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CONSUMER BANKRUPTCY PANEL

TUITION CLAWBACK: WHOSE MONEY IS IT, AND WHAT IS IT WORTH?

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Mark Duedall^{**}

Neil Gordon^{***}

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MR. GENSBURG: I want to thank you all for coming out, especially braving the monsoon that has engulfed the city, and avoiding the monstrous puddles that I'm sure are on every highway, to this, the *Emory Bankruptcy Developments Journal's* Sixteenth Annual Symposium. My name is Mark Gensburg. I'm the Editor-in-Chief of the *Emory Bankruptcy Developments Journal*. We have a fantastic Symposium set up for all of you today. At this point, to kick off the Symposium, I would like to invite to the podium the dean of our law school, Dean Hughes.

DEAN HUGHES: Good morning. I'm pleased to welcome you to the *Emory Bankruptcy Developments Journal* Symposium. I have to issue an apology as I get started. I'm going to have to duck out immediately. I'll be in and out during the day. I think other than the judges in the room, we all have bosses, and I have to meet with my boss, the Provost, immediately after this, so I'll be ducking out, but coming in and out after that.

As you know, this marks the thirty-sixth year of the *Emory Bankruptcy Developments Journal*, and this is its sixteenth annual symposium. Next month the *Journal* will hold its twenty-first annual banquet, and at that time they will honor Jamie Sprayregen, a restructuring partner with the Chicago and New York offices of Kirkland & Ellis, with a distinguished service award for Lifetime Achievement.

As you know, the bankruptcy program here is a signature program of the law school. It provides a curriculum that truly integrates theory with practice, and also integrates the paths of practitioners, students, scholars and judges. It's

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actually a model we think. We don't think there are many other programs like this in the country. I just want to brag a little bit about our EBDJ students. Over the last two graduating classes, five EBDJ members are serving as clerks to U.S. Bankruptcy Court judges. Thank you, Judges. One just completed a bankruptcy clerkship. Four are currently with or just finished a clerkship to the U.S. District Court judges. One is with the U.S. Circuit Court of Appeals for the Eleventh Circuit Staff Attorney's Office, and three are in State Court clerkships.

In the last year the *Emory Bankruptcy Developments Journal* has been cited by nine courts including the Sixth Circuit Court of Appeals, and EBDJ pieces have been cited in over thirty other law reviews.

Before we begin, there are always people that we need to thank. Of course I'd like to thank our generous sponsors who are listed in your programs. EBDJ faculty advisor, Rafael Pardo; alumni advisor Keith Shapiro, Class of 1983, and all members of the EBDJ Advisory Board, thank you all. Executive Symposium Editor, James Risener; Symposium Editor, Maria Valderrama, EBDJ Editor-in-Chief, Mark Gensburg. Also I'd like to thank some of our tremendous staff members who always assist us and enable us to put on these programs. Scott Andrews, Corky Gallo, Rhonda Heermans, Denea Duran, and Amy Marcellana.

Of course I'd like to thank today's panelists including this panel for coming here to enlighten us today. Now I'd like to invite Executive Symposium Editor Jake Risener to the podium to introduce our first panel. Thank you so much for being here.

MR. RISENER: Thank you so much for being here today, and thank you once again to our sponsors. We definitely couldn't do it without them and we are very grateful for their continuing support.

I'd also like to thank some of the people who helped me on the ground put this together, so of course Rhonda Heermans was so incredibly helpful as always, all the people in the Marketing Department, I'm very thankful for their support. I'm thankful for Mark Gensburg's help as my Editor-in-Chief, and I'm thankful for Maria Valderrama as my Symposium Editor. I'm also thankful to all of the members of our panels for flying in and driving in.

I would also like to extend a special thanks to the person I'm about to invite to the stage, Mr. Mark Duedall, who has been an Advisory Board member of the *Journal* since 2003, and has consistently shown support for the *Journal* and has really helped put this together. Thank you so much, Mark, if you'd like to come up to the podium.

MR. DUEDALL: Jake, you are a gentleman. You and Mark have done a tremendous amount of work to put this on. You guys have really done a great job. This is a really outstanding program this year. Once again, the *Journal* comes through.

