No. 126 at 39-40 (Bankr. D. Del. Feb. 9, 2021).
5. *In re STN Enterprises*, 779 F.2d 901 (2d Cir. 1985).
6. *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 566 (3d Cir. 2003).
7. *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020).

8. *In re iPCS, Inc.*, 297 B.R. 283, 290 (Bankr. N.D. Ga. 2018).
9. *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 223 (5th Cir. 1988).
10. *Liberty Mut. Ins. Co. v. Official Unsecured Creditors Comm. (In re Spaulding Composites Co., Inc.)*, 207 B.R. 899, 903 (B.A.P. 9th Cir. 1997).

### **Argument Three:**

**Issue:** Does a Chapter 13 debtor have standing to bring an avoidance action under §§ 547 or 548 of the Bankruptcy Code?

The question centers around whether a debtor has the same power as the trustee to bring actions that might recover value for the bankruptcy estate. Specifically, the split arises from differing interpretations under section 1303 of the Bankruptcy Code.

Avoidances as a general concept:

1. Undoing, otherwise known as “avoidance,” is an important part of the bankruptcy process requiring that “creditors who have been paid, or other parties who have received the debtor’s property, may be required to disgorge payments, return property, or pay its value.”
2. “The purpose of disgorgement...is to promote a degree of equality of distribution among creditors and prevent channeling of the debtor’s assets during specified time frames preceding the filing of a bankruptcy petition.”

Avoidance powers are characterized as property under § 1306:

1. Under § 1306(b), debtors remain “in possession of all property of the estate throughout the life of the chapter 13 case.”
2. Property of the estate “not only includes property as defined by § 541, but also property acquired after the commencement of the case – like bankruptcy-specific avoidance rights.”

### **See additional resources:**

1. Keith M. Lundin, LUNDIN ON CHAPTER 13, § 53.12, AT ¶ 1, LUNDINONCHAPTER13.COM (last visited October 15, 2021).
2. William C. Hillman, Margaret M. Crouch & Steven J. Brujic, PRACTICING LAW INSTITUTE: BANKRUPTCY DESKBOOK § 6:1.1, AT 6-2 N.1 (5TH ED. 2014).
3. *In re Cohen*, 305 B.R. 886, 897 (B.A.P. 9th Cir. 2004).
4. John Gustafson, AVOIDANCE POWERS IN CHAPTER 13, THE NACTT ACADEMY FOR CONSUMER BANKRUPTCY EDUCATION (DECEMBER 30, 2018), [https://considerchapter13.org/category/member/the\\_toolbox/avoidance-powers/](https://considerchapter13.org/category/member/the_toolbox/avoidance-powers/) (Noting that “[l]itigation assets are property of the estate” and inquiring “what does ‘possession’ of these assets mean if it does not allow the Debtor to pursue these avoidance rights through litigation?”).

5. *Matter of Hamilton*, 125 F.3d 292, 297 (5th Cir.1997).
6. *In re DeMarah*, 62 F.3d 1248, 1250 (9th Cir.1995).
7. *In re Steck*, 298 B.R. 244, 248–249 (Bankr.D.N.J.2003).
8. *In re Funches*, 381 B.R. 471, 492 n.32 (Bankr. E.D. Pa. 2008).
9. *In re Einoder*, 55 B.R. 319 (Bankr. N.D. III. 1985) (citations omitted)