

# THE ABSOLUTE PRIORITY

The  
Absolute  
Priority

New Jersey Bankruptcy Lawyers Advisory Committee

Volume 4 Issue 1 March 2019



## A Discussion with Judge Rosemary Gambardella

By: Ross J. Switkes

For thirty-three years, the Honorable Rosemary Gambardella has served as a Judge of the United States Bankruptcy Court for the District of New Jersey. Judge Gambardella graciously participated in an interview for this issue of *The Absolute Priority* to discuss a variety of topics, including her mentors and influences, the evolution of the bankruptcy practice in this District during her tenure, and tips for practitioners. The Lawyers Advisory Committee extends their sincere gratitude to Judge Gambardella for participating in this interview.

### **Who have been your biggest influences or mentors over your career?**

I have been very lucky to have worked with many amazing people throughout my career. Besides my family, I would have to start with Chief Judge Vincent Commisa. I served as his law clerk following my graduation from Rutgers Law School. I also had the privilege of working for Hugh Leonard at the Office of the United States Trustee and learned a great deal from him.

Throughout my tenure, I have always enjoyed the collegiality and support shown by my colleagues on the Bench and the terrific Clerks of Court Jim Waldron and Jeanne Naughton. In the beginning of my career, myself, Chief Judge William Gindin, and Chief Judge Judy Wizmur were the “new kids on the block.” It was great to have their support while getting acclimated to serving as a Judge.

In addition, Judge Anne Thompson and Judge Maryanne Barry were truly great role models as they provided fantastic examples for me of how influential female judges conducted themselves on the Bench.

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Also, when I sat in the Camden vicinage, I received tremendous support from Judge Stanley Brotman and Judge William Lipkin. Chief Judge John Gerry was also a source of support and had a wonderful sense of humor.

The District of New Jersey is really a great family.

**You have been on the Bench since 1985, how has the practice evolved? Do you miss any aspects of the practice prior to electronic filing? What challenges do you observe?**

When I first went on the Bench, bankruptcy was more of a boutique practice. There were some marvelous attorneys that really knew how to move cases through the system. With the evolution of the Code, however, it opened up the practice to many other individuals and firms as with the new law there were no true “experts” anymore. The law was evolving.

To that end, once cases started to get more substantial, we saw larger firms establish bankruptcy groups in the 1980s. This led to a diversification of the practice as many of the lawyers were not only strong bankruptcy lawyers, but also had significant experience in other fields.

Obviously, the establishment of electronic filing changed the way we handle matters. I do miss the “old” motion days when everyone was in the courtroom. This led to greater communication between the parties.

I have noticed two somewhat recent challenges. First, is the proliferation of self-represented litigants and debtors. While we do have many forms and resources to aid these parties, it is still difficult for them to navigate the system without the aid of counsel and the large amount of these cases burden the Court.

This presents challenges to the attorneys and the Court. Second, and it is not from every firm, but I have noticed some young lawyers appearing before me who need additional mentoring. Fortunately, the Bankruptcy Inn of Court and other organizations help to provide that support and training to young lawyers.

**Has there been any consistent objective of the Board of Judges that you have experienced during your time on the bench?**

We have always strived for uniformity amongst the Judges and vicinages. We try to make the practice consistent and more predictable. The promulgation of

standard forms has helped with this initiative. I hope that the forms will minimize costs as practitioners can rely on forms that have been approved by the Board of Judges. We have made great strides in this area under the leadership of Chief Judge Kathryn Ferguson.

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

I have already read all the papers. There is no need to recite verbatim the facts and arguments set forth in the submissions.

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

My staff is great - my Judicial Assistant Rosemary Paul, my Courtroom Deputy Sharon Moore, and ECRO Specialist Charlene Richardson. Practitioners must understand that they cannot give legal advice.

**Have you worked with your Chambers staff for a long time?**

I had a great staff during my time in the Camden vicinage from 1985-1992 led by my Judicial Assistant Denise Howard and Courtroom Deputy Terry Leardi. I have been with most of my current staff since I began sitting in Newark in 1992.

**You have presided over many cases during your tenure on the Bench. Are you particularly proud of any specific decisions of yours?**

Cohen v. de la Cruz always comes to mind. That case involved the non-dischargeability of punitive damages. The Supreme Court of the United States affirmed decisions of the Bankruptcy Court, District Court and Third Circuit.

Also, the G-I Holdings case, involving asbestos claims, was complicated and marvelous as it extended into many different practice areas. It also provided me with a great opportunity to sit jointly with Chief District Court Judge Garrett Brown on the confirmation hearing concerning a request for a channeling injunction.

**Do you have a favorite Court related memory?**

Having had the privilege to serve on the Bankruptcy Court for some thirty-three years, I can't pick a favorite memory. Let's just say that I have a lifetime of memories.

**What is your . . .****Favorite restaurant?** – Peter Lugers**Favorite Bruce Springsteen song?** – “Thunder Road”**Favorite Bruce Springsteen concert?** – a show at Shea Stadium where Bob Dylan came out during the encore and Bruce and Bob played “Highway 61 Revisited”**Favorite Yankee of all-time?** – Dave Righetti**Favorite place to vacation?** – Tuscany and San Juan, Puerto Rico**Favorite thing to do to relax?** – I like to watch home improvement shows on television, e.g., “Fixer Upper”, “Property Brothers” and “House Hunters”**Congratulations!**

On September 26, 2018, Ross J. Switkes, a partner at McManimon, Scotland & Baumann, LLC, received the Young Lawyer of the Year Award from the Mercer County Bar Association.



Pictured left to right: MCBA President, Angelo Onofri and Ross J. Switkes.

**MESSAGE FROM THE CHAIR**

I am humbled to serve as the current Chair of the New Jersey Bankruptcy Lawyers Advisory Committee. I had the honor of becoming Chair this past year and following in the footsteps of the late Bill Mackin who always served the Committee with enthusiastic leadership and a big smile on his face. We will always miss his presence.

As many of you know, the Lawyers Advisory Committee is comprised of skilled practitioners selected by the Chief Judge who serve for an appointed term. New members appointed this past year were Benjamin Stanziale, experienced practitioner and Chapter 7 Panel Trustee, and Brian Hofmeister, an experienced practitioner in Chapter 7, 11 and in the representation of Trustees. The Committee also includes a number of liaisons from other important stakeholders in the New Jersey Bankruptcy community including The Board of Judges, the Office of the United States Trustee, The New Jersey State Bar Association, the Federal Court LAC, the IRS and the Office of the N.J. Attorney General.

The Bankruptcy Court LAC meets once a quarter with subcommittees holding monthly calls to move forward agenda items. Meeting Minutes are posted on the Courts website for all to review and keep up on issues that are currently under consideration.

I also have the good fortune to be serving on the 3<sup>rd</sup> Circuit Lawyers Advisory Committee which has given me an even broader perspective on the issues that face the bench and the bar within our Circuit.

The 3<sup>rd</sup> Circuit LAC meets twice a year and addresses not only 3<sup>rd</sup> Circuit rules but also issues that arise across the Courts in the 3<sup>rd</sup> Circuit, including issues that impact the Bankruptcy Court.

Lawyers Advisory Committees serve as a conduit of information and input from the bar to the bench. The issues that we review and the rule changes that we propose to the Board of Judges mostly start out as questions or suggestions from the bar.

To quote Chief Judge Ferguson, “the LAC is only as good as the bankruptcy bar makes it. We all want the bankruptcy practice in New Jersey to be as good as we can make it—the LAC is one of the best tools to make it so.” It is easy to provide suggestions or questions to the LAC. There is a link on the Courts website or reach out anytime to myself, or one of our members.



**The New York Institute of Credit *Women's Division***  
 Proudly Congratulates the Honorees of the  
**11th Annual Women in Achievement Awards**



**Honorable Kathryn C. Ferguson**, Chief United States Bankruptcy Judge for the District of New Jersey, will be presented with the *Eleventh Annual Honorable Cecelia H. Goetz Award*.  
*Presenter: Honorable Rosemary Gambardella, United States Bankruptcy Judge for the District of New Jersey*

The LAC is pleased to share with the Bankruptcy Bar that on February 15, 2018 our Chief Judge Kathryn Ferguson was honored by the New York Institute of Credit and received the Eleventh Annual Honorable Cecelia H. Goetz Award; and on March 20, Chief Judge Ferguson was honored by the Woman’s Initiative and Leaders in Law (“WILL”) when she was presented with the esteemed Federal Judicial Honor at WILL’s annual gala.

Please join IWIRC-NJ for an evening in honor of The Honorable Kathryn C. Ferguson, Chief Judge for the United States Bankruptcy Court for the District of New Jersey, and her staff, celebrating 25 years on the bench on April 17, 2019 at 6:00 p.m. at The Boathouse at Mercer Lake, 334 S. Post Road, West Windsor, New Jersey.



Please use the following link to register:

<https://www.eventbrite.com/e/an-evening-in-honor-of-the-honorable-kathryn-c-ferguson-registration-57010883086>

On Friday, November 16, 2018, the Federal Bankruptcy Bar Association of NJ and the Essex County Bar Foundation hosted a Chapter 13 Symposium at the National Conference Center at East Windsor, NJ.



**The 20th Annual William H. Gindin  
Bankruptcy Bench Bar Conference  
Celebrates Men of Vision**

The East Brunswick Hilton was the setting this past Spring for the 20th annual William H. Gindin Bankruptcy Bench-Bar Conference. The day-long seminar was well-received by over three hundred jurists, practitioners, and administrators.

A beautiful and entertaining video tribute to The Honorable William H. Gindin kicked off the day's agenda, and served to reinforce the vision of Judge Gindin, who played an integral part in the history and development of the Bankruptcy Court for the District of New Jersey.

Conference attendees were also treated to a visit from the Father of American Banking, Colonel Alexander Hamilton, portrayed by Bill Chrystal, who appeared in authentic dress and remained in character throughout the day. New Jersey Attorney Donald Scarinci captivated the crowd as he interviewed the visionary who helped shape our nation, and Colonel Hamilton was peppered with questions from those in attendance.

Numerous workshop sessions were presented on topics such as Current Developments in Third Circuit and Supreme Court Bankruptcy Decisions, a Mock 2004 Examination, Taxes and Bankruptcy, and a Mock Trial regarding Contested Cash Collateral and DIP Financing

Hats off to our Chief Judge, The Honorable Kathryn C. Ferguson, and to Jaimie Finberg, Chair and Anthony Sodono, III, Vice Chair of the NJSBA Bankruptcy Law Section, and their team of experts and panelists, for production of an outstanding event!



**NOTICE/SERVICE REMINDERS  
IN CONTESTED MATTERS AND ADVERSARY PROCEEDINGS INVOLVING  
THE STATE OF NEW JERSEY:**

In addition to serving the specific state agency, the New Jersey Attorney General must also be served at the following address:

**OFFICE OF THE ATTORNEY GENERAL**

New Jersey Attorney General Office  
Division of Law  
Richard J. Hughes Justice Complex  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625-0112

**DIVISION OF TAXATION BANKRUPTCY UNIT NOTICE AND CONTACT INFO**

New Jersey Division of Taxation  
Collection and Enforcement Activity - Bankruptcy Unit  
50 Barrack Street, 9th Floor  
P.O. Box 245  
Trenton, NJ 08695-0245

**MAIN # (609) 292-6616**  
**FAX #1: (609) 292-9614**  
**FAX #2: (609) 984-5754**

**Jamie Secula, Supv (609) 292-0025**  
**Timothy Cole, Inv (609) 292-0267**  
**Kristin Martin, Inv (609) 777-1720**  
**Rich Flatch, Inv (609) 943-4390**  
**Erica Hamlin, Inv (609) 984-1562**  
**Munir Samad, Inv (609) 984-6205**  
**M. Umar Butt, Inv (609) 943-4391**

**Nancy Chan-Rivera, Inv (609) 292-6629**  
**Halpin Stephen, Inv (609) 633-2484**  
**Victoria Wright, Inv (609) 633-2485**  
**Cathy McCants, Inv (609) 984-1738**

**Meet the Clerk's Office: Sean Quigley**  
**Camden Vicinage Deputy-in-Charge**



**Where did you grow up?**

I grew up in Edison, New Jersey in close proximity to the greater New York City region where most of my extended family is from. Despite having lived in Philadelphia for about 5 years now, I'll probably never shake the instinct of thinking of NYC every time someone mentions "the city".

**Where did you go to H.S., college, and law school?**

I attended high school at J.P. Stevens in Edison, and then went on to college at the University of Maryland in College Park. Although I personally have a terrible jump shot, I grew to love college hoops and our team won the NCAA tournament only a year after I graduated -- GO TERPS! After college, I obtained a law degree from Rutgers School of Law here in Camden.

**What was your first job?**

I recall doing odds and ends in the neighborhood growing up, but I believe my first real job with a paycheck was as a lifeguard at the local swim club. Perhaps not the best paying gig, but the tradeoff was being outside in the sun.

**When did you start working with the Court?**

I started working with the Bankruptcy Court in 2006 when Judge Kaplan took the bench and hired me as his first term clerk. Although I had taken bankruptcy,

U.C.C., and secured transaction courses in law school, working with Judge Kaplan was my first real exposure to bankruptcy practice. The rest is history as they say...

**What is your favorite memory from your time working with Judge Kaplan as a law clerk?**

What stands out the most in my mind is Judge Kaplan's patience in taking the time to teach me the finer points of golf. Because how could you truly understand the ramifications of the automatic stay if you can't even hit a 5-foot putt?! [Disclaimer: I can't. I'm terrible at golf.]

All kidding aside, some of my best memories involve those first few years of exposure to bankruptcy. For example, Judge Kaplan had officially been a judge for maybe a day before being assigned the Kara Homes, Inc. case, a fairly large Chapter 11 matter. Going from knowing very little about bankruptcy to learning about complex bankruptcy procedures in a short amount of time was truly eye-opening.

More generally, I grew to enjoy the opinion writing process as a law clerk. Although the "buck stops" with a judge in terms of a final ruling, Judge Kaplan would always take a collaborative approach, often making tweaks to certain sections of an opinion based on discussions we had. I always felt that I was part of the decision-making process, and very much appreciated (and continue to appreciate) his guidance.

**What new challenges do you face in your current position?**

First, I must say that I am humbled to have been given the opportunity to continue working for such a great court. It truly is a great place to work, and our District is well-known throughout the Nation.

Second, one of the biggest revelations that I've had in transitioning from a more legal analysis role to the judicial administration side is how much work goes on "behind the curtain" in the Clerk's Office. Having spent some time in private practice, I can tell you from experience that your typical bankruptcy practitioner does not fully appreciate, beyond what they see in the courtroom, the amount of work and effort that goes into making the court tick. Our judges are obviously the main ingredient to the recipe, but the Clerk's Office is certainly an integral part of the bankruptcy process.

That said, I think the biggest challenge thus far is the process of digesting the ever-evolving rules of procedure and case law, and repackaging that information into a concise format for the Clerk's Office staff. While many folks have years of experience under their belts, the law -- bankruptcy law in particular -- continues to be fluid. My legal background has been extremely helpful, but as in any job there is always a lot to learn.

### **What are some of your interests/hobbies?**

Outside of work, my current focus is on spending time with my wife and toddler son. Our love for traveling to various destinations has taken a back seat for the moment, but I wouldn't change a thing.

In terms of hobbies, I grew up dabbling in sports, everything from soccer to baseball (unsurprisingly, not golf). I would always keep active, but at some point I got the bug for endurance sports, focusing on triathlon (swim, bike, run) for quite some time now.

In addition to satisfying my competitive tendencies, triathlon has a large community and it's nice to be part of a group while also working on individual goals. Plus, my wife and I met through the sport. So, you could say that it's a family affair!

## **Recent Notable Decisions:**

### **In re Benjamin, 580 B.R. 115 (Bankr. D.N.J. 2018)**

**By Brian Hofmeister**

On January 19, 2018, the Bankruptcy Court considered whether a debtor may amend, as of right, their exemption schedule (Schedule C), to exempt a previously undisclosed personal injury lawsuit in a subsequently reopened bankruptcy case. At the heart of the analysis is the interpretation of Bankr. Rule 1009(a), which allows a debtor to amend schedules as of right "at any time before the case is closed."

In striking the amended schedules, the Court, after beginning its analysis with the dicta in the Supreme Court's holding in Law v. Siegel, --- U.S. ---, 134 S. Ct. 1188 (2014), conducted a copious analysis of the three approaches emerging from courts in other jurisdictions regarding amendments under Bankruptcy Rule 1009(a), to wit, the so-called "broad approach," the "narrow approach," and the "middle approach."

The "broad approach," as articulated by Courts such as in In re Goswami, 304 B.R. 386 (B.A.P. 9<sup>th</sup> Cir. 2003), is the most liberal and treats a reopened case as a case that never closed. As such, this approach allows a debtor to amend schedules without limitation in a reopened case. On the other end of the spectrum, the "narrow approach," articulated by Courts such as In re Bartlett, 326 B.R. 436 (Bankr. N.D. Ind. 2005), strictly interprets the phrase, "before the case is closed" under Rule 1009(a) and prohibits amendments to schedules in any reopened bankruptcy case.

In rejecting both of these approaches, Judge Ferguson adopted the "middle approach," as articulated by Courts such as In re Dollman, 2017 WL 4404242 (Bankr. D.N.M. September 29, 2017) and In re Awan, 2017 WL 4179816 (Bankr. C.D. Ill. September 20, 2017). This "middle approach" takes into consideration the mechanism under Rule 9006(b)(1) in permitting a bankruptcy court to consider motions to expand certain deadlines even after the expiration of a specified time period. As such, the Court held that in a situation where a debtor seeks to file an amended schedule in a reopened case, the debtor must file a motion to enlarge the time to amend under Rule 9006(b)(1), which must meet Rule 9006's excusable neglect standard. Ultimately, the Court struck the Debtor's amended schedules, but held that the debtor could file a motion for leave to file an amended Schedule C.

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### **Dunlop v. Chung-Hwan Kim (In re Chung-Hwan Kim), 2018 WL 671467 (Bankr. D.N.J. January 31, 2018)**

**By Ramanjit K. Chawla**

This matter involved the applicability of U.S.C. §523(a)(2)(A). In this matter, an attorney and her mother ("Plaintiffs") entered into a contract with the Debtor to renovate their home. The contractor ("Debtor") failed to perform on the contract and Plaintiffs filed an action in state court. Plaintiffs obtained a \$4.1 million judgment in state court in August 2011. The Debtor filed a voluntary Chapter 7 bankruptcy petition in August 2012. Plaintiffs filed an adversary proceeding alleging that the debt owed by Debtor was non-dischargeable under U.S.C. §523(a)(2)(A).

After a thorough review of the record and testimony, the Hon. Vincent F. Papalia applied a five-factor test to determine whether the debt was non-

dischargeable. The Court specifically evaluated the following elements: Debtor's material misrepresentations, false pretenses, actual fraud; intent to deceive; justifiable reliance; knowledge of falsity; and damages. First, the Court found that Debtor's representations as to his capabilities, experience, the status of necessary approvals and the work force available to him were made under false pretense and constituted actual fraud. The Court found that the Debtor intentionally created a contrived and misleading understanding of approvals obtained and needed for the project.

Second, destruction of the records by the Debtor, misstatements by the Debtor as to his abilities, changing testimony, and other evidence clearly established that the Debtor intended to deceive the Plaintiffs. In addition, Plaintiffs established that they relied on the Debtor's misrepresentations and that their reliance was justified. The Court noted that the Plaintiffs had interviewed several contractors and after numerous meetings and assurances of approvals, determined that the Debtor was the best man to do the job. Debtor had intentionally misled the Plaintiffs as to the status of approvals and the Court found that it was reasonable for the Plaintiffs to rely on the Debtor when he told them that approvals had been obtained and that payment was due.

The Court further ruled that Debtor had knowledge of the falsity of his representations as to his and his company's capabilities and experience. The Court found that the Debtor made the representations with a reckless disregard for the truth.

Finally, the Court analyzed the element of damages. The Court concluded that Plaintiffs clearly had suffered damages due to Debtor's actions and representations. The Court also ruled on the issue of collateral estoppel. Plaintiffs argued that collateral estoppel applied as to the state court's damages award and Debtor was prevented from re-litigating the state court's damages award. Debtor argued that collateral estoppel did not apply, as damages was not litigated in state court because he had stopped defending in state court for financial reasons. The Bankruptcy Court disagreed with the Debtor. Debtor's deliberate failure to comply with discovery requests and deliberate destruction of documents relevant to the state court action led the Bankruptcy Court to conclude that the Debtor had deemed to have actually litigated the damages issue for purposes of collateral estoppel. Judge Papalia held that re-litigating the damages issue

would effectively reward the Debtor and the Debtor did not deserve a second bite at the apple on the damages issues. The Court thus found in favor of the Plaintiffs, held the debt non-dischargeable in the amount of \$4,135,330.05, plus accrued interest at the state court judgment rate.

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**Rosa v. Wells Fargo Bank, N.A.  
(In re Rosa), 2018 WL 4352168  
(Bankr. D.N.J. August 9, 2018)**

**By Brian Hofmeister**

The Debtor attempted to engage Wells Fargo in loss mitigation negotiations after the final judgment of foreclosure was entered and prior to the bankruptcy filing and was unsuccessful. She alleged that the analysis used by WF for the gross income calculation was incorrect so she appealed the determination internally using two separate appeal letters. When Rosa filed her Chapter 11 bankruptcy she also filed an adversary proceeding against WF alleging that they violated RESPA regulations as well as Regulation X (ten) by failing to properly consider her appeal of the loss mitigation. WF filed a motion to dismiss the action because, inter alia, it is not a "servicer" as that term is defined in the regulations after the final judgment of foreclosure is entered. (12 U.S.C. §2605(i)(2)) The Court disagreed, holding that they continue to be a "servicer" under RESPA. The Court also held the claim under §1024.41(h) withstood the scrutiny of a motion to dismiss because of the direct evidence that the same processor handled the appeal that handled the initial loss mitigation decision and the regulation requires that a separate person must analyze and consider the appeal. The Court granted the WF motion to dismiss on some counts but denied with respect to §1024.41(h), permitting the parties to go forward with discovery. The case is very fact specific but at least attempts to resolve a district split regarding the lender's status as servicer post-final judgment and at least in the early stage of litigation holds the lender accountable for internal appeals that do not comply with the regulation.

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**Third Circuit Addresses Construction Lien  
Creditors' Rights in Bankruptcy**

**By Leonard C. Walczyk**

The Third Circuit's recent opinion in In re Linear Electric Co., Inc., 852 F.3d 313, 2017 WL 1177465

(3d Cir., Mar. 30, 2017) is the first since the enactment of the New Jersey Construction Lien Law in 1994 to address construction lien rights upon a contractor's bankruptcy filing in New Jersey. In *Linear Electric*, the Third Circuit affirmed Bankruptcy and District Court rulings that post-petition liens filed by suppliers pursuant to the New Jersey Construction Lien Law when the contractor has filed for bankruptcy violate the automatic stay, notwithstanding the fact that the liens were filed against projects owned by non-debtor third parties. The post-petition lien filings impacted the debtor-contractor's ability to collect on receivables due from the project owners, and thus the lien filings were acts in violation of the automatic stay which impacted property of the debtor-contractor's bankruptcy estate.

The Third Circuit's decision in *Linear Electric* will affect construction lien practice by limiting the ability of subcontractors and material suppliers to secure their accounts receivables by construction liens filed against distressed contractors. Even though the liens were filed against the non-debtor project owner's real estate pursuant to the provisions of the New Jersey Construction Lien Law and, facially, appeared to be actions against the real estate of the non-debtor third party, the liens directly impacted assets of the contractor's bankruptcy estate by impairing the debtor contractor's ability to collect on the receivable due from the project owner for work performed on the project. The Third Circuit affirmed the Bankruptcy Court and District Court's reasoning that although the real estate project itself is not the debtor's property, the account receivable that the property owner owed the debtor for the construction work is indeed property of the debtor estate and under the control and supervision of the Bankruptcy Court.

The Third Circuit decision in *Linear Electric* should be compared and contrasted with *Schoonover Electric Co. v. Enron Corp and Garden State Paper Co.* (In re *Enron Corp.*), 294 B.R. 232 (Bankr. S.D.N.Y. 2003), a case interpreting New Jersey Construction lien rights where the debtor was the project owner, and not the contractor as in *Linear Electric*. In *Enron*, a prime contractor in direct privity of contract with the debtor project owner filed a construction lien under the New Jersey Construction Lien Law against the property of the debtor post-bankruptcy. The issue as to whether the lien was against property of the bankruptcy estate in *Enron* was more clear-cut since the real estate was the property of the debtor. However, the contractor in *Enron* sought to avail itself of the

safe harbor "relation back" exceptions to the automatic stay, relying on the language of the Construction Lien law which establishes the right of any contractor subcontractor or supplier to file a construction lien for the value of the work, services provided or materials furnished N.J.S.A. 2A: 44A-3. Arguing that the filing of a bankruptcy petition will not prevent the holder of an interest in property from perfecting its interest if, absent the bankruptcy filing, the interest holder could, under any generally applicable law, have perfected its interest against the debtor entity acquiring rights in property before the date of the filing. Bankr. Code, 11 U.S.C.A. § 546(b)(1)(A). This "relation back" exception to the trustee's "strong-arm" avoidance powers, which are subject to any generally applicable law that permits the perfection of interest in property to be effective against an entity which acquires rights in such property prior to date of perfection, serves the relatively narrow purpose of protecting, in spite of surprise intervention of a bankruptcy filing, those whom state law favors by allowing them to perfect an interest that they obtained before bankruptcy proceedings began. 11 U.S.C.A. § 546(b)(1)(A).

In *Enron*, the Bankruptcy Court for the Southern District of New York in interpreting New Jersey law, held that the right to file a construction lien as established by statute under the New Jersey Construction Lien Law N.J.S.A. 2A; 44A-3 did not relate back to the commencement of its service period before commencement of property owner's Chapter 11 case, but would seek to attach only post-petition when contractor's lien was actually filed. Accordingly the lien was avoidable by the debtor-in-possession in exercise of the strong-arm power as hypothetical bona fide purchaser. 11 U.S.C.A. §§ 545, 546(b)(1)(A); N.J.S.A. 2A:44A-1 et seq.

Why is there no "relation back" under the New Jersey Construction Lien Law? A progressive step was believed to have been taken by the New Jersey legislature in 1994 when it enacted the Construction Lien Law ("CLL") adopting several significant differences between the Construction Lien Law and the Mechanic's Lien Law that it replaced. Under the Mechanic's Lien Law, a supplier of labor and/or materials was obliged to file a mechanic's notice of intention as a condition precedent to filing a Mechanic's lien claim. N.J.S.A. 2A:44-71 (repealed April 22, 1994); see generally, *Mansion Supply Co. v. Bapat*, 305 N.J.Super. 313, 316, 702 A.2d 509 (App.Div.1997), certif. denied, 153 N.J. 49, 707 A.2d

153 (1998) (discussing pre-filing requirement under Mechanic's Lien Law). After the filing of the notice of intention, the unpaid supplier of labor or materials had to then file an actual lien claim which related back to the filing of the Notice of Intention as to effective date and then to bring an action to foreclose the lien within four months of the date the last labor or materials were provided. N.J.S.A. 2A:44-98 (repealed April 22, 1994). Failure to file the notice of intention precluded the party from later filing a lien claim. That pre-filing process often created distrust and friction between contractors and owners. *Mansion Supply Co.*, supra, 305 N.J.Super. at 317, 702 A.2d 509.

To protect subcontractors and material suppliers, the construction industry should consider legislation establishing a trust fund concept, similar to that in effect for public projects, against all funds in the hands of owners, general or prime contractors and subcontractors. This could arguably eliminate any issues of "relation back" or the timing of filing of Construction liens related to contractor or project owner bankruptcy filings.

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**Hunter v. New Hersey Higher Educ. Ass'n Auth.  
(In re Hunter),  
Adv. Pro. No. 15-02052 (JKS)  
(Bankr. D.N.J. April 27, 2018)**

**By Anne Cantwell**

Holding: Partial hardship discharge of student loans granted.

The Chapter 13 debtor brought an action seeking discharge of student loan debt of \$288,911.15 two years post-graduation. Judge Sherwood conducted a Brunner test to measure undue hardship, which requires a debtor to establish three elements: 1) current income and expenses, if forced to repay the loans, is not enough to maintain a minimal standard of living; 2)

which fact is likely to persist for a significant portion of the repayment period; and 3) the debtor has made a good faith effort to repay the loans. The Court noted that: "The Third Circuit has not addressed whether section 523(a)(8) requires complete discharge of student loan debt or permits partial discharge. Other circuits are divided on this issue." The court determined the amount of the debtor's surplus income through proofs at trial, and concluded that the last four of twelve student loans must be repaid by the debtor, with the remaining loans discharged under the undue hardship test. The monthly amount to be repaid on the non-dischargeable loans would approximate the debtor's surplus income.

In an earlier opinion on January 5, 2018, Judge Sherwood had denied the debtor's motion for partial summary judgment where the debtor argued that a portion of the loans for amounts in excess of the actual costs of attendance were not "qualified education loans" under 11 U.S.C. §523(a)(8). The court found that because the NJHESAA is a state agency, it is a governmental unit under the Code and accordingly, whether the loans were qualified education loans was irrelevant.

2018 Filing Statistics				
Month	Chapter 7	Chapter 11	Chapter 13	Monthly Total
Jan	1235	26	872	2133
Feb	1209	23	810	2042
Mar	1617	27	828	2472
Apr	1612	15	892	2519
May	1363	39	931	2333
Jun	1367	22	838	2227
Jul	1255	22	869	2146
Aug	1367	28	965	2360
Sep	1102	17	790	1909
Oct	1477	23	898	2398
Nov	1203	11	773	1987
Dec	1085	34	672	1791
<b>Total:</b>	<b>15892</b>	<b>287</b>	<b>10138</b>	<b>26317</b>

**2019 - 21st Annual William H. Gindin Bankruptcy Bench Bar Conference**

<b>Date/Time</b>	<b>Borgata Hotel, Casino and Spa, Atlantic City</b>
Thursday, April 4 4:00PM - 7:00PM	21ST ANNUAL WILLIAM H. GINDIN PRE-BANKRUPTCY BENCH BAR CONFERENCE - THURSDAY
Friday, April 5 8:45AM - 3:00PM	21ST ANNUAL WILLIAM H. GINDIN BANKRUPTCY BENCH BAR CONFERENCE- FRIDAY

**CURRENT MATTERS BEFORE THE LAC**

The Lawyers Advisory Committee for the District of New Jersey Bankruptcy Court (the “LAC”) is comprised of 5 subcommittees: The (i) Commercial Bankruptcy/Chapter 11 Subcommittee; (ii) Local Rules Subcommittee; (iii) Local Forms Subcommittee; (iv) Newsletter Subcommittee; and (v) Consumer Bankruptcy Subcommittee. The subcommittees work on several matters throughout the year and present progress reports to the LAC quarterly each year at the LAC meetings.

Among the issues currently under the consideration of the LAC are:

The Commercial Bankruptcy/Chapter 11 Subcommittee is addressing to the potential use of a form for a combined disclosure statement and plan in an individual chapter 11 case. The combined disclosure statement and plan form is not specifically authorized by the Bankruptcy Code. Therefore, the Subcommittee is exploring a mechanism by which practitioners may file a motion for authorization to file a combined disclosure

statement and plan in an individual chapter 11 case.

The Consumer Bankruptcy Subcommittee has been tasked with proposing a “no-look” fee option for loan modification work done while a debtor is bankruptcy.

In addition to the subcommittee updates at the quarterly LAC meetings, there are several liaisons from the court and other associated agencies that provide reports to the LAC. The LAC receives reports from representatives for the Board of Judges, the Clerk of the Court, the D.N.J. Lawyers Advisory Committee, the U.S. Trustee, the I.R.S., the N.J. Attorney General, the N.J. State Bar Association, and the Federal Bankruptcy Bar Association.

The LAC welcomes comments and suggestions from the bar. To submit a comment or suggestion to the LAC, please e-mail, or contact a member of the LAC directly. For a complete roster of LAC members, please see the last page of this issue of The Absolute Priority, or visit <http://www.njb.uscourts.gov/content/lawyers-advisory-committee>.

**LAC Officers:**

Catherine Youngman (LAC Chairperson);  
David G. Beslow (LAC Vice-Chair);  
Chief Judge Kathryn Ferguson;  
Hon. Christine Gravelle, LAC Liaison

**Ex-officio Members:**

Hon. Rosemary Gambardella, Hon. Michael Kaplan,  
Hon. Andrew Altenburg, Hon. Vincent Papalia, Hon.  
John Sherwood, Hon. Jerrold Poslusny, Hon. Stacey  
Meisel, Jeanne Naughton

**LAC Members/ Liaisons:**

Morris S. Bauer, Carrie J. Boyle\*\*, Michael Brown,  
Anne S. Cantwell\*, Ramanjit K. Chawla\*, Sydney  
Darling, E. Richard Dressel, Marie-Ann Greenberg, Mark  
E. Hall, Martha Hildebrandt, Brian W. Hofmeister\*,  
Karina Pia Lucid, Kim R. Lynch, Melissa A. Martinez\*,  
Louis A. Modugno, Eamonn O’Hagan, Shoshana Schiff\*,  
Benjamin A. Stanziale, Ross J. Switkes\*, Jeanie Wiesner

\*The Absolute Priority LAC Subcommittee Member ;

\*\* The Absolute Priority LAC Subcommittee  
Chairwoman