Before I introduce this panel, which is a really neat panel with a lot of really engaging thoughts on this topic, let me just say I'm really excited about what's going on in the *Journal*. The fact that Jamie Sprayregen is going to be the honoree at this year's annual banquet is wonderful. He is one of the originators of modern chapter 11 practice at Kirkland & Ellis, and then at Goldman Sachs, then back at Kirkland & Ellis. The level of continuity that the *Journal* has been able to maintain over the years, and that you are maintaining by being here and by supporting it, is really through the roof. Our honorees at the annual banquet have included people like Senator Elizabeth Warren, Senator DeConcini, Harvey Miller, the originator of the modern bondholder refinancing and bondholder workout. It is just a wonderful thing that you're continuing to support the *Journal* and the *Journal* is able to continue to advance the bankruptcy community over time.

Let me start with the panelists. The topic today is tuition clawback, which is a very simple way to understand what could be a very simple issue, but actually there are a lot of layers to this onion. The neat thing is, some of them are complex, others are not. And like I said, it generates somewhat of a visceral reaction in people. Can a bankruptcy trustee sue a college for receipt of tuition, bankruptcy trustee sues the college for receipt of tuition from the debtor to pay for the debtor's child's education? Very, very interesting issue. Somewhat straightforward, then it gets more and more complex. That's what we're going to talk about today. The panelists are wonderful.

We have Elizabeth Austin from Pullman & Comley up in Connecticut. She spent the first part of her career working on some of the most complex chapter 11's you will ever see out of the United States Trustee's Office. She was one of the originators of some of the thoughts and rulings that came out of these cases. She was also, as a member of the trustee's office, one of the speed bumps and governors to ensure that there was transparency and openness and adherence to the Code while these large bankruptcies were going forward, that had so many jobs and so much money on the line. So she had a wonderful career. She joins us here from Connecticut. In a few weeks she's going to be going out to Vancouver to speak to the American Bar Association on another bankruptcy issue. She is a thought leader in bankruptcy matters and really a model for us all.

Neil Gordon, those of you who practice know this, those of you who are students do not: he is a legend of the Atlanta bankruptcy community. He has been a fiduciary. He has advised fiduciaries. He has taught fiduciaries. He is a fiduciary in every sense of the word, and his skill and his adherence to the law and the fiduciary standards, and teaching others through over 150 presentations in his career is a model for us all. He has given so much to this field, and it's really special for us that he is here. And he's done this fiduciary practice while working for a big firm, which I don't even understand to begin with. So it's proof positive you can do so many neat things with a bankruptcy career, and Neil is really just a model for that.

Mike Imber joins us from Eisner Amper. He's the only non-lawyer here. As a result, he will be the only voice of sanity on this entire panel. Mike's a managing director working out of New York for Eisner Amper, an outstanding advisory and accounting firm. He's the co-head of the Public Sector Advisory practice, which works on advising states, localities, cities on all matters of financial distress, as well as colleges and universities. Mike's been practicing in this area for well over twenty-five years. I had the pleasure to work with Mike when I was a lot younger and he was a lot younger as well.

MR. IMBER: We both had more hair.

MR. DUEDALL: We both had more hair, the belt was two loops over. Chapter 11 prepackaged plan, which was a very simple case until about three months in when the prepack became unpacked, and it turned into just a disastrous case that ended up as a successful chapter 11 after a lot of gnashing of teeth. It was a textile company. That's what so neat about restructuring. You get these funny stories everywhere. It was a textile company in North Carolina that made a lot of specialty textiles. They also made a lot of rugs. Part of their thoughts for coming out of bankruptcy—this was just after 9/11—was we have the equipment to make specialty rugs. We're going to make rugs that have the American flag on them and everyone is going to buy them. Until at some point someone said, I'm not sure stepping on the American flag as you come in and out of your house each day is a viable opportunity. So Mike and I go way back. We've got a lot of good stories, and he is going to bring a lot of expertise to this from the public sector.

We have Lynne Xerras from Holland & Knight, a wonder in that she has managed to stay at a major law firm her entire career. As people jump from place to place to place, she has succeeded in Boston at Holland & Knight, a secondary market Boston, like Atlanta, but where she's managed to carve out a very sophisticated chapter 11 practice. I mean really something very impressive. She

writes a great deal. I met Lynne when I wrote on this issue on my little blog, and she wrote on this issue on her blog, Liz was writing about it, Neil was teaching people about it ten years ago. And I thought I was onto something new, and then I realized Liz and Neil and Lynne had been writing about it for years, but they still talked to me about the issue which I thought was very generous of them. So we're real pleased to have Lynne here, coming all the way from Boston and taking time out of her schedule as a big firm lawyer to write on these issues and speak on these issues. So it's just a great panel. I'm really appreciative to all of you for doing this.

Let's start with the basics, because it's going to get more complex as we go, but if we talk about the basics for a little while, I think that might help. Neil, is this just a straightforward application of fraudulent transfer law? Maybe a straightforward application of Statute of 13 Elizabeth that existed 400 years ago? You gave something away and you didn't get anything for it. Is it that simple? Is there nothing else to talk about?

MR. GORDON: Well, the cases go in different directions, so there's no easy yes to this. I'd say probably half the people in this room have heard me present this topic, and I've done it without anybody on the other side of the issue and it goes very quickly. Now I've got three people on the other side of the issue, so I asked for equal time and they said no.

When you're getting into fraudulent transfer law, in this area it's the same law. It's 548, the same defenses, except there are more defenses in this area than there are in other areas because there are unique aspects to how you finance an education. And if you're a trustee and you don't understand what these defenses are, you can waste a lot of time.

In my practice I try to get into it very early, how the financing occurred of the education of an adult child. We're only talking about in my perspective an adult child, not a minor child. And apparently what the adult is, is defined differently in other states, too, but in most states it's going to be age eighteen.

When you're talking about is it uniform, should it be uniform, the answer to me is yes. The real differences come down to how you interpret reasonably equivalent value. A lot of people are very unhappy, people associated with universities. I have had panels where I've had law professors on the panels with me, and they're defending the university side. I've spoken to the National Association of Attorney Generals. They defend the state universities, and they're really irate about this area. It's costing them a lot of time. They don't generally

have a lot of bankruptcy expertise and they're being thrown into the bankruptcy courts to defend these actions.

It's really, and to answer Mark's question, to me if you want to carve out an exception to 548, then you have to do it legislatively. You're not going to be able to do it judicially. The First Circuit has had a case, and this panel is involved in that case, it's had a case on direct certification from the bankruptcy court in Massachusetts, the *Palladino* case, Mark DeGiacomo is the trustee, and they've had it for over two years, and we thought that was going to be the first circuit court to really get into the reasonably equivalent value issue which is what the appeal concerned. We haven't gotten a decision from them.

I can tell you that when BAPCPA was being negotiated, and the lobbyists came out of the woodwork and those that sort of started the process of amending the bankruptcy laws were the big losers because once you open up Pandora's box, all the lobbyists come out. The landlords benefitted, all these different groups benefitted, the car lenders, but also they added exceptions to 548 for charitable institutions, 548(a)(2). So you can't just sue the charitable institutions because there was a legislative change, only in certain circumstances. The same thing could be done if they want to in this area.

There was a bill, Protecting All College Tuition Act of 2015, that went nowhere. I know a lot of legislation goes nowhere in Washington, but this was one of them that went nowhere, and they could resuscitate that or some other piece of legislation if they want to build an exception to 548. But until they do, in my opinion the law has got to be applied uniformly. And so the real question comes down to reasonably equivalent value, and is paying for your adult child's tuition because you expect economic benefits for that child down the road enough? Most of the courts recently have said it's not enough. That it's admirable that you want to pay, but that the creditors aren't really, if you ask them, willing to finance the education. You're taking money that they believe they could be paid with and instead you're using it to finance an education that could be paid in other ways. It could be paid with student loans. It could be paid in different ways.

The only circuit courts that I have seen that are dealing with these intangible non-economic benefits have come out, not tuition clawback cases, but in other cases they come out and say that, no, intangible non-economic benefits are not sufficient. They don't qualify as reasonably equivalent value. Everybody else on this panel is going to disagree with me, but most of the judges more recently have also taken that position.

Everybody understands the pressure that some parents are under if they've got the ability to do it. But because we're talking about 548, we're talking about a situation where the parents are either already insolvent or these transfers to the universities are rendering them insolvent. So it's not like they're flush with money when they're making these payments, because if they were solvent you wouldn't even have the claim to bring. So I think the answer is yes, it should be uniform.

As to the policy argument which you'll hear, yes, there's a lot of good policy reasons why you might want to carve out these exceptions for the universities, but as the Supreme Court said in *Law v. Siegel* in 2014, it doesn't matter how good the policy arguments are. If there's a statute, you've got to follow the statute. Policy arguments don't trump statutes. I think that is just a simple statement of fact and law both that can be applied here in this area.

MR. DUEDALL: I think this is very helpful, and we're going to get into reasonably equivalent value in a little bit with Lynne and Liz, and Liz is litigating it in the trenches in the First Circuit. But we have a clear statement of the law which I appreciate. Before you get into reasonably equivalent value we have an argument for uniform application of the law. In 1978 when the Bankruptcy Code was enacted, there were I think seven or eight exceptions to the automatic stay. There's now thirty-six. Everyone and their brother gets an exception to the automatic stay and the Bankruptcy Code is being cannibalized. So we need uniform application of the law. Congress knows how to fix this. They fixed this with the tithes. They got together and they fixed it. They can fix it for the colleges. At the end of the day, these aren't the most sympathetic defendants out there. These are universities with endowments the size of Rhode Island. So, Mike?

MR. IMBER: Rhode Island's not that big.

MR. DUEDALL: Then maybe a small county in southern Georgia. But seriously, Mike, what's the big deal? These costs can be spread over thousands of students, and we're trying to get uniformity of the system, so I don't understand. Or am I being obtuse?

MR. IMBER: I would never say that about you. I think this is a case where public policy gets to sit in the front seat with the law. We may need air bags, but I think public policy gets to sit in the front seat.

Bankruptcy court, at least in my experience and hopefully everybody in here, is a court of equity, and everything is negotiable. So as a former and recovering

banker, I respect and appreciate creditor rights, but in my experience there have been exceptions where the law seems to get ignored in favor of public policy. The most striking example for me is I've worked on three chapter 9 bankruptcies, and in my experience in *Detroit* and in looking at other cases in *San Bernardino* and *Stockton*, retirees' unsecured claims in theory are pari passu with pension obligation bondholders. This was my experience in *Detroit* with some exceptions, but you would think they'd all get treated the same way, yet the retirees in the *Detroit* case realized sixty-eight percent recovery while my clients who had financed a \$1.4 billion contribution to the pension fund only realized a thirteen percent recovery. So where's pari passu? Where's absolute priority? And I think in the *Detroit* case there was a public policy argument that was put forward that says we've got to take care of the retirees.

So moving back to the universities, this country has long advocated and supported, at the federal level, higher education for its citizens. We're a stronger and better country for having well educated kids and we thrive that way. I think that it would be an undue burden on universities to have to reserve moneys for potential clawback, especially if we go into another downturn, they're going to have to refund tuition. I just think this is an exception.

The other public policy argument that, granted it's written into statute, but how many people can we think of who consolidated all their wealth and bought a big house down in Florida and protected themselves under the Homestead Act down there? It kind of flies in the face of the consumer bankruptcy laws. It's like we can hide our assets in our house down in Florida. So I'm not buying this. I think we need to defend the kids.

MR. GORDON: You probably do know this. In Florida there are rulings that fraudulent transfer law doesn't apply to a house because that's a statute and the protection of the home is in the Florida Constitution. The Florida Constitution trumps statute. So it actually is even more complicated down in Florida. More clear to your point. You can't bring fraudulent transfer actions with respect to, if you go and you paid off your home, the mortgage on your home in a fraudulently transferred whatever, it's not recoverable because it's in the Florida Constitution that the home is protected.

MR. DUEDALL: I think this frames the legal issue in a very policy format, and that's what so neat about this is it's a very understandable issue and it can pull both sides each way. Now that I think we understand the legal issue—by the way, jump in with questions at any time. We're going to be up here for a little while, and the more questions we have, the better.

Now that we've framed the legal issue, let me turn it over to Liz, and Lynne, you jump in as well. Liz, we need a ruling out of the First Circuit in the *Palladino* case which was a major case that went straight up to the First Circuit. It's been sitting there forever. The First Circuit is picking on the poor Puerto Rico restructuring council ruling it unconstitutional, like the Constitution applies to bankruptcy, which we know it doesn't. Tell folks about *Palladino* and then tell folks what the holdup is, and when we're going to get a ruling.

MS. XERRAS: I feel like we need to roll into it a little bit more though, just to talk a little about what the courts are saying, what arguments the parties are making.

MR. DUEDALL: Yes, please. What is the reasonably equivalent value?

MS. AUSTIN: In *Palladino*, Mark DeGiacomo, the trustee, sued Sacred Heart University, my client, and we argued, and there's kind of an interesting twist in that case because the debtors had been convicted of participating in a Ponzi scheme, so there was a presumption of fraud. So going in, I had quite a battle, but I was able to rebut the presumption of fraud with Judge Hoffman determining that not—and the law is not quite well developed in the First Circuit on that issue, but in the Second Circuit it's very well developed that you can show that not every payment made by anyone participating in a Ponzi scheme is necessarily in furtherance of that Ponzi scheme. For example, you buy groceries, you make a car payment, whatever. The court found that making tuition payments was clearly not in furtherance of a Ponzi scheme so I was able to rebut that presumption.

Next we move onto, did the parents receive reasonably equivalent value? In the *Palladino* case, I did something a little bit unique in that I produced evidence. I produced affidavits from the parents that said that they felt an obligation to make the payments, that they felt by doing so they would have a financially self-sufficient daughter who would be less likely to have to live at home, that if she didn't get her degree she would be likely to have to be supported by her parents. I had two experts file reports, one expert on financial aid and under all of the financial aid laws, there is an expectation that the parents will, or the family will be the first source of financing for a child's education that's built into the laws of the United States with respect to financial aid, and you cannot apply for financial aid without there being consideration of the family income.

Also I had a social expert who talked about the benefits of a child receiving an education with all kinds of statistics that showed that they made considerably more than if you have a college education as opposed to people with just high

school degrees. In fact, on average, adults with a four-year college degree earn about sixty-five percent more than a person who's over forty years, works, and has only a high school diploma. Someone without a high school diploma is more likely to need and receive financial support from their parents. And on the contrary, if you have a child who has a college education, research shows they're going to be in a position to provide assistance to an elderly parent if they need it later on in life.

So considering all that, Judge Hoffman found that there was reasonably equivalent value, with the emphasis on reasonably. He found it to be concrete and quantifiable. He found it to be an investment, and, as we all know, people make investments and sometimes those investments pay off, sometimes they don't. For example, you pay a medical bill, you pay these bills, you don't know if the outcome will result in what you hope it will come out to be, but if you make an investment, that's not a fraudulent conveyance. And so he found there was reasonably equivalent value.

The court asked for direct certification to the First Circuit. We had argument in October of 2017 and we are still awaiting a decision. In all fairness to the First Circuit, Puerto Rico is in the First Circuit, and they have been very busy with issues from Puerto Rico, so I don't know if that has something to do with it, but the First Circuit has been very busy with those issues. So hopefully we will have an outcome soon, and obviously you know what outcome I'm hoping for.

MR. GORDON: Judge Glenn, just two and a half months ago in that *Sterman* case, took that on and he said increasing likelihood that children would be self-sufficient was not value under the Bankruptcy Code or New York law. And then you've got 548(d)(2) which defines value for purposes of the fraudulent transfer laws. And one of the things that is not included in value is an unperformed promise to furnish support to the debtor or relative of the debtor. Promise to provide economic value to the debtor or a relative of the debtor which could include family members is pretty close to what we're really talking about, and most of the judges in the recent cases have relied on that section to say that it's not.

I guess that's why Judge Hoffman certified it, wanted it certified, because he knows, we all know it's sitting here, that courts have gone in different directions on this and we need some answers.

MS. AUSTIN: Right. And to your point, actually you said that most of the cases were going in favor of the trustee. But by and large it's a pretty even split as far as the decided cases. It's not just the value that Judge Hoffman found was not

just the possibility that they're going to need the support of their daughter in the future, but it's the fact that they will be relieved of the financial burden because she will not need to be supported by her parents. The statistics show that there's a much higher likelihood that she is not going to have to live at home, etc., etc., and the value can be indirect. It doesn't need to be direct. The case law is clear on that. Look at the *Tarin* case where the parents paid for a wedding and the judge found the fact that the parents were able to smell the flowers, eat the food, listen to the music, was a benefit. If that's a benefit, how can educating your child not be the same kind of benefit for the debtors?

Going to Judge Glenn's case was a very, I found it to be a very odd case. It's as if he wanted to find for the schools and he was trying to figure it out. He found that any payments made on behalf of the child up to the age of twenty-one was not avoidable because that constituted reasonably equivalent value.

MS. XERRAS: I think the one thing we haven't talked about is the moral and legal obligation and how that ties in. I do think we need to move into some of the other examples of payments by parents that might be avoidable or not avoidable.

So these cases came about because we're focusing on whether these transfers made by parents to a university for their adult children constitute reasonably equivalent value. The value as we all know is flowing to the child. So the parents pay the tuition but the value, the real value conceptually, is the education that the children get, these children who are between the ages of eighteen and twenty-two. A lot of the defenses that have been raised by the universities, and I hope that it is always or for the most part it is the universities being sued. It's never the children. I think there's one case where the children have been sued.

MR. GORDON: I've sued the children.

MR. DUEDALL: And we're going to talk about that soon.

MS. XERRAS: We're after the deep pockets. We're skipping over those children who are still living in their parents' basement. So there are a couple of theories that have come out of this. The universities are basically making the arguments that they're pulling together when they talk to the families, talk to the parents. Obviously the Palladino's worked closely with the university to defend the trustee's claim there. They are basically saying that the parents have one of two obligations. So if there is a statute on the books in the jurisdiction where the case is pending that says that children do not reach the age of majority until twenty-one, then there's some sort of either express or implied concept in the

law that parents have to support their children until that age of majority, whether it's eighteen or twenty-one, and there is a legal obligation.

A legal obligation is basically satisfying antecedent debt. It's clear, it's clean, and that fits right into reasonably equivalent value. The problem with these cases is the parents are not required to sign a promissory note. The parents don't need to cosign. So when these kids enroll, the easiest to me is just put the parents on the note. Put the parents on whatever agreement it is to pay tuition. Then they are obligated to pay this debt, and when you make a payment you're satisfying antecedent debt. But that's not how the payment structure works, even though the parents largely do make these payments.

The other argument, if you're in a jurisdiction where the age of majority is eighteen, then a lot of the courts will say, well, you no longer have a legal obligation past the age of eighteen, so everything you're doing now is not satisfying antecedent debt. There is then this moral obligation that is talked about in a lot of the cases, and we can go through them, and I have some of the quotes here. Just going back to the policy and the way that the financial aid forms work and the fact that parents have to put their income on these forms, and that I believe they are required to submit these forms until the child is twenty-four, implies that there is this moral obligation in society that parents, if they can support their children, if they have the financial means to pay \$5,000 or \$20,000 or \$50,000, they should be contributing toward their child's education.

And again, expecting to receive those benefits but really just focusing on moral obligation, not really what's the benefit that flows to the parent. That's where a lot of the cases have drawn the lines, where you have either a case where the age of majority is twenty-one and it seems easier for the courts to get to reasonably equivalent value. Where if it's the age of eighteen, then you have to start talking about the more fluffy moral obligations.

MR. IMBER: I just want to put a face on this for my benefit. Would all the law students in the room right now just raise your hands? Judges, look around. This is Emory Law School, famous for its bankruptcy curriculum, and I presume everybody just raised their hand is over the age of twenty-one.

MR. DUEDALL: Let me go back to you, Mike. We've heard Liz has won these cases based on the quality of evidence. You've testified before, not on this but on other things. Is this just an evidentiary issue? You have to build up a solid evidentiary case. If you build the right evidentiary case, can you win anything? Is that what it comes down to?

MR. IMBER: I think evidence carries you so far, and then I think you come back to what Lynne was talking about. There is a moral imperative here, about how is it that we take care of our children and how is it we advance our society. And I agree with Neil that this 548 ought to have some sort of exception written in and should all be part of the Bankruptcy Code, if we get around to revising it again. But in the absence of that, let's use the court as a means of establishing new precedent. And it sounds like judges are coming down on both sides of the issue.

MR. GORDON: Liz had the right venue I think for the *Palladino* case because there's probably more colleges and universities in the Boston area than anywhere in the world.

MS. AUSTIN: That's true. And Connecticut, actually—there are a lot of Connecticut state colleges and they've been getting hit hard with these cases. So much so that the Connecticut legislature changed the law in Connecticut and wrote in an exception to tuition clawbacks which became effective October 1, 2018.

MR. GORDON: What's it say, the new law?

MS. AUSTIN: Any payments for the benefit of any child under the age of twenty-four for secondary education is exempt from—it's an exception to the Uniform Fraudulent Transfer Act.

[Inaudible question from audience]

MR. GORDON