NACTT 57th Annual Seminar

San Francisco, CA

Educational Materials

Saturday - 11:30-12:30

The Future of Consumer Bankruptcy: When Will Consumer Filings Increase or Will They?

Moderator: Herbert L. Beskin, Chapter 13 Standing Trustee for the Western District of Virginia (Charlottesville)

Honorable D. Sims Crawford, United States Bankruptcy Judge, Northern District of Alabama (Birmingham)

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MATERIALS INDEX

THE FUTURE OF CONSUMER BANKRUPTCY

NACTT ANNUAL CONFERENCE

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A Chapter 13 Trustee's Perspective

Herbert L. Beskin, Chapter 13 Trustee, Charlottesville VA

In talking about the future of consumer bankruptcy from the perspective of Chapter 13 Trustees, a useful approach might be to first define the role of the Trustee, and then ponder how that role might evolve in the future. Several benchmarks come to mind.

The first is the set of goals and aspirations contained in the "Standing Trustee Pledge of Excellence." Every Chapter 13 Trustee operating under the auspices of the Office of the United States Trustee is required to post The Pledge in a conspicuous place in his or her office. Among other things, the Pledge requires a Trustee to:

--provide a high level of trust and service to Chapter 13 debtors and creditors;
--promptly respond in a meaningful manner to inquiries from interested parties;
--work to ensure that debtors comply with their obligations under the Code and Rules;
--work to ensure that debtors comply with their plans and take appropriate action when a debtor defaults in the performance of the plan;
--efficiently track receipts and disbursements in every case from beginning to end; and
--disburse payments monthly, properly classify and pay claims, and recover erroneous payments;

The second benchmark is a quote from a 2006 Bankruptcy Court case. Judge Michael J. Kaplan wrote the following in discussing the issue of disposable income in a difficult above-median case:

> "…no Bankruptcy Court can possibly "know the soul" of a party who stands before the Bench… The result is the disquieting comprehension of just how much the product of a successful Chapter 13 program is "rough justice." (In this context, "rough justice" means making justice work in a vast nationwide program that pumps hundreds of millions of dollars (if not billions) back into the economy, and genuinely helps a lot of people, but does not necessarily accomplish each goal in every single case.) That rough justice, to this writer*, is* the law of Chapter 13, even after BAPCPA…this is what a Standing Trustee is for…" In re Peter and Kristen Lasota, 351 B.R. at 58-59 (Bankr. W.D. N.Y, 2006).

The role of the Chapter 13 Bankruptcy Trustee has always been one that is required to serve multiple—and sometimes conflicting—constituencies. And it's not always clear how best to balance our multi-faceted mission to enforce the provisions of the Code, assist the Bankruptcy Court, assist debtors and their attorneys, and work with the Office of the United States Trustee. After eighteen years in this position, I have come up with another phrase that helps to define our role: *our job is to ensure the integrity of the Chapter 13 process.*

So perhaps the most important question for Trustees as we gaze into our collective crystal ball is: how do we adapt to the inevitable changes that await us, and how do we continue to assist our multiple constituencies to make the Chapter 13 process one that is meaningful, fair, and respected?

The Trustee as Communicator of Information

If the Chapter 13 process is pictured as an old-fashioned bicycle wheel, it can be useful to view the Trustee as something of a hub. Some spokes travel upward from our office to the Judges; other spokes travel outward in all directions to debtors, creditors, attorneys, Court personnel, the public, and the United States Trustee. Information is constantly flowing between all parts of this system, sometimes efficiently, sometimes not so efficiently. It has been my experience that one of the most valuable functions I can serve as Trustee is to assist all the parties in the interchange of important information. That assistance takes many forms, and it will remain important going forward, no matter what changes are implemented in the coming years.

With debtors, there are numerous points throughout the process where a Trustee's office conveys information that is timely, important, and supportive. In order to ensure that every debtor has the same baseline of knowledge of the Chapter 13 process at the beginning of each case, we send out a welcome letter and a thirty-page FAQ pamphlet as soon as the case is filed. That ensures that every debtor begins their case with the same baseline of relevant information about the process and what is expected of them. I contact every *pro se* debtor personally and explain the virtual necessity of obtaining counsel in order to be successful, and I provide a list of available attorneys. Like all Trustees, we send each debtor a Trustee's Report (and, if necessary, an Objection to Confirmation) after each 341 meeting, and once a year we send each debtor a report advising them of the status of their payments and our disbursements to their creditors. There is no other player in the system that is likely to assume these functions in the future.

In an effort not to be seen as a faceless and impersonal government agency, and pursuant to Code section 1302(b)(4), we take a more personal approach to some of our interactions with debtors. If debtors call to complain about their attorneys—a not-infrequent event—I take each such call and (very carefully) explain their options for resolving their concerns with their attorney, filing a complaint, or seeking alternative counsel. To each debtor who receives a discharge, we send a congratulatory letter: they have earned it, and we want to be sure that their efforts are acknowledged. A final rule of our office is that any debtor who calls and asks to speak to the Trustee gets a call-back from me if their issue is one that cannot be quickly and appropriately answered by a staff member. I think it's important to show debtors that the Trustee's office takes their concerns seriously, and that they will be able to talk to a real person without undue delay. Even if it's just to explain to them why calling their attorney is what they need to do, it has become clear to us over the years that debtors greatly appreciate their concerns being acknowledged with respect.

As for creditors, it's been my experience that there are two kinds of creditors who call our office: the small company, landlord, professional, or relative who's never dealt with this strange creature called Chapter 13; and the experienced creditor or creditor attorney for whom Chapter 13 is a frequent event. I often take calls from the former group so that I can keep in touch with how the Chapter 13 process is being viewed in "the real world" by folks for whom it's a new and bewildering maze. They are almost always frustrated by the paperwork, dismayed to hear how little they will receive and how long it will take for their unsecured claims to be paid, and angry at what they consider the injustice of the system. Often times they don't realize that they have to file a claim to be paid anything, and a few minutes spent explaining the process and guiding them to the Clerk's Office for assistance is much appreciated. It also keeps us from forgetting about how our system is viewed and experienced by the general public. While I as a Trustee cannot solve such systemic problems, the fact that they have been able to talk to me at least lets them feel that they've been listened to. Most of these folks will never appear in Court, and it's important for us to remember that we may be the only contact point they have in the entire process, a process that will usually leave them with a negative impression of the system to which we have devoted our careers. We are, for better or worse, often the only "good-will ambassador" for Chapter 13 they will ever encounter, so we need to take advantage of these opportunities. These potential interactions will present themselves no matter how the Chapter 13 system evolves.

For the experienced creditors and their attorneys, they usually want to find out as quickly and efficiently as possible what the plan has in store for them. The most obvious goal is to respond as soon as reasonably possible, and

don't make them call multiple times before they hear back from someone. Whatever our role may be, old-fashioned courtesy will always be appreciated, and its absence noted. Our role in assisting such creditors has been made much easier, and less frequent, by signing them up for access to our case management website so they can check on the status of a case at their convenience. The other function that we can serve, and which is appreciated, is talking to creditor attorneys who are unfamiliar with the customs and procedures of our District. By answering their questions about how claims, lift stay motions, loan modifications, and other matters are handled here we are lubricating the wheels and gears of the Chapter 13 process.

The Trustee as Educator

One of the most important communication functions Trustees perform is with debtors' attorneys, especially inexperienced ones. When attorneys are just beginning their Chapter 13 practice, or when they are just getting started in a new District, they're often not aware of the steepness of the learning curve that faces them. It can be startling to discover how different Local Rules and (often unspoken) local customs can be from District to District, or even in different parts of the same District. The Trustee will usually be the first person to be aware of the "rookie" who has just filed their first case. By taking a proactive role in greeting and introducing the new attorney to the ins and outs of this new environment, the Trustee accomplishes two equally important goals. The first is to quickly acquaint the attorney with the pitfalls, deadlines, procedures, forms, and culture of this bailiwick, and to initiate a relationship where they will feel comfortable seeking guidance in the future. The second is to increase the odds that debtors receive quality representation and are not penalized by having retained inexperienced attorneys.

This is accomplished in a number of ways. When we see that a case has been filed by an attorney whose name is unfamiliar to us, we send out a welcome letter that advises them of our office website and other pertinent information. Then I call the attorney to introduce myself and see if they have other questions. The website contains a *very* lengthy, easily searchable section that guides debtors' attorneys through the pre-confirmation and post-confirmation process in painstaking detail. The site also contains links to many of the forms most commonly used in our Court. Finally, it contains a searchable compendium of all published Chapter 13-related opinions from our Bankruptcy and District Court, our Circuit Court, and the Supreme Court. In addition to ensuring that all new attorneys have access to the same baseline of information, the website of course saves me time answering many basic questions that newer attorneys would otherwise be asking. We invite every new attorney to come visit our office in person and meet me, the staff attorney, and the court-preparation paralegals.

The "educating" function is an ongoing one. I maintain two constantly-updated "e-mail blast lists": one for all the debtors' attorneys, and one for the creditors' attorneys who appear in our Court. Whenever there is an important opinion issued by our Judge, I will circulate a short summary of the case to the attorneys. Some important rulings are informal bench rulings and will not be published, so the only way the attorneys will find out about these rulings is if I let them know. This habit also ensures that *all* the attorneys know about a decision, which creates a more level playing field for all concerned. I try to send out notice of any important new legislation—federal or state—or agency regulations, and any state bar ethical opinions concerning our corner of the legal pond.

Finally, I let it be known that if debtors' attorneys want to talk about plan options and issues in complicated cases, I am available to knock around ideas. This is not only appreciated by the attorneys; it keeps my brain cells active and keeps me in touch with some of the challenges they face on a regular basis. (It has been so long since I was a debtors' attorney that I need these refreshers to remind myself of how tough their job can be.)

For years my fellow Trustee in our District and I would put on a one-day annual gathering of attorneys and their paralegals to review case law and legislative developments, hear a guest speaker, and respond to attorney questions and concerns. That tradition has fortunately evolved into a more formal, Judge-sponsored annual conference for

everyone in our District. It's the only time each year that virtually everyone involved in consumer bankruptcy comes together for a common purpose and to renew personal relationships. Because consumer bankruptcy is a more collegial, more relational, and less litigious area of law, such conferences take on an important role in making the system run more efficiently.

All of these efforts serve a basic goal—creating a competent and collegial Chapter 13 bar—that will always be desirable, and it's unlikely that any other entity will be as well situated as us to perform this function.

The Trustee as Intermediary

This role depends in large part on the Trustee's relationship with the Judge, the Court, and the US Trustee/Administrative Office, and often that factor will be partially or even fully beyond our control. I am fortunate to speak from the experience of having all three be open and welcoming to my active involvement in influencing and managing the Chapter 13 process in our District.

Our Judge has periodic "brown bag lunches" with attorneys during which she will discuss Court policies and procedures and take their questions. (Of late they have been Zoom gatherings without the food, but hopefully they will return to the old format someday.) My role is to set up these meetings and let the Judge know what kinds of issues are likely to be raised. The attorneys look forward to these meetings and the chance to express their concerns directly to the Judge; they understand that it's an opportunity not available to many of their peers in other Districts.

When the Judge wants the attorneys to know of a change in general Court policy or a concern about how cases are being handled, I will often be asked to be the conduit of that information to them. I have often wondered how such information was conveyed in "the old days," but in the era of e-mail and blast lists it's a pretty simple task.

If debtors' attorneys have an important concern that affects all of them, and they want to bring it to the Court's attention, I and the other Trustee in my District are sometimes contacted as to how the issue might be brought to the Judge's attention. A recent example was the attorneys' effort to increase the local no-look fee. After some negotiations back and forth with the attorneys, my Trustee peer and I agreed to join with them in presenting a proposal to the Judges. This joint effort led to the Judges amending the Standing Order on fees.

Our US Trustee's office has long sought our referrals on potential criminal cases, attorney competence, and compliance with ethical standards. While their focus is primarily on Chapter 7 cases, they have provided important assistance on trial strategy in our more complicated cases. On occasion I have been the messenger/go-between on questions and issues presented to me by attorneys seeking feedback from the UST.

In the same vein, I have sometimes found myself acting as a conveyor of concerns between the Clerk's Office and the attorneys. Such exchanges can go both ways. My presenting an issue to the Clerk has the advantage of not embarrassing a particular attorney; it's another way of assisting attorneys and adding a positive dimension to the Trustee-attorney relationship.

The Trustee as Chapter 13 "Cop on the Beat"

There's no getting around it: regardless of how the system is structured or changed, there are always going to be some attorneys who do not practice law in a way that provides their Chapter 13 debtors with the kind of representation

they expect and deserve. The question for Chapter 13 Trustees is what should our role be vis a vis these attorneys, and how might that role change in the future.

This task of policing the ranks of attorneys is a big responsibility, one not to be taken lightly. And the parameters of our role are not always clear. Like every licensed attorney, we have an obligation to report ethical problems and incompetency to the state bar. Some judges and some US Trustee offices look to us to take action against attorneys who are not serving their clients well; others fulfill that role themselves. Much of what we are expected to do varies significantly from jurisdiction to jurisdiction. Fortunately, there are resources to assist us in these situations. I have on multiple occasions made us of the state bar ethics attorneys, fellow Trustees, and the local US Trustee office to seek advice.

I have had occasion to take actions of varying degrees against about a half dozen debtor attorneys. I always start with informal conversations, phone calls, or lunches. If things don't improve, e-mails follow, establishing a record. If those don't work, I make it clear that unless things don't improve, I will have to file something with the Court or the state bar. Several of the attorneys I've had to confront decided to cease practicing Chapter 13; they knew they had problems and saw the handwriting on the wall. In other cases, a referral to the state bar committee assisting attorneys with substance abuse proved helpful. In the most egregious case we filed for and obtained monetary sanctions from the Court and a pledge by the attorney to meet certain practice standards in the future. Five years later, with no improvement, we sought his expulsion from the Bankruptcy Court. Under the rubric of *be careful what you ask for*, after he was dis-barred we spent over a year finding replacement attorneys for more than three hundred of his Chapter 13 debtors. It turned out to be a successful cooperative effort with the local bar, the US Trustee, and the state bar, and a reminder of how well the system can function when its various parts work together.

In all likelihood, Judges, debtors, and the US Trustee/Administrative Office will continue to look to us to report and take action of some kind against problematic attorneys. It "goes with the territory."

The Trustee as Employer and Disbursing Agent

As attorneys, usually with significant experience in Chapter 13, we usually come into this position with confidence in our ability to perform the legal aspects of the job. But many of us have not been the sole *buck-stops-here* person in our prior legal setting, and virtually none of us have been the disbursing agent for millions of dollars to distant parties every month. It takes some serious getting-used-to.

Running an office of disparate personalities while maintaining a very high level of financial and technological security is a never-ending challenge. There are always personnel issues either popping up or percolating just beneath the surface. Setting policies, enforcing them fairly, and amending them to fit changing circumstances is not something they teach us in law school. Nor is budgeting, electronic banking, or internet security. I have found that the best way to navigate all these changing tides is to make constant use of professionals who specialize in areas for which I have little or no expertise. I have used, and will continue to use, computer software and hardware experts, labor attorneys, team-building leaders, financial consultants, retirement plan advisors, Zoom consultants, staffing firms, health insurance agents, ergonomic advisors, and even office-yoga teachers. And more times than I can count I have tuned to smarter and more-experienced Chapter 13 Trustees. My lesson: don't be afraid to admit what I don't know, and be willing to pay for professional advice and services.

I've been lucky to have a staff that's small enough, and stable enough, that I've been able to get to know both them and their families. I had all of them take the Myers-Briggs test, which provided very helpful insights into their personalities and their work styles. Every Trustee has to decide what kind of management style and office structure fits

their personality and the needs of their particular staff: formal vs. informal; democratic vs. top-down; pipeline vs. team structure; etc. But whatever choices one makes, there will aways be the need for open and ongoing communication between the Trustee and the staff if one wants to maintain a stable work environment. As part of that communication, it's important to let your staff members experience the process firsthand—especially 341 meetings and an occasional court hearing. They should never be allowed to forget that all the documents and information they are processing are just a dry glimpse into the challenging lives of folks who are dangling over a financial cliff.

The money-disbursing part of our job is pretty straightforward: disburse funds every month; have redundant systems in place to make sure you're sending the money in the right amounts to the right payees; have backup systems to catch as many of the inevitable mistakes as you can as early as you can; segregate duties to lower the chances of, and opportunities for, financial mischief; and always be working with the experts to upgrade and protect your hardware and software. Our focus on security will always be there. As my first US Trustee supervisor drilled into me: *your job is to keep honest people honest; you probably won't deter the really dishonest ones, but those on the fence will think twice because they know you're watching.* The specific processes will change as we move toward faster and more secure electronic funds transfers--less paper and more digital records--so we will need to be willing to adapt to these changes. The lesson for Trustees: be willing to change and adapt your systems to keep up with latest technologies.

All of these issues have been exacerbated, and accelerated, by COVID. Teleworking, the role of virtual platforms, office structures, relationships with the other players in the systems: all have been pushed suddenly to the forefront as the virus has altered our vocational landscape. I had never seriously considered the teleworking option prior to March of 2020; I believed then, and still believe, that a certain critical mass of in-person chemistry and interaction is required to keep an office functioning well over time. Now I'm two years into The Teleworking Age with some of my staff and I realize I will need to provide at least a hybrid office structure if I don't want to lose some of them. Similarly, until last week I hadn't set foot in a Bankruptcy Courtroom for over two years, but to my surprise I have found that hearings and 341 meetings can be conducted quite satisfactorily over Zoom. And, living in a District where I have to drive over an hour each way to get to some of my Courtrooms, the time savings have been significant. Lesson for Trustees: some change is gradual, some is sudden; sometimes we will have to change faster and further than we would prefer; and sometimes we will be pleasantly surprised at the resulting new paradigm.

Conclusion

As Chapter 13 Trustees we play a number of roles and wear a number of hats. No matter how our portion of the consumer bankruptcy world evolves—regardless of what number our Chapter becomes—these issues will remain in some form. We will be communicators of information, educators of debtors and attorneys, intermediaries, good-will ambassadors, cops-on-the-beat, and employers. We will remain at the center of the process, connecting with all the players and stakeholders, looked-to for guidance, and expected to contribute significantly to the smooth-running and improvement of the system.

Some of us are better at welcoming change and adapting than others, but all of us will be required to get on board with the avalanche of new laws, technologies, and economic and cultural shifts that will mark this new century. Most of us like our job *because* it is so multi-faceted and challenging, because we get to play a meaningful part in this never-ending dance of debt and debtors, lawyers and judges, bureaucrats and creditors, Trustees and staff. We talk constantly among ourselves, sharing ideas and problems, looking for ways to do our job better. While many of the details of what we do and how we do it will inevitably change, the basics are likely to survive. Our primary challenge will continue to be balancing our different roles, working with the other players in this ongoing drama, and not losing sight of our primary goals: honoring the Pledge of Excellence, striving for *rough justice,* and working to ensure the integrity of the Chapter 13 process.

National Association of Chapter 13 Trustees (NACTT)
57th Annual Seminar - San Francisco, California
July 9, 2022

Panel on the Future of Consumer Bankruptcy
Recent Decisions on Bifurcated Attorney Fees

Fee Bifurcation Allowed

In re Prophet, No. 4:21-CV-01081-JMC, 2022 WL 766390 (D.S.C. Mar. 14, 2022) (J. Michelle Childs). The United States Trustee sought to cancel an attorney's bifurcated fee agreements in three chapter 7 cases for violating the bankruptcy court's applicable local rule. All three fee arrangements involved factoring agreements. After a review of several recent decisions on this issue, the district court found no binding precedent where such fee agreements were prohibited as a matter of law, reversed the bankruptcy court, and remanded the case for further proceedings. The court noted that the debtors favored the bifurcated fee arrangements and obtained satisfactory results from their counsel.

In re Brown, 631 B.R. 77 (Bankr. S.D. Fla. 2021) (J. Isicoff). The United States Trustee objected to the bifurcation of attorney fees in three chapter 7 cases and sought to enjoin the business practices of two law firms that represent consumer bankruptcy clients. With reference to the Supreme Court's decision in *Lamie* as well as the ABI Commission report on consumer bankruptcy, the court took a close look at Judge Wise's *Carr* decision, Judge Anderson's *Hazlett* decision, and Judge Williamson's *Walton* decision before approving bifurcated fee agreements—with certain conditions. Any flat fee arrangement must be reasonable, all necessary disclosures must be made to the debtor and the court, and debtors have a 14-day rescission period for all postpetition fee agreements. In addition, law firms are prohibited from advancing a debtor's filing fee with postpetition repayment because this practice violates the Bankruptcy Code and the Florida Bar Rules. All the bankruptcy judges for the Southern District of Florida agreed to follow this opinion.

Fee Bifurcation Not Allowed

In re Suazo, No. 20-17836-TBM, 2022 WL 1468083 (Bankr. D. Colo. May 10, 2022) (J. McNamara). The United States Trustee moved to examine the reasonableness of fees charged by a Colorado attorney to represent a consumer debtor who agreed to "file now and pay later" for his chapter 7 case. The attorney was a partner with Ovation, a law firm based in Arizona which utilized Fresh Start Funding for its financing, payment management, and line of credit needs for delinquent attorney fee payments. The court found that the pre-filing and post-filing fee agreements signed by the debtor were misleading, violated the Bankruptcy Code and the court's local bankruptcy rules, and were exceedingly confusing. The court enjoined the attorney and the Ovation law firm from making any misrepresentations or misleading statements in its fee agreements, and required them to provide clear, conspicuous, and comprehensive disclosures about its services. The court declined to make a *per se* prohibition against bifurcated fee agreements and limited its holding to the specific facts of this case.

« Critical Case Comment– Reverse Mortgage May be Modified Critical Case Comment »

Bifurcated Fees Under Examination

BY CONSIDERCHAPTER13, ON MAY 22ND, 2022

By William Houston Brown, Editor/Adviser for Academy

Bankruptcy and appellate courts in increasing numbers are considering whether it is appropriate for debtors filing for Chapter 7 relief and attorneys representing them to enter into bifurcated fee agreements. It has been recognized that one of the reasons that debtors may decide to file Chapter 13 rather than Chapter 7 is that attorneys require payment of the Chapter 7 fee "up front. Up-front payment is sought because, under the Bankruptcy Code, a debtor's pre-petition commitment to pay attorney fees after the bankruptcy filing may be discharged as part of the bankruptcy process. The system created a conundrum because many debtors have difficulty paying attorney fees in advance."[1] In contrast, under Chapter 13 the Code does not prohibit payment of the debtor's attorney fees by installment as part of the plan payments. This is not a new issue, but recent case law demonstrates more focus and is producing divergent views. A few of these recent court decisions will be explored in this article.

The American Bankruptcy Institute's Commission on Consumer Bankruptcy studied this issue, explored various options, and made recommendations that the Bankruptcy Code should be amended to address payment of Chapter 7 attorney fees.[2] One of the options considered was that section 329 of the Code might be amended to permit debtors and attorneys to enter into fully informed pre-petition agreements to pay the fees post-petition as an executory contract, but the Commission recommended that strict conditions be included in such contracts and that assignment or factoring of fees to be paid post-petition be prohibited.

As this issue is being developed in the courts, rather than in congressional amendment of the Bankruptcy Code, "some attorneys have begun using so-called 'bifurcated' fee agreements as a means of enabling debtors to pay most of the fees *after* they file for bankruptcy. Under the bifurcated fee agreement model, a debtor is asked to sign a pre-petition contract wherein an attorney agrees to provide only very limited legal services through the petition date. The attorney typically charges nothing or a small fee for performing the unbundled legal services, which consist of filing a 'bare-bones' or 'skeletal' case missing most of the documents required for a bankruptcy case to proceed to discharge. Then, the idea is that after the petition date, the debtor will be offered a new post-petition contract in which the debtor agrees to pay for the remaining deferred legal services (usually at a rate materially in excess of the standard up-front fee and payable in installments). The debtor is informed that if the debtor declines to sign a second fee agreement post-petition, counsel may withdraw, in which case the debtor will then need to proceed *pro se* or engage another lawyer."[3]

There are many factors that a bankruptcy court may consider in deciding whether to approve such bifurcated fee contracts between Chapter 7 debtors and their attorneys. One is whether the applicable rules of professional conduct permit such contracts and whether unbundling of legal services is permitted as a part of the fee agreement. Some recent bankruptcy court decisions have examined relevant ethical and professional responsibility rules and have concluded that bifurcated fee agreements do not necessarily violate such rules, but, of course, compliance with the applicable rules were part of those courts' grounds for approving such agreements.[4] This article does not attempt to examine potential applicable rules of professional conduct but merely points out that whether a bifurcated fee arrangement complies with such rules is a critical factor.

Another factor is whether such an arrangement complies with applicable local rules of the bankruptcy court. For example, in a recent District Court decision from South Carolina, *In re Prophet*,[5] a local rule had been interpreted as prohibiting bifurcated fee agreements because that rule required the Chapter 7 debtor's attorney to represent the debtor throughout the case, while a bifurcated fee arrangement could lead to the attorney withdrawing from representation when the debtor declined to enter into the post-petition fee agreement.[6] As explained in the District Court's opinion, in Chapter 7 cases in the District of South Carolina the debtors' attorney offered two payment options: prepayment of fees before filing the case or bifurcated fee agreements. Under the latter, the engagement was split between pre-petition and post-petition services, with the clients then having the option to enter into post-filing fee agreements within ten days after the case was filed. The debtors were given other options of representing themselves post-filing or engaging other counsel if they chose not to enter into the post-filing agreements. The fee agreements specified pre-filing and post-filing services. If the debtor chose to pay in full before filing, the fixed fee was $2,350, including filing fee, but with potential hourly rates post-petition for specific services. If the debtor chose the bifurcated agreement, financing was through a third party, which charged fees for the financing service.[7] The United States Trustee asserted that the bifurcated fee arrangements violated a local rule, and the Bankruptcy Court agreed, based on then existing interpretation of that rule.

On appeal the District Court referred to the Eighth Circuit Bankruptcy Appellate Panel's comment that bifurcated fee agreements "are designed to change the attorney's fees into a post-petition, non-dischargeable debt that can be collected from the client without violating either the automatic stay or the discharge injunction."[8] The District Court stressed that such bifurcated fee agreements require adequate disclosure about payments, and that they must comply with state rules of professional conduct and any relevant local rules. The Bankruptcy Court had determined that its local rule required continued representation by the attorney throughout the case, and such a requirement did not permit bifurcated fee agreements that could lead to the filing attorney's withdrawal after filing. The District Court reviewed recent opinions from other courts and found no binding authority that bifurcated fee agreements were prohibited as a matter of law. Then, the Court found that such agreements did not violate that District's local bankruptcy rule, with the debtors' attorney agreeing to remain the attorney of record until the Bankruptcy Court allowed withdrawal. In the cases on appeal, the filing attorney did not attempt withdrawal, and the debtors expressed satisfaction with the attorney's services and with the bifurcated fee arrangements. The Bankruptcy Court had not made findings on the reasonableness of the attorney fees or other related matters; therefore, those issues were not before the District Court, which reversed on the basis that the fee agreements were not violative of the local rule but remanded for other determinations.

On remand, the Bankruptcy Court will face decisions on whether there was adequate disclosure of the fee options, whether those disclosures complied with applicable Code and Rule requirements, as well as whether the bifurcated fee and financing proposals were reasonable.The range of such considerations is illustrated by a recent decision from the Bankruptcy Court in Florida, *In re Brown*.[9]

In *Brown*, the Court explored the issues of attorney competency and appropriate unbundling of legal services. This involved consideration of what services were required as part of a flat fee for pre-petition services and whether those offered services complied with Florida's Professional Bar Rules concerning attorney competency. Although unbundling of legal services was not prohibited by applicable State Bar Rules, there must be informed consent by the client, and the unbundling of services must be reasonable under the circumstances. The *Brown* Court stressed that whether a post-petition fee agreement was approved or not, the attorney was obligated to represent the debtor until withdrawal was approved by the Court, and in this case no withdrawal had been sought. In addition to full disclosure to the client, the attorney must fully disclose terms of the bifurcated fee agreement to the Court and parties in interest, which would include the United States Trustee and case trustee. The *Brown* Court then set out specific guidance to attorneys for what would be necessary for that Court to approve bifurcated fee agreements going forward.

A Bankruptcy Court in Colorado took a different direction, first examining the reasonableness of bifurcated fees charged by attorneys for Chapter 7 debtors and then finding the pre-petition and post-petition fee agreements before the Court "both contain misrepresentations and are misleading since, among other things, they did not accurately disclose counsel's obligations under the Bankruptcy Code and Local Rules. Thus, the Pre-petition Agreement and the Post-Petition Agreement are void under Section 526."[10] The attorneys involved had financing and payment management services for their consumer practice through Fresh Start Funding, LLC. The pre-petition agreement "contemplates only an admittedly deficient 'bare-bones' or 'skeletal' submission containing the minimum necessary to start a bankruptcy case," and the Court found that part of the agreement "misleading because it omits explanation of all the numerous additional filings which are required to be made pursuant to Section 521(a)(1)(B) and Fed. R. Bankr. P. 1007(b) and (c) within 14 days after the Petition Date."[11]

The Pre-petition Agreement was also defective because it did not offer an option for debtors to continue representation by the attorneys without regard to whether the debtors entered into a post-petition fee contract. The Post-petition Agreement was also defective because it failed to explain that the attorneys had a legal obligation under Code section 526 and Local Bankruptcy Rule 9010-1(c) "to file all documents required by Section 521(a)(1)(B) and Fed. R. Bankr. P. 1007(b) and (c) and perform all the Basic Services."[12]

In addition, the fee agreements in *Suazo* provided that the attorney would advance the case filing fee, which violated Code section 526(a)(4).[13] Finding the proposed bifurcated fee agreements to be void, all payments made by the debtors must be refunded. The *Suazo* Court declined to decide "whether bifurcated fees agreements are *per se* prohibited in every case and makes no such determination. And, the Court will not endorse a new framework for what types of bifurcated fee agreements might be good policy. That would seem best left to the Legislative Branch."[14] The Court only decided that the bifurcated fee agreements before it were void, in violation of the Bankruptcy Code and Local Rules.

Conclusion

As illustrated by these recent Court decisions, there is much uncertainty about whether bifurcated fee agreements in Chapter 7 cases will be approved by a bankruptcy court, and assuming a particular court did approve such an agreement, there is no assurance of consistency between various courts. Some courts are not ready to endorse bifurcation of Chapter 7 fees, and there is no present indication that Congress has an interest in tackling the issue. Where does that leave debtors and their attorneys? It seems that inability to pay Chapter 7 fees up front will continue to encourage debtors to file Chapter 13, where they are able to pay the entire legal fee through a plan. Whether this is the best result for a particular debtor is left to debtors and their attorneys to decide, but there are over-laying ethical questions involved in advising debtors which Chapter choice is best for them.

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[1] In re Suazo, 2022 WL 1468083, at *1 (Bankr. D. Colo. 2022). See also Lamie v. United States Trustee, 540 U.S. 526 (2004), for holding that Chapter 7 attorney fees on behalf of the debtors were not an administrative expense payable from the bankruptcy estate.

[2] American Bankruptcy Institute, Final Report of the ABI Commission on Consumer Bankruptcy, § 3.01 (2019), available at abi.org.

[3] In re Suazo, 2022 WL 1468083, at *1.

[4] *See, e.g.*, In re Hazlett, 2019 WL 1567751 (Bankr. D. Utah 2019); In re Carr, 613 B.R. 427 (Bankr. E.D. Ky. 2020).

[5] In re Prophet, 2022 WL 766390 (D. S.C. 2022).

[6] See In re Prophet, 628 B.R. 788 (Bankr. D. S.C. 2021), for interpretation of the Local Rule.

[7] Note that the ABI Consumer Commission recommended that factoring financing should not be permitted as a part of any bifurcated fee agreements. American Bankruptcy Institute, Final Report of the ABI Commission on Consumer Bankruptcy, § 3.01 (2019), available at abi.org.

[8] In re Prophet, 2022 WL 766390, at *4 (D. S.C. 2022), citing *In re Allen*, 628 B.R. 641, 644 (B.A.P. 8th Cir. 2021).

[9] In re Brown, 631 B.R. 77 (Bankr. S.D. Fla. 2021).

[10] In re Suazo, 2022 WL 1468083, at *1 (Bankr. D. Colo. 2022).

[11] *Id.*, at * 16.

[12] *Id.*, at * 18.

[13] *Id.*, citing In re Brown, 631 B.R. 77, 102-03 (Bankr. S.D. Fla. 2021).

[14] In re Suazo, 2022 WL 1468083, at * 21.

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The Honorable William Houston Brown retired in 2006 as a United States Bankruptcy Judge for the Western District of Tennessee, and he had been designated to sit also in the Middle District of Tennessee, Southern District of Florida, Eastern District of Michigan and Western District of Kentucky. Judge Brown served a four-year term on the Bankruptcy Appellate Panel for the Sixth Circuit from 1999 through 2002. He received his law degree from the University of Tennessee College of Law, where he was Order of the Coif. Judge Brown is a member of the American Bankruptcy Institute, having served on its Board and Executive Committee, and he is a Fellow in the American College of Bankruptcy. He is the author or co-author of several texts, including Bankruptcy Exemption Manual, 2005 Bankruptcy Reform Legislation with Analysis 1st and 2d editions, Bankruptcy and Domestic Relations Manual, The Law of Debtors and Creditors, as well as bankruptcy form books, all published by Thomson West. He is also a principal contributing editor for Norton Bankruptcy Law and Practice 3rd, published by Thomson West. Judge Brown prepares a quarterly update of consumer cases for the Federal Judicial Center, which distributes those materials to all bankruptcy judges, and he is a speaker at the Federal Judicial Center's annual seminars for bankruptcy judges. He also speaks regularly at seminars throughout the United States, on consumer bankruptcy topics. Judge Brown co-authors Chapter 13 Bankruptcy 4th ed., a digital publication, available at ch13online.com. Judge Brown also acts as a mediator in bankruptcy-related disputes, has conducted mock trials, and has testified as an expert witness in bankruptcy court proceedings.

ATTORNEY'S FEES, JUST ADDED, MEMBER, THE TOOLBOX

« Critical Case Comment– Reverse Mortgage May be Modified

Critical Case Comment »

calculations for the means test in section 707(b)(2)(A)(i)(I) specify to use the National Standards and Local Standards as of the order for relief, which section 348(a) again directs is the original filing date in a converted case. Similarly, section 707(b)(2)(A)(iii) allows a debtor to deduct payments "contractually due" for the six months after the filing of the petition. In addition, there is the common-sense concern that it would make little sense to apply deductions to income for a time period other than when that income is calculated. For all of these reasons, the Commission believes the statute clearly directs that the means test should be applied as of the date of the original filing — namely, that the debtor should be able to convert from chapter 13 only if the debtor would have been eligible to file chapter 7 on the original petition date.

The Commission also believes these interpretations represent sound policy and would support a clarifying amendment from Congress to implement them. Section 704(b)(1) gives the US. Trustee (or bankruptcy administrator) ten days after the meeting of creditors to review all materials filed by the debtor and file with the court a statement on whether the debtor's case would be presumed an abuse under section 707(b) (i.e., fails the means test). The U.S. Trustee then has seven days to provide a copy of the statement to all creditors. In making clarifying amendments to implement the Commission's recommendation, Congress should consider whether it would need to address the deadlines in section 704(b)(1).

§ 3.09 Document-Production Requests by Bankruptcy Trustees

(a) The Commission endorses the "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases."

(b) The "Best Practices" document should be part of the *Handbook for Chapter 7 Trustees*.

Background. Section 521(a) requires a debtor to make many disclosures at the time of filing:

- bankruptcy schedules detailing assets, liabilities, income, and expenses;
- a statement of financial affairs;
- payment advices received within 60 days of filing;
- a statement of net monthly income, itemized to show how the amount is calculated;
- a statement disclosing any reasonably anticipated increases in income for one year after filing; and
- a statement of intention with regard to property that secures a debt.

In addition, section 521(e) requires the debtor to provide the trustee a copy of the debtor's most recent federal income tax return, and section 521(a)(3) imposes a duty on debtors to cooperate with the bankruptcy trustee, which may require the debtor to provide further documentation that the bankruptcy trustee requests. These statutory provisions are supplemented by Federal Rule of Bankruptcy Procedure 4002, which requires the debtor to provide to the trustee at the meeting of creditors evidence of current income and statements for each of the debtor's depository and investment accounts for the time period that includes the date of the petition.

In its public meetings and through written submissions, the Commission received negative comments about document requests from some bankruptcy trustees that routinely go beyond the requirements of section 521, rule 4002, and the official bankruptcy forms. These comments gave examples of requests the commenter believed were unreasonable. The comments also discussed the burden of having to comply with routine extra documentation requests that varied not just from district to district but from trustee to trustee within a district. Other comments discussed burdens that arose from the formatting that some trustees demanded for submitted documentation. Excessive routine document requests waste resources across the entire system — those of trustees, debtors, and even the courts.

Recommendation. The Commission acknowledged the validity of the comments it had received but also recognized that many documentation requests from trustees are necessary to verify information the debtor has provided. Debtors' attorneys also can fail to act with alacrity in response to legitimate document requests that would allow trustees to value assets. The challenge is to draw lines between unreasonable routine requests and appropriate requests when the trustee needs the information.

The Commission observed it is not breaking new ground on this issue. Acting in consultation with the National Association of Bankruptcy Trustees, the National Association of Chapter 13 Trustees, and the National Association of Consumer Bankruptcy Attorneys, the USTP has developed a document titled, "Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases."[186] The document begins with an example of an unreasonable document-production request:

> A trustee asks every debtor to supply copies of automobile titles, copies of a county treasurer's tax statement for real property, six months of bank statements, three years of tax returns, an itemized inventory of household goods, copies of divorce decrees or property settlements entered in the last three years, and copies of the complaint and answer in any legal proceeding to which the debtor is a party. This request is excessive. There may be good reasons to make any or all of these requests in an individual case, but a blanket request for all of these documents should not be made in all cases.

186 U.S. Dep't of Justice, Best Practices for Document Production Requests by Trustees in Consumer Bankruptcy Cases," https://www.justice.gov/sites/default/files/ust/legacy/2012/07/23/best_practices.pdf (last visited Jan. 13, 2019); *see also* U.S. Dep't of Justice, Director Addresses the 35th Annual Convention of the National Association of Bankruptcy Trustees, https://www.justice.gov/ust/speeches-testimony/director-addresses-35th-annual-convention-national-association-bankruptcy-trustees (last visited Jan. 28, 2019) (reporting comments of Director Clifford J. White about the best-practices document and reports received through the Commission expressing concerns about overly burdensome document requests).

The document continues with other examples of unreasonable document requests. As noted above, there are often legitimate reasons for a trustee to request additional documentation, and the "Best Practices" document also has examples of reasonable trustee requests for extra documentation, as in situations of an expensive home value accompanied by very nominal household furnishings or a home value for a residence that the trustee knows is inconsistent with home prices in that area.

The comments the Commission received and the experience of the commissioners themselves suggested that the "Best Practices" document is not always followed. The Commission has concluded, however, that the "Best Practices" document provides sound guiding principles for document-production requests. The Commission recommends that the USTP incorporate the guidelines from the "Best Practices" document into the *Handbook for Chapter 7 Trustees*. Having the document as a formal part of the *Handbook for Chapter 7 Trustees* will make its guidance more prominently available, as well as aid in enforcement both against trustees who make unreasonable documentation requests and against debtors who fail to provide reasonable documentation.

§ 3.10 Chapter 13 Debt Limits

(a) Congress should amend section 109(e) to provide that an individual is eligible for chapter 13 if the individual has less than $3,000,000 in total noncontingent, liquidated debts, eliminating the distinction between secured and unsecured debts. The new debt limit should continue to be adjusted for inflation according to section 104(a).

(b) In the case of married persons, Congress should amend section 109(e) so the following rules clearly apply:

(1) If only one spouse files, the debts of the nonfiling spouse that are not the liability of the filing spouse should not count against the filing spouse's debt limit. Debts of the filing spouse thus should not be aggregated with the debts of a nonfiling spouse.

(2) If both spouses file, each should have the benefit of the debt limit. Debts owed by both spouses are counted against each spouse's limit.

Amount of Debt Cap. Currently, an individual is eligible for chapter 13 relief if that person has "noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850."[187] These amounts are automatically adjusted for inflation every three years.[188]

The Commission believes the chapter 13 debt limits no longer work well given the amounts of outstanding household debt and that the debt limits sometimes lead to satellite litigation that often does not advance any core bankruptcy policy. Therefore, the Commission recommends that Congress amend section

187 11 U.S.C. § 109(e).

188 *See id.* § 104(a).

Bivens v. Newrez LLC (In re Bivens)

625 B.R. 843 (Bankr. M.D.N.C. 2021)
Decided Mar 25, 2021

Bankruptcy Case No. 14-80841 AP No. 20-09018

03-25-2021

IN RE: Wendy BIVENS Debtor. Wendy Bivens, Plaintiff, v. NewRez LLC f/k/a New Penn Financial, LLC and d/b/a Shellpoint Mortgage Servicing and CitiMortgage, Inc., Defendants.

Khoury L. Hicks, Craig M. Shapiro, Law Offices of John T. Orcutt, Durham, NC, for Plaintiff. Jason K. Purser, Andrew L. Vining, LOGS Legal Group, LLP, Charlotte, NC, for CitiMortgage Inc.

Catharine R. Aron, UNITED STATES BANKRUPTCY JUDGE

845 *845

Khoury L. Hicks, Craig M. Shapiro, Law Offices of John T. Orcutt, Durham, NC, for Plaintiff.

Jason K. Purser, Andrew L. Vining, LOGS Legal Group, LLP, Charlotte, NC, for CitiMortgage Inc.

MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS COMPLAINT

Catharine R. Aron, UNITED STATES BANKRUPTCY JUDGE

846 This adversary proceeding came before the Court on February 25, 2021, to consider *846 the Motion to Dismiss Adversary Proceeding [Doc. #10] (the "Motion to Dismiss") filed by Defendant CitiMortgage, Inc. ("Defendant") on October 12, 2020. At the hearing, Jason Purser and Andrew Vining appeared on behalf of Defendant, Koury Hicks and Craig Shapiro appeared on behalf of Wendy Bivens ("Plaintiff"), and William Miller appeared as the United States Bankruptcy Administrator. After considering the Motion to Dismiss, the Brief in Support of the Motion to Dismiss [Doc. #15], the Brief in Opposition to the Motion to Dismiss [Doc. # 30], the arguments of counsel, and the record in this proceeding, the Court finds that the Motion to Dismiss should be denied for the reasons that follow.

BACKGROUND

On July 31, 2014, Plaintiff filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code. Plaintiff owns real property located at 1618 South Alston Avenue, Durham, North Carolina (the "Property"), which is Plaintiff's principal residence. The Property secured a mortgage claim held by Defendant. Plaintiff's plan was confirmed on October 20, 2014. Pursuant to the confirmed plan, Plaintiff proposed to pay the mortgage as a long term debt with the Chapter 13 Trustee to make ongoing monthly mortgage payments to Defendant in addition to monthly payments on the prepetition arrearage in an amount "To be determined" (Case No. 14-80841, Doc. # 21). Defendant filed a proof of claim on November 14, 2014,

indicating that the ongoing monthly mortgage payment was $1,128.08 and the total arrearage claim was $7,011.61 (Claim #3). The ongoing monthly mortgage payment was later reduced to $1,069.54 effective August 2015 due to an escrow change (Case No. 14-80841, Doc. # 29).

On December 9, 2016 a Notice of Transfer was filed indicating that Defendant assigned the deed of trust and secured claim to Ditech Financial, LLC, with notices and payments to be sent to Ditech Financial, LLC (Case No. 14-80841, Doc. # 44). On July 19, 2017 a Notice of Transfer was filed indicating that Ditech Financial, LLC assigned the deed of trust and secured claim to New Penn Financial, LLC d/b/a/ Shellpoint Mortgage Servicing with notices and payments to be sent to Shellpoint Mortgage Servicing (Case No. 14-80841, Doc. # 46). On January 29, 2020, the Trustee filed a Notice of Final Cure Mortgage Payment (Case No. 14-80841, Docket # 60). NewRez, LLC d/b/a Shellpoint Mortgage Servicing responded to the Notice of Final Cure Payment agreeing that the prepetition arrearage was cured and that the Plaintiff was current on all postpetition payments, with the next payment due on February 1, 2020 (Case No. 14-80841, Docket # 61). On February 19, 2020, a Notice of Transfer was filed indicating that New Penn Financial, LLC d/b/a/ Shellpoint Mortgage Servicing assigned the deed of trust and secured claim to NewRez, LLC d/b/a/ Shellpoint Mortgage Servicing with notices and payments to be sent to NewRez, LLC d/b/a/ Shellpoint Mortgage Servicing (Case No. 14-80841, Doc. # 62). Plaintiff made all payments required under the confirmation order and received her Order of Discharge on June 1, 2020 (Case No. 14-80841, Doc. # 69). Plaintiff received a Notice of Default and Intent to Accelerate from Shellpoint on June 2, 2020 (Doc. #1, ¶ 84). Her bankruptcy case was closed on July 8, 2020.

On August 19, 2020, Plaintiff filed a motion to reopen her bankruptcy case for the purpose of filing an adversary proceeding against her past and present mortgage holders which was granted by Order dated
847 September 11, 2020 (*847 Case No. 14-80841, Doc. # 77 & 81). The same day the case was reopened, Plaintiff filed a complaint against NewRez LLC f/k/a New Penn Financial, LLC and d/b/a/ Shellpoint Mortgage Servicing and Defendant. The complaint contains three claims for relief: (1) violation of the discharge injunction, (2) violation of the automatic stay, and (3) violation of Bankruptcy Rule 3002.1(c)[1] . Plaintiff asserts that Defendant willfully failed to correctly credit payments received under the confirmed plan, in violation of the discharge injunction and automatic stay (Doc. #1, ¶¶ 144, 208). Specifically, Plaintiff alleges that Defendant misapplied ongoing monthly payments received from the Trustee to the prepetition arrearage claim, misapplied ongoing monthly payments to the wrong month, and misapplied prepetition arrearage payments to the ongoing monthly installment payments (Doc. #1, ¶¶ 96-98). Plaintiff further asserts that Defendant assessed fees, expenses, and charges to Plaintiff's account without filing the requisite notice pursuant to Bankruptcy Rule 3002.1(c) including late charges, foreclosure attorney fees, bankruptcy costs, property inspections, technology fees, appraisal fees, and electronic invoice fees (Doc. #1, ¶ 191).

[1] In addition, Plaintiff alleged violation of Bankruptcy Rule 3002.1(g) only as to NewRez LLC f/k/a New Penn Financial, LLC and d/b/a/ Shellpoint Mortgage Servicing. This Motion to Dismiss only pertains to the claims alleged against CitiMortgage, Inc.

On October 12, 2020, Defendant filed their answer and this Motion to Dismiss which is presently before the Court requesting that the Court dismiss the complaint for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6), made applicable in this proceeding via Rule 7012 of the Federal Rules of Bankruptcy Procedure, provides that a complaint should be dismissed if "it fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To satisfy this pleading standard, the complaint must

allege facts sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v. Twombly* , 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is plausible if the plaintiff pleads facts that allow the Court to reasonably infer that the plaintiff is entitled to his sought-after relief. *Ashcroft v. Iqbal* , 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). To determine plausibility, all well-pled facts set forth in the complaint are taken as true and viewed in a light most favorable to the plaintiff. *Id.* "[L]egal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement" will not constitute well-pled facts necessary to withstand a motion to dismiss. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* , 591 F.3d 250, 255 (4th Cir. 2009). In addition, "if the complaint lacks an allegation regarding an element necessary to obtain relief," dismissal is proper under Rule 12(b)(6). 2 MOORE'S FEDERAL PRACTICE § 12.34(4)(a) (2019); *see also EEOC v. PBM Graphics* , 877 F. Supp. 2d 334, 343 (M.D.N.C. 2012) (finding that a plaintiff must allege facts sufficient to state each element of his claim in order to survive a 12(b)(6) motion to dismiss) (citing *Bass v. E.I. DuPont de Nemours & Co.* , 324 F.3d 761, 764–65 (4th Cir. 2003)).

DISCUSSION

I) First Cause of Action: Violation of the Section 524(i) Discharge Injunction

848 Plaintiff contends that Defendant violated 11 U.S.C. § 524(i) by willfully failing *848 to correctly credit payments received under the confirmed plan and as such asks the Court to sanction Defendant pursuant to its authority under 11 U.S.C. § 105.[2] 11 U.S.C. § 524(i) provides that:

> [2] 11 U.S.C. § 105 "allows a bankruptcy court to hold a creditor in civil contempt, and impose contempt sanctions, for violating the discharge injunction." *Williams v. Citifinancial Servicing LLC (In re Williams)* , 612 B.R. 682, 690 (Bankr. M.D.N.C. 2020) (citing *Taggart v. Lorenzen* , —— U.S. ——, 139 S. Ct. 1795, 1801, 204 L.Ed. 2d 129 (2019)).
>
> --------
>
> The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming a plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

11 U.S.C. § 524(i). Thus, there are two requirements that must be met to establish a violation of § 524(i) : (1) a willful failure to credit payments received under a confirmed plan and (2) material injury to the debtor. *Williams v. Citifinancial Servicing LLC (In re Williams)* , 612 B.R. 682, 691 (Bankr. M.D.N.C. 2020) (citing *Ridley v. M&T Bank (In re Ridley)* , 572 B.R. 352, 361 (Bankr. E.D. Okla. 2017)).

As to the first requirement, in the context of § 524(i), "willfullness" only requires that the creditor intended to apply the payments received in the manner it applied them. *See In re Williams* , 612 B.R. at 691. "Willfullness" does not require bad faith nor a specific intent to violate the Code or plan provisions. *Id* . In the Complaint, Plaintiff alleges that Defendant "willfully failed to correctly credit payments received under the confirmed plan" (Doc. #1, ¶ 144). Specifically, the Plaintiff alleges that Defendant misapplied ongoing monthly payments received from the Trustee to the prepetition arrearage claim, misapplied ongoing monthly payments to the wrong month, and misapplied prepetition arrearage payments to the ongoing monthly installment payments (Doc. #1, ¶¶ 96-98). Plaintiff alleges that Defendant communicated inaccurate account information to Shellpoint, due to the misapplied payments, which led to Shellpoint demanding post-discharge payments of amounts that had already been paid during the Chapter 13 Plan and caused Shellpoint to send Plaintiff a Notice

of Default and Intent to Accelerate, initiating a foreclosure action on Plaintiff's home of over fifty years (Doc. #1, ¶¶ 84, 171). The Court finds that the allegation that Defendant willfully misapplied payments, which is supported by the subsequent inaccurate account balance and threat of foreclosure, sufficiently plausible taken in the light most favorable to the Plaintiff to survive a motion to dismiss.

As to the second requirement, a material injury to the debtor, this will "be met in virtually every case involving a secured creditor, because the failure to properly credit payments will almost always result in a higher payoff balance for the debtor and therefore a larger lien on the debtor's property than if the payments were credited properly." *Id* . at 692 (quoting 4 Collier on Bankruptcy ¶ 524.08 (16th ed. 2019)). The Complaint alleges this precise injury, that due to the misapplication of payments, there was "an allegedly past due balance upon discharge" which led to "Shellpoint demanding post-discharge payments of amounts that had already been paid
849 during the Chapter 13 Plan" (Doc. *849 #1, ¶¶ 5, 171). Plaintiff also alleges emotional injury (Doc. #1, ¶ 173).

Further, this Court has previously held in *Williams* that where a creditor misapplies payments under a confirmed plan and then transfers the account with records showing an incorrect payment history and inflated loan balance, causing injury to the plaintiff, that those actions could constitute a violation of § 524(i). *In re Williams* , 612 B.R. at 693-94 (finding that § 524(i) applies to both current and previous claim holders. Also finding that transferring a "mortgage account with an inflated balance due to misapplied payments sufficient to constitute an act to collect for the purposes of withstanding a motion to dismiss under Rule 12(b)(6)"). As such, the facts pled in the Complaint are sufficient to state a plausible claim for violation of the § 524(i) discharge injunction.

II) Second Cause of Action: Violation of the Automatic Stay

Plaintiff also seeks sanctions against Defendant for violation of the automatic stay pursuant to 11 U.S.C. § 362(k). Section 362(k) provides that "an individual injured by any willful violation of a stay ... shall recover actual damages including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k). Therefore, to support a claim for violation of the automatic stay, a movant must show 1) that there was a violation of the automatic stay, 2) that the violation was willful, and 3) that actual damages resulted from the violation. *In re Williams* , 612 B.R. at 694 (citing *Ridley v. M&T Bank (In re Ridley)* , 572 B.R. 352, 361 (Bankr. E.D. Okla. 2017).

Plaintiff alleges that the misapplication of payments received under the confirmed plan constitutes a violation of the automatic stay (Doc. #1, ¶¶ 204-06). This Court has followed the majority of courts and has held that "misapplication of chapter 13 plan payments is a cause of action for violation of the automatic stay." *In re Williams* , 612 B.R. at 694. However, Defendant contends that there was no violation of the automatic stay as Defendant never communicated the erroneously credited payments to the Debtor and that their bookkeeping entries do not violate the automatic stay, citing the First Circuit's decision in *Mann v. Chase Manhattan Mort. Corp* ., 316 F.3d 1 (1st Cir. 2003). While it is true that there is no violation of the automatic stay if the erroneous bookkeeping entries are "in no manner communicated to the debtor, the debtor's other creditors, the bankruptcy court, nor any third party," that is distinguishable from what the Plaintiff alleges in the case at hand. *Mann* , 316 F.3d at 3. Here, the Plaintiff alleges that the Defendant misapplied payments and then transferred the account with an inflated loan balance which led the subsequent claim holder to attempt to collect the inflated balance. These allegations are sufficient for this Court to make the reasonable inference that the alleged misapplied payments were not simply internal bookkeeping records as discussed in *Mann* .

Plaintiff also alleges that the violation of the automatic stay was willful. To constitute a willful violation of the automatic stay, a creditor need only "commit an intentional act with knowledge of the automatic stay." *Citizens Bank v. Strumpf (In re Strumpf)* , 37 F.3d 155, 159 (4th Cir. 1994). Plaintiff alleged that Defendant was aware of both the automatic stay and the confirmed plan and despite this knowledge misapplied the payments received under the confirmed plan (Doc. #1, ¶¶ 30, 56, 59, 160). Thus, Plaintiff has plausibly pled a willful
850 violation of the automatic stay.*850 Finally, Plaintiff contends that she did in fact suffer actual damages as a result of the violation of the automatic stay. Plaintiff has alleged that due to the misapplication of payments under the confirmed plan there was "an allegedly past due balance upon discharge" which led to "Shellpoint demanding post-discharge payments of amounts that had already been paid during the Chapter 13 Plan and threatening to foreclose" (Doc. #1, ¶¶ 5, 171). Plaintiff also alleges emotional injury (Doc. #1, ¶ 173). The Court finds the allegations in the Complaint regarding damages sufficient for the purposes of Rule 12(b)(6) and that Plaintiff has plausibly pled all elements required under § 362(k).

III) Third Cause of Action: Violation of the Bankruptcy Rule 3002.1(c)

Plaintiff's final cause of action alleges that Defendant failed to give notice of assessed fees, expenses, and charges as required by Bankruptcy Rule 3002.1(c) and seeks sanctions under Bankruptcy Rule 3002.1(i). Bankruptcy Rule 3002.1(a) states that the noticing requirements of Rule 3002.1(c) apply "in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments..." Bankruptcy Rule 3002.1(a). Thus, Rule 3002.1(c) is applicable to the claim at hand.

Pursuant to Bankruptcy Rule 3002.1(c):

> The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

Bankruptcy Rule 3002.1(c).

Plaintiff alleges that Defendant "assessed fees, expenses, and charges to the Account without filing the requisite notice and notifying [Plaintiff], [Plaintiff]'s counsel, and Trustee Hutson pursuant to Rule 3002.1(c), including late charges, foreclosure attorney fees, 'bankruptcy costs,' property inspections, 'technology fees,' appraisal fees, and 'elec invoice fees.' " (Doc. #1, ¶¶ 185, 191). Plaintiff contends that Defendant transferred the account with the assessed fees, expenses, and charges, thus asserting the recoverability of such fees (Doc. #1, ¶¶ 61, 62).

Under Bankruptcy Rule 3002.1(i), if a holder of a claim fails to provide the notice required under Rule 3002.1(c), the court may take either or both of the following actions:

> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Bankruptcy Rule 3002.1(i).

Pursuant to Rule 3002.1(i), "[t]he only defense a creditor has to this action by the court is to prove that the failure to provide the information was substantially justified or harmless." 9 Collier on Bankruptcy ¶ 3002.1.03 (16th ed. 2020). Plaintiff alleges that Defendant's failure to provide the information required by Rule 3002.1(c) "was not substantially justified" and "was not harmless" (Doc. #1, ¶¶ 185, 186). Plaintiff contends that Defendant transferred the account with the assessed fees, expenses, and charges, thus asserting the
851 recoverability *851 of such fees, which inflated the balance of the amount owed as the "failure to comply with Rule 3002.1(c) prevented [Plaintiff], her counsel, and Trustee Hutson from utilizing Rule 3002.1(e) by moving this Court to 'determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code' " (Doc. #1, ¶ 80). Taking Plaintiff's allegations as true, for the purposes of Rule 12(b)(6), this Court finds that Plaintiff has plausibly pled her cause of action for violation of Bankruptcy Rule 3002.1(c) and sanctions pursuant to Bankruptcy Rule 3002.1(i).

CONCLUSION

For the reasons as stated above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss the Complaint is DENIED.

SO ORDERED.

M. Elaine Hammond

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re Mark C. Bingham, Debtor.	Case No. 16-53217 MEH Chapter 13

MEMORANDUM DECISION RE OBJECTION TO CONFIRMATION

The Chapter 13 Trustee (the "Trustee") filed an eighth amended objection to confirmation of Debtor's plan in this case on March 7, 2018 (the "Objection) (Dkt. #83). A contested confirmation hearing was held on March 20, 2018. Appearances were as stated on the record.

Objection Points 1 and 2

The Objection contains four points. The first point is a request that Debtor provide the Trustee with a copy of each federal and state income tax return and W-2 form required under applicable law with respect to each tax year of Debtor's ending while the case is pending confirmation. This objection point is a standing objection point for the Trustee and has not been addressed in briefing or argument.

The second point relates to an additional provision in Debtor's most recent plan (the "Plan") (Dkt. #68) which states:

"Notwithstanding the value of the collateral in Schedule A/B, the claim of Stirling Jewelers Inc. will be paid in full."

The Objection and Trustee's brief (Dkt. #84) state that Trustee's substantive objection on this additional provision has been resolved and all that remains is court approval. No other creditor has objected to it. This provision is specific to this case and is approved.

Objection Point 3 – Attorney's Fees Paid Post-Discharge

The second additional provision in the Plan states:

"Attorneys fees and costs approved by the court but unpaid as of completion of the plan shall not be discharged and shall be paid directly by the debtor to counsel for the debtor notwithstanding the discharge."

Debtor's counsel seeks to include this additional provision in this case as well as in future filings by other debtors. It is unknown at this time whether fees will be fully paid through the Plan in this case.

Debtor cites to *In re Johnson*, 344 B.R. 104 (BAP 9th Cir. 2006) for the proposition that a debtor and attorney may arrange for fees to be paid outside of the plan. There, the confirmed plan excepted unpaid attorney's fees from discharge. The court held that the provision whereby the attorney waived his right to full payment under the plan so long as full payment was made by the debtor after discharge was permitted if agreed to by the attorney, as holder of a priority claim. *Id.* at 107-08. Agreement between the debtor and the attorney was evidenced by filing of a plan containing the provision, and the court subsequently approved the plan. *Id*. The court in *In re Vasquez* (14-50507), a 2017 bankruptcy case in the Northern District of California, applied the holding in *Johnson* and found that the parties were permitted to include a provision in the plan that Debtor's counsel's fees be reserved from

discharge. In so holding, the *Vasquez* court noted that the Bankruptcy Code does not explicitly bar the payment of fees outside of a plan.

Trustee argues that this additional provision would upend a long-standing practice in this district, that the Chapter 13 Rights and Responsibilities (Dkt. #14) does not allow it, and that the provision is premature and thus does not fit the holding of *Vasquez*, where considerable fees had been incurred towards the end of the case. These arguments stand in the shadow of a larger worry: does this arrangement unduly benefit attorneys, saddling a debtor with new debt as they emerge from Chapter 13? The Objection and the Trustee's brief reflect a concern that these payments abrogate the very purpose of a bankruptcy case and sully a debtor's fresh start.

By inclusion of the additional provision, Debtor and counsel have agreed to a payment arrangement that may continue following completion of the Plan notwithstanding the discharge. This is similar to the facts in *Johnson* and *Vasquez* referenced above. Their agreement does not flout the requirements of 11 U.S.C. § 1322(a)(2), which states only that priority claims must be paid through the plan unless the claimant agrees to a different treatment. Nor does this arrangement challenge the requirements of the Chapter 13 Rights and Responsibilities, which only state that fees should be paid through the plan, unless otherwise ordered.

The Trustee's argument that *Vasquez* should be distinguished based upon when the attorney's fees were incurred is unsupported by the order in that case (Dkt. #82 in 14-50507). Instead, the order states " . . . it is certainly not an absolute requirement of the Bankruptcy Code that debtor's counsel's fees be paid under the plan." It also refers to the language of § 1322(a)(2) and the Rights and Responsibilities, and the holding in *Johnson* as its basis for holding that the fees may be reserved from discharge. There is no mention of a circumstantial exception being made to account for fees incurred late in the case.

Per *Johnson*, the explicit language of § 1322 and the Rights and Responsibilities, and the lack of contravening authority, this additional provision is approved and Trustee's

objection is overruled on this point. In the absence of law that bars this provision, Trustee's concerns about a debtor's true eligibility for a Chapter 13 appear unfounded.

As to the benefit to attorneys over debtors, Trustee argued at the hearing that debtors rarely contest fee applications and courts rarely reduce fees. This argument fails to account for the requirement that bankruptcy courts closely review fee applications.

The Trustee's reference to *In re Hines* reflects a concern about debtors agreeing to debts with unknown deadlines and amounts. 147 F.3d 1185, 1190 (9th Cir. 1998) (dealing with reaffirmation of a debt between an attorney and a debtor in the context of a Chapter 7 case). The court echoes this concern. In the interest of disclosure and transparency, counsel for a debtor whose plan incorporate an additional provision such as that proposed here must also comply with the following:

- The additional provision must be revised so as to apply only to a discharge in the Chapter 13 case. For example: "Attorneys fees and costs approved by the court but unpaid as of completion of the plan shall not be discharged and shall be paid directly by the debtor to counsel for the debtor notwithstanding a discharge entered in this Chapter 13 case."
- The order confirming a plan that contains such an additional provision shall include the following: "Conversion of the case to Chapter 7 voids the additional provision. If converted, Counsel is required to file a claim for any unpaid fees, and will receive a distribution on such claim pursuant to § 726 if there are sufficient assets in the estate to do so. Any unpaid portion of the claim is discharged."[1]
- Prior to incurring fees that will require the filing of a supplemental fee application in which counsel anticipates the fees will not be paid in full prior to

[1] See § 727(b); *In re Simpson*, No. 15-10250, 2017 WL 2198955 at *1 (Bankr. N.D. Cal. May 18, 2017) ("When a case is converted from Chapter 13 to Chapter 7, attorneys' fees incurred before conversion are treated as prepetition debts pursuant to § 727(b) of the Bankruptcy Code and are therefore discharged along with all other debt.") (citing *In re Fickling*, 361 F.3d 172, 175 (2d Cir. 2004)).

discharge, counsel shall meet in person with the debtor to explain what fees are anticipated to be paid through the plan and what they will seek to collect following discharge.

- Counsel must explain, and provide in writing, the following to the debtor:
  - He or she will not be able to discharge the fees in a subsequent Chapter 7 case for six years pursuant to § 727(a)(9),
    - unless payments under his or her Chapter 13 plan provided for 100% of the allowed unsecured claims in the case, or
    - debtor paid 70% of allowed unsecured claims and the plan was proposed in good faith and was his or her best effort;
  - He or she will not be able to discharge the fees in a subsequent Chapter 13 case for two years pursuant to § 1328(f)(2).
- Counsel shall also discuss with the debtor how they will pay the fees.
- Finally, counsel shall also tell the debtor how he or she will collect the fees if the debtor does not pay them.[2]

- In any supplemental fee application:
  - State that the plan includes a provision authorizing payment of fees post-discharge;
  - State whether the requested fees are anticipated to be paid through the plan;
  - If the requested fees are not anticipated to be paid through the plan, then specifically state the amount expected to remain due post-

[2] If the use of this additional provision is adopted by multiple counsel, I anticipate that the court will revise the "Rights and Responsibilities of Chapter 13 Debtors and their Attorneys" to address the use of this provision.

discharge and certify that counsel held an in person meeting with the debtor as required above.

- Counsel must also serve debtor with the fee application, accompanied by a cover letter consistent with the "Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees," paragraph 7. The letter must clearly state the additional information required above in the supplemental fee application.

Objection Point 4 - Effective Date of the Plan

The final point of the Objection relates to the final additional provision in the Plan, which states that the effective date is the commencement of the case.

As Trustee concedes, the effective date is not defined by the Bankruptcy Code. In its decision in *In re Nguyen*, Case No. 16-52743, this court held that the effective date of the plan for purposes of the § 1325(a)(4) is the confirmation date, unless an alternate date is provided for in the plan. Tracking the analysis in *In re Hoopai*, if no date is provided in a Chapter 13 plan, the effective date is confirmation. *Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai)*, 581 F.3d 1090, 1101 (9th Cir. 2009). This was confirmed by the Ninth Circuit BAP in *In re Messer*, 2014 WL 643712 at *4–5 (Feb. 19, 2014), which held that if the debtor's Chapter 13 plan does not include a specific effective date, then the effective date of the plan is the confirmation date. Consistent with this case law, the debtor may provide a specific date, but if the plan does not provide for such a date then confirmation shall serve as the effective date. Debtor here has chosen the commencement of the case as his effective date.

Trustee argues that Debtor is attempting to circumvent the requirements of the Bankruptcy Code and exclude an arbitration award from the estate. Debtor argues that his choice of effective date is based on an interest in receiving the best possible valuation for his real property, which is the subject of a motion to value. At the hearing, the parties agreed that the arbitration award is property of the bankruptcy estate, thus this additional provision is not

in dispute in this case. However, Debtor's counsel has indicated that she wishes to use this additional provision in future cases.

The court notes that the new district-wide Chapter 13 model plan affirmatively states that the effective date is the confirmation date, so if a party seeks to alter the form plan, they must submit an additional provision that addresses the current language and alters it. The Trustee may object to this additional provision if it is warranted by the facts.

For the reasons set forth above, Trustee's Objection is overruled, subject to amendment of the additional provision regarding attorney's fees stated above. Debtor is requested to file an amended plan and upload an order overruling Trustee's Objection consistent with this decision.

END OF MEMORANDUM DECISION

UNITED STATES BANKRUPTCY COURT
for the Northern District of California

COURT SERVICE LIST

Via ECF:

All ECF Recipients

S. 3823

One Hundred Seventeenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the third day of January, two thousand and twenty two

An Act

To amend title 11, United States Code, to modify the eligibility requirements for a debtor under chapter 13, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Bankruptcy Threshold Adjustment and Technical Corrections Act".

SEC. 2. BANKRUPTCY AMENDMENTS.

(a) DEFINITION OF SMALL BUSINESS DEBTOR.—Section 101(51D)(B) of title 11, United States Code, is amended—

(1) in clause (i), by inserting "under this title" after "affiliated debtors"; and

(2) in clause (iii), by striking "an issuer" and all that follows and inserting "a corporation described in clause (ii).".

(b) ADJUSTMENTS FOR INFLATION.—Section 104 of title 11, United States Code, is amended—

(1) in subsection (a), by inserting "1182(1)," after "707(b),"; and

(2) in subsection (b), by inserting "1182(1)," after "707(b),".

(c) WHO MAY BE A DEBTOR UNDER CHAPTER 13.—Section 109 of title 11, United States Code is amended by striking subsection (e) and inserting the following:

"(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title.".

(d) DEFINITION OF DEBTOR.—Section 1182(1) of title 11, United States Code, is amended to read as follows:

"(1) DEBTOR.—The term 'debtor'—

"(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning single asset real estate) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than 50 percent of which arose

from the commercial or business activities of the debtor; and

"(B) does not include—

"(i) any member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $7,500,000 (excluding debt owed to 1 or more affiliates or insiders);

"(ii) any debtor that is a corporation subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)); or

"(iii) any debtor that is an affiliate of a corporation described in clause (ii).".

(e) TRUSTEE.—Section 1183(b)(5) of title 11, United States Code, is amended—

(1) by striking "possession, perform" and inserting "possession—

"(A) perform";

(2) in subparagraph (A), as so designated—

(A) by striking ", including operating the business of the debtor"; and

(B) by adding "and" at the end; and

(3) by adding at the end the following:

"(B) be authorized to operate the business of the debtor;".

(f) CONFIRMATION OF PLAN.—Section 1191(c) of title 11, United States Code, is amended by striking paragraph (3) and inserting the following:

"(3)(A) The debtor will be able to make all payments under the plan; or

"(B)(i) there is a reasonable likelihood that the debtor will be able to make all payments under the plan; and

"(ii) the plan provides appropriate remedies, which may include the liquidation of nonexempt assets, to protect the holders of claims or interests in the event that the payments are not made.".

(g) TECHNICAL CORRECTIONS TO THE BANKRUPTCY ADMINISTRATION IMPROVEMENT ACT.—Section 589a of title 28, United States Code is amended—

(1) in subsection (c) by striking "subsection (a)" and inserting "subsections (a) and (f)"; and

(2) in subsection (f)(1)—

(A) in the matter preceding subparagraph (A), by striking "subsections (b) and (c)" and inserting "subsection (b)(5)"; and

(B) in subparagraph (A), by inserting "needed to offset the amount" after "amounts".

(h) EFFECTIVE DATE; APPLICABILITY.—

(1) IN GENERAL.—Subsections (b) and (c) and the amendments made by subsections (b) and (c) shall take effect on the date of enactment of this Act.

(2) RETROACTIVE APPLICATION OF CERTAIN AMENDMENTS.—The amendments made by subsections (a), (d), (e), and (f) shall apply with respect to any case that—

(A) is commenced under title 11, United States Code, on or after March 27, 2020; and

(B) with respect to a case that was commenced on or after March 27, 2020 and before the date of enactment of this Act, is pending on the date of enactment of this Act.

(3) EFFECTIVE DATE OF TECHNICAL CORRECTIONS TO BAIA.—The amendments made by subsection (g) shall take effect as if enacted on October 1, 2021.

(i) SUNSETS.—

(1) IN GENERAL.—Effective on the date that is 2 years after the date of enactment of this Act—

(A) subsection (e) of section 109 of title 11, United States Code is amended to read as such subsection read on the day before the date of enactment of this Act; and

(B) section 1182(1) of title 11, United States Code, is amended to read as follows:

"(1) DEBTOR.—The term 'debtor' means a small business debtor.".

(2) AMOUNTS.—For purposes of applying subsection (e) of section 109 of title 11, United States Code, as amended by paragraph (1)(A), the amounts specified in such subsection shall be the amounts that were in effect on the day before the date of enactment of this Act.

Speaker of the House of Representatives.

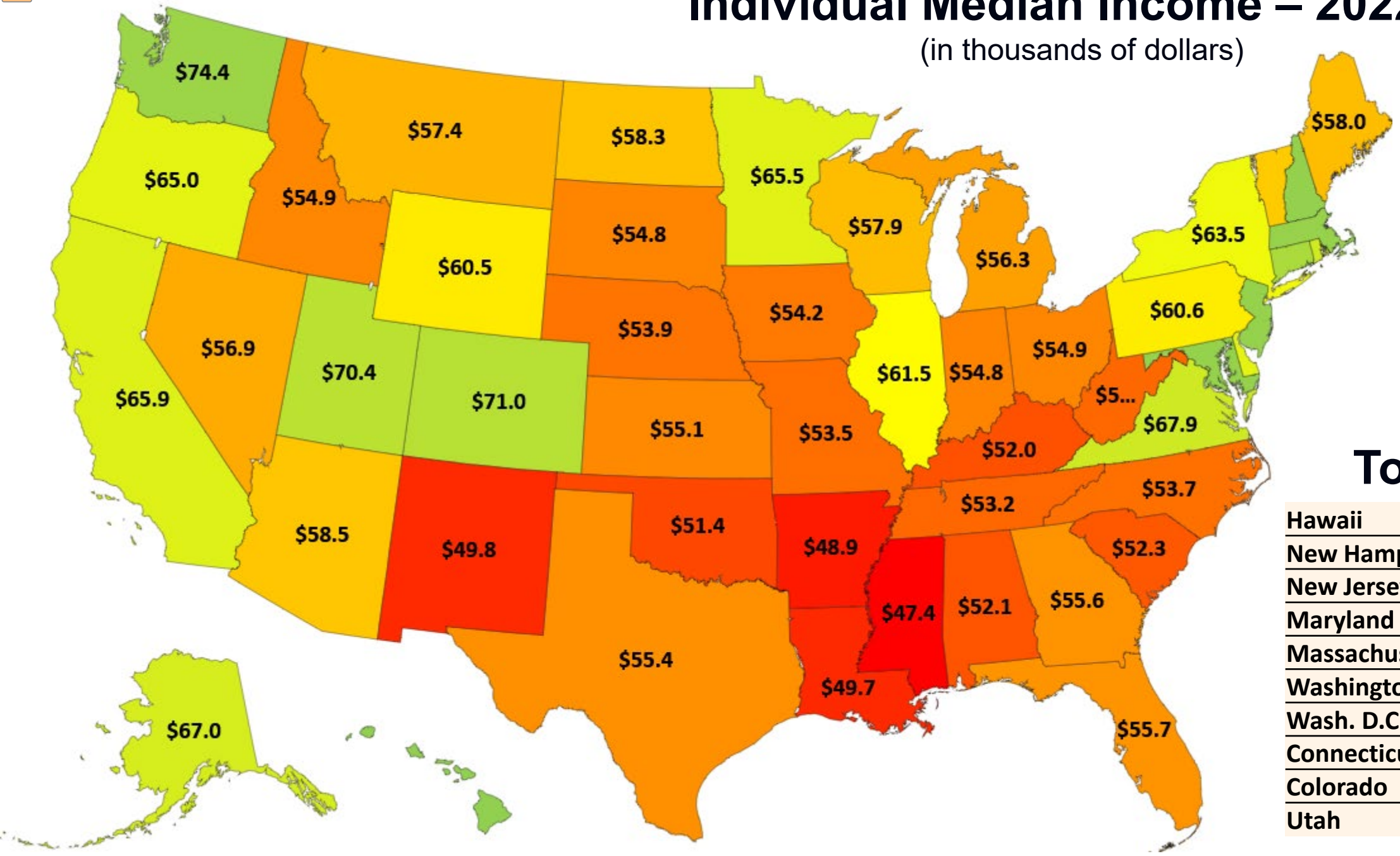
Vice President of the United States and
President of the Senate.

The Future of Consumer Bankruptcy
NACTT Annual Seminar
San Francisco, California
July 9, 2022

Slides and Statistics generously compiled by
Honorable Kevin R. Anderson
United States Bankruptcy Judge
District of Utah

Individual Median Income – 2022

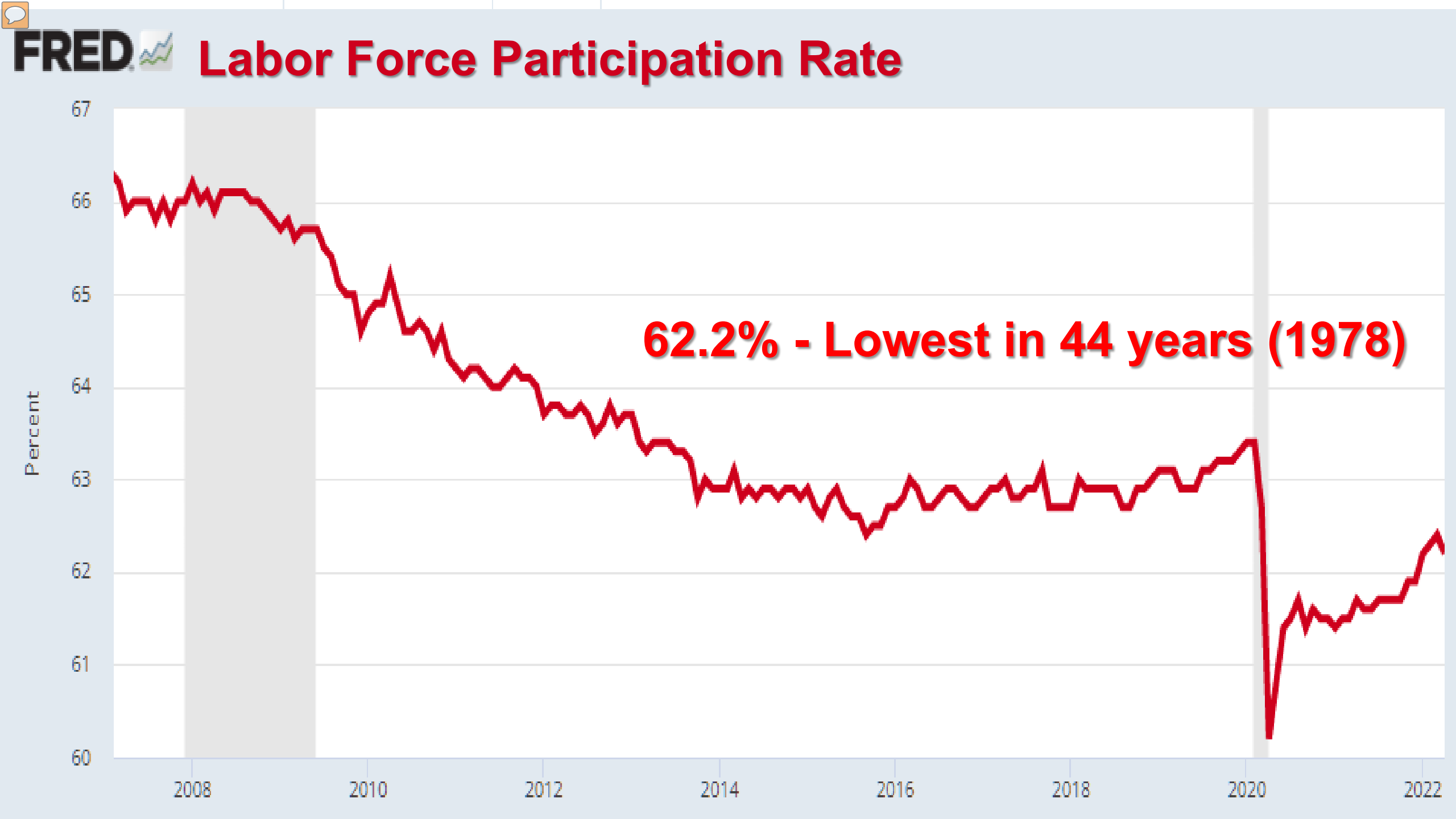
(in thousands of dollars)



Top Ten

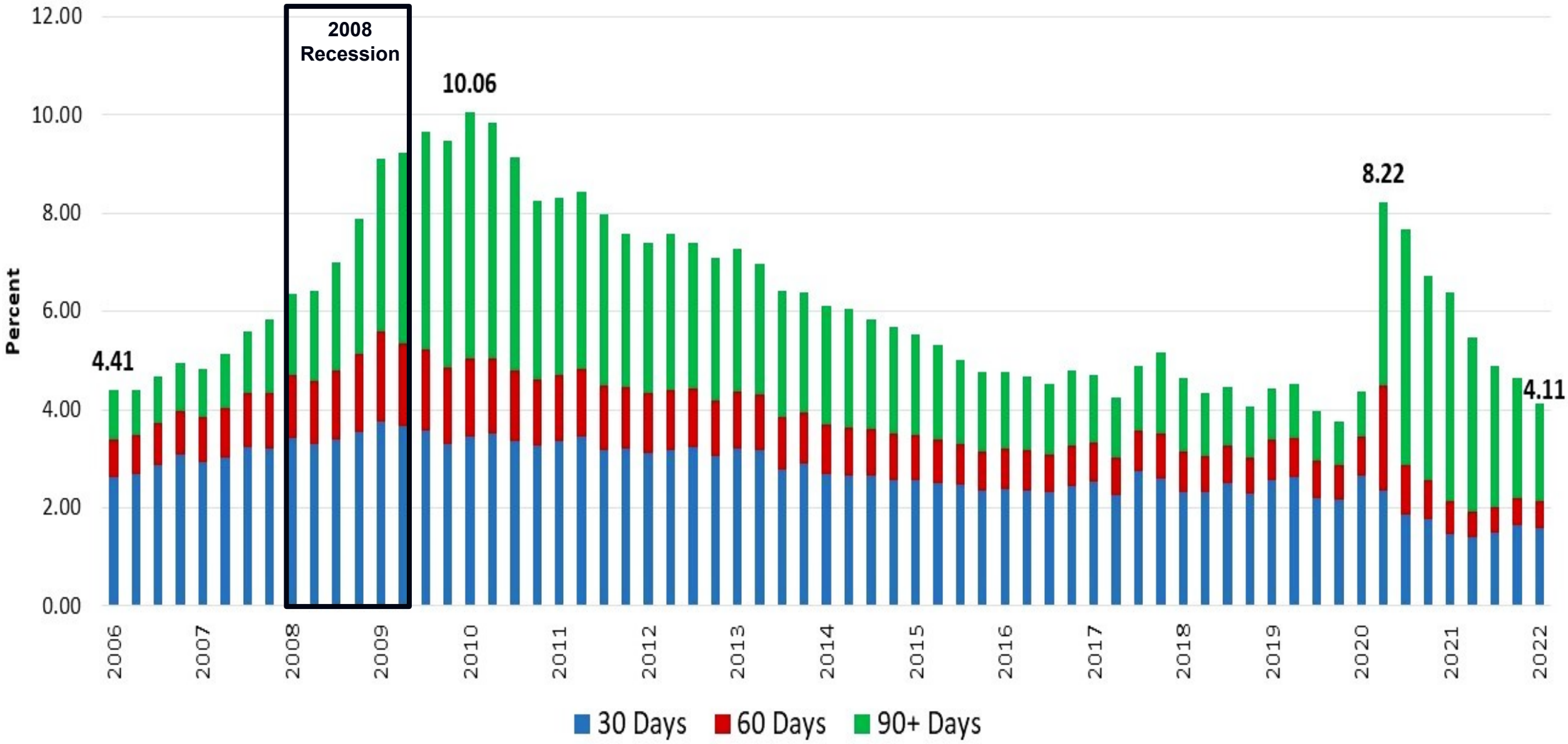
Hawaii	$75,797
New Hampshire	$75,432
New Jersey	$75,321
Maryland	$75,214
Massachusetts	$75,077
Washington	$74,398
Wash. D.C.	$74,266
Connecticut	$72,497
Colorado	$70,952
Utah	$70,425

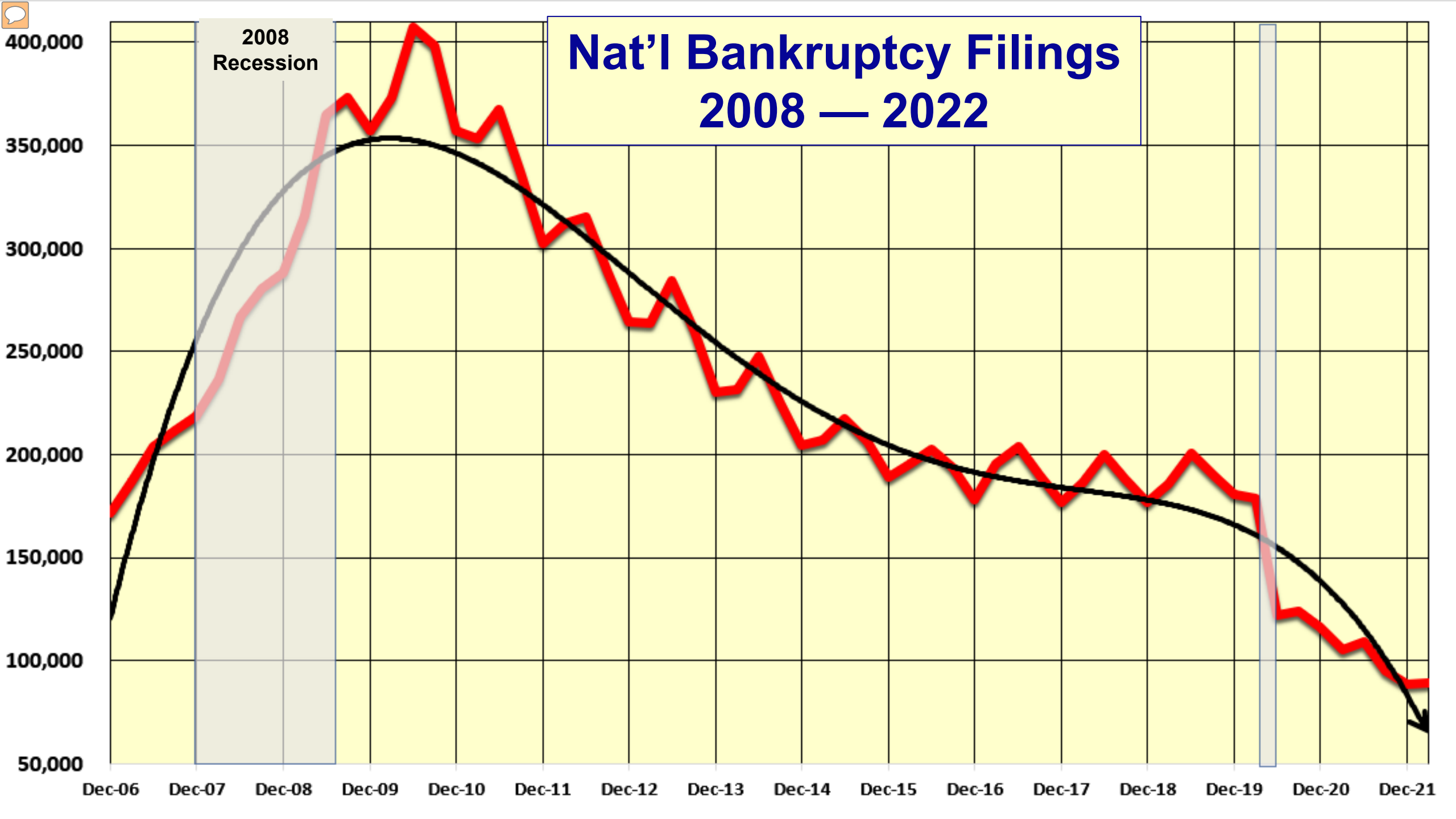
Labor Force Participation Rate



Mortgage Delinquency Rates

Lowest in 23 Years




Nat'l Bankruptcy Filings
2008 — 2022
2008
Recession
400,000
350,000
300,000
250,000
200,000
150,000
100,000
50,000
Dec-06
Dec-07
Dec-08
Dec-09
Dec-10
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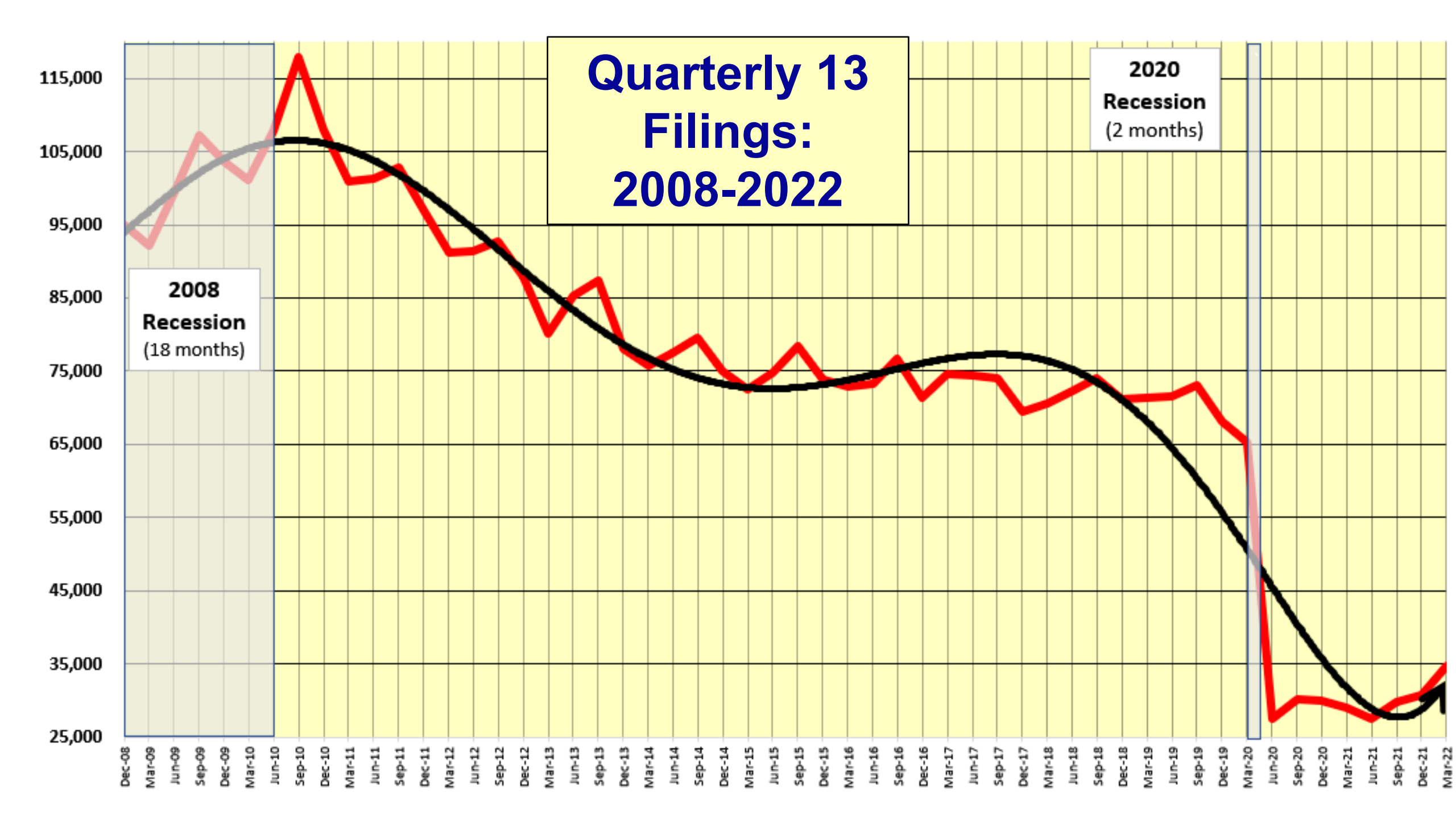
Dec-21


Quarterly 13 Filings: 2008-2022
2008 Recession (18 months)
2020 Recession (2 months)
115,000
105,000
95,000
85,000
75,000
65,000
55,000
45,000
35,000
25,000
Dec-08
Mar-09
Jun-09
Sep-09
Dec-09
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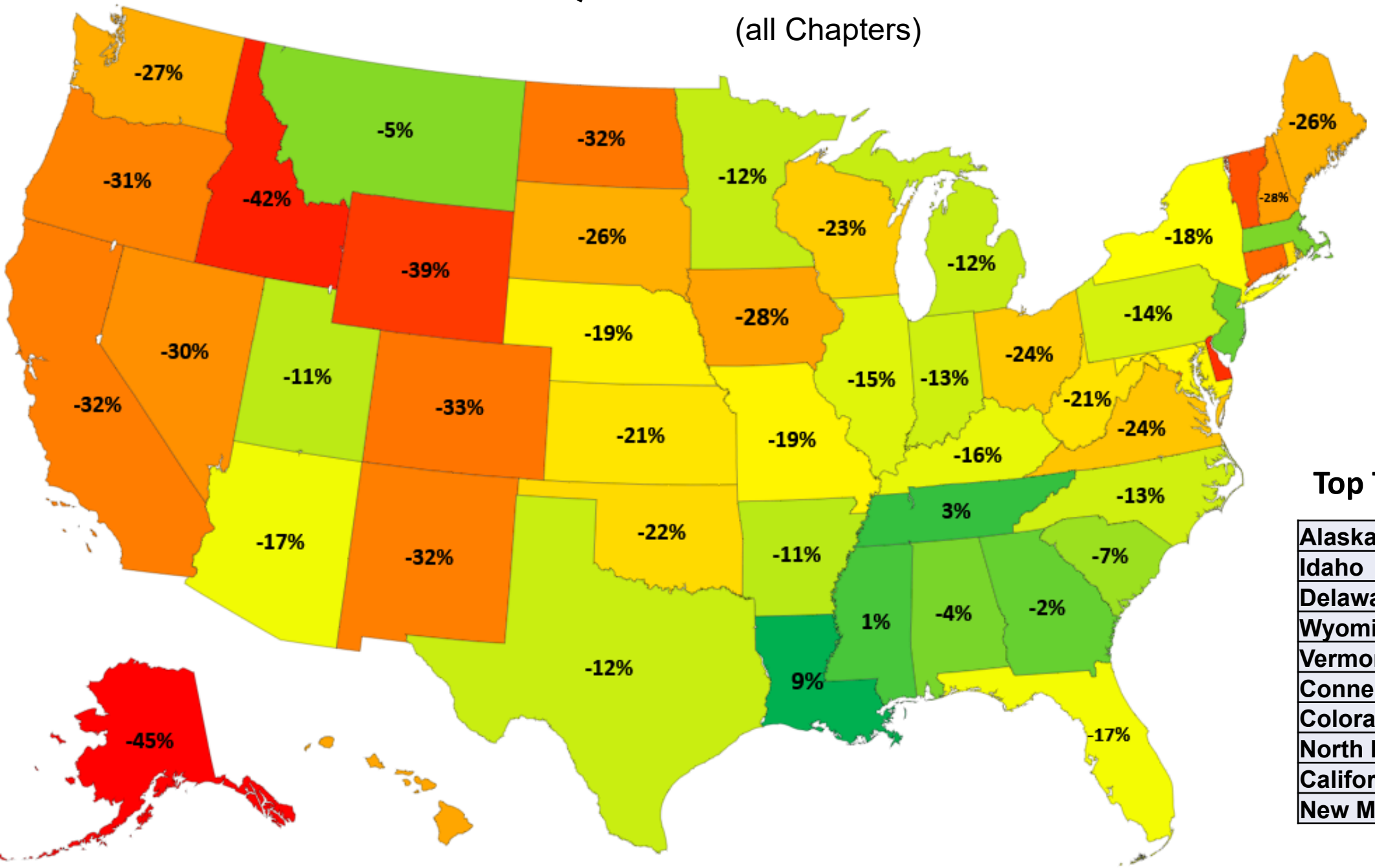
Dec-21
Mar-22

1st Qtr. YoY Decline: 2021-2022

(all Chapters)

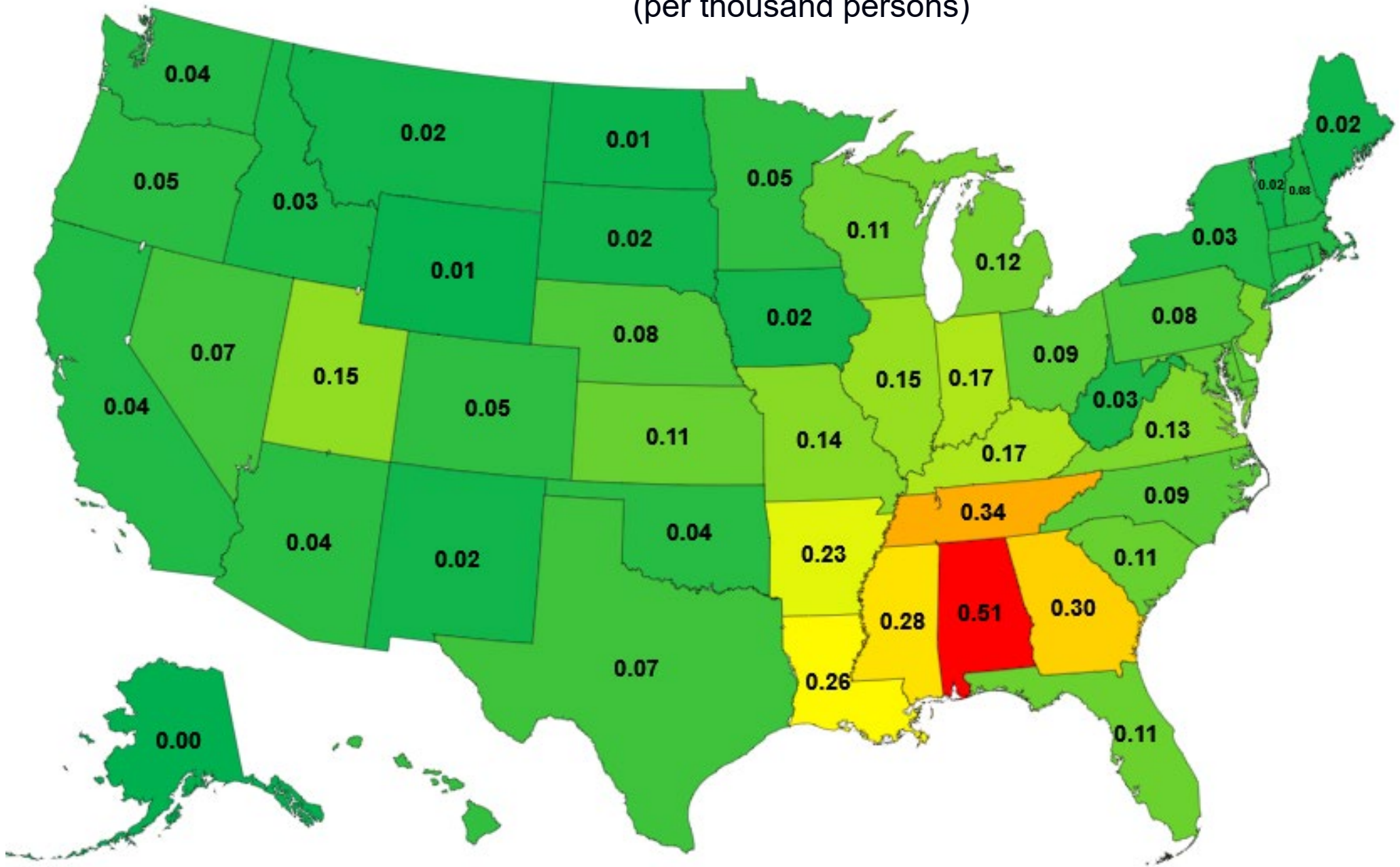


Top Ten in Declines

Alaska	-45%
Idaho	-42%
Delaware	-40%
Wyoming	-39%
Vermont	-36%
Connecticut	-34%
Colorado	-33%
North Dakota	-32%
California	-32%
New Mexico	-32%

Per Capita Ch. 13 Filings: 1st Qtr. 2022

(per thousand persons)



One Word: Civility

We need to heed lessons of the past and lead efforts to promote civil discourse

"Civility costs nothing, and buys everything."

These words, written in the 18th century by poet Mary Wortley Montagu, provide a valuable reminder as we move forward in 2017.

We have become more polarized, politically, socially, geographically and economically. We have become less understanding and less tolerant of different points of view and the people who hold them.

New communication technologies have allowed us to surround ourselves with those who reinforce our beliefs and lash out anonymously at those who disagree. Civility seems to have faded from modern society, an archaic relic of a bygone era. But given all we face together, it is more necessary.

As the calendar turns to February, we would do well to remember two of our country's most influential figures, both with birthdays we celebrate this month: George Washington and Abraham Lincoln.

Washington wrote the book on civility—literally. Actually, it was a list created by 16th century Jesuit priests that Washington copied for a penmanship exercise as a schoolboy. The list stuck with Washington. He lived by the 110 maxims published in the book "George Washington's Rules of Civility & Decent Behavior In Company and Conversation."

The first rule—"Every Action done in Company, ought to be with Some Sign of Respect, to those that are Present"—if followed faithfully, would go a long way toward improving the discourse in our country.

Following the last rule—"Labor to keep alive in your breast that little spark of celestial fire called conscience"—would help us do the right thing more often.

In between, there is wisdom about keeping promises, not believing rumors without facts, not bragging about yourself and not taking pleasure in the misery of others.

Lincoln, an accomplished lawyer, presided over our country's most fractured period. On the eve of the Civil War, Lincoln continued reaching for common ground saying, "We are not enemies, but friends. Though passions may have strained, it must not break our bonds of affection."

Near the war's end, at his second inauguration after four years of bloody carnage, Lincoln pleaded for the nation to heal and restore civility. He told a divided America, "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds."

Civility allows us to deal with conflict through mutual respect without damaging relationships. It involves connecting with others, developing a sense of empathy, encouraging communication and manners.

The ABA recognizes this. In 2011, it passed a resolution affirming the principle of civility as a foundation for democracy and the rule of law. It urged lawyers to set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others. It encouraged political parties, government officials, advocacy groups and media to take meaningful steps toward promoting a more civil and deliberative public dialogue. The resolution can be read at bit.ly/ABARes108.

As leaders in society, lawyers must ensure that civility once again becomes a quality that defines us. We need to set the tone for constructive communication and rational decision-making. It starts with us and every individual committing to a more civil manner, insisting that civility be a part of meetings and interactions. Indeed, we need to hold ourselves and our leaders to a higher standard.

In his farewell address 220 years ago, Washington recognized that differences of opinion were a necessity to democracy and a by-product of a free society but warned us about them. He described debate as "a fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume."

It is up to us to make sure we are not consumed. As lawyers, we are the perfect role models to act with civility and compromise to achieve the goals of our great nation. ■

PHOTOGRAPH COURTESY OF THE OFFICE OF THE PRESIDENT

Follow President Klein on Twitter @LindaKleinLaw or email abapresident@americanbar.org.

Speaker Biographies

Herbert L. Beskin practiced consumer bankruptcy law for 25 years in Charlottesville, Virginia, before being appointed a Chapter 13 Bankruptcy Trustee for the Western District of Virginia in 2003. He has been a Virginia CLE lecturer since 1989, has written articles for The Virginia Lawyer and the National Association of Chapter 13 Trustees (NACTT) website, and has taught law related courses at both the University of Virginia and Piedmont Virginia Community College. From 1991 to 1997 he served on the Board of Governors of the Bankruptcy Law Section of the Virginia State Bar. He co-authored two chapters of the Virginia CLE publication Bankruptcy Practice in Virginia: Chapter 7 practice in the 1st edition with Douglas Little, and Chapter 13 practice in the 2nd, 3rd, and 4th editions with Judge Rebecca Connelly. He has also served as a trainer for new Chapter 13 Trustees at the United States Trustee's training facility in Columbia South Carolina, and as a member of the Board of Directors of the NACTT from 2017-2019.

The Honorable D. Sims Crawford, *U.S. Bankruptcy Court, Northern District of Alabama,* Birmingham. Judge Crawford was appointed to serve as a United States Bankruptcy Judge for the Northern District of Alabama, Southern Division, on September 1, 2016. Judge Crawford previously served as the Chapter 13 Standing Trustee for the Northern District of Alabama, Southern Division, from 2004 until his appointment as a bankruptcy judge. Prior to his appointment as Chapter 13 Trustee, Judge Crawford served as the Trustee's staff attorney for 7 years. Before that, he was engaged in the private practice of law in Birmingham, Alabama. Judge Crawford served as Chair of the Bankruptcy and Commercial Law Section of the Birmingham Bar Association in 2007 and he served on the Board of the Birmingham Bar Foundation in 2008-2009. He served as the President of the National Association of Chapter 13 Trustees (NACTT) in 2016, after serving as an officer and a board member of that organization for 7 years. He was also a member of several NACTT committees. Judge Crawford has spoken at more than 60 bankruptcy seminars on a local, regional, and national level. He also served as an adjunct instructor for 5 years teaching Debtor-Creditor Law at Samford University through the ABA paralegal certification program. He is currently a member of the National Conference of Bankruptcy Judges, and a judicial member of the American Bar Association, the American Bankruptcy Institute, and the Alabama State Bar. Judge Crawford earned his B.A. from the University of Alabama and his J.D. from Cumberland School of Law at Samford University.

Cathy Moran has headed her own small firm Moran Law Group in Mountain View, California, for nearly 30 years. Family law and tax issues as they play out in bankruptcy are areas of particular interest to Cathy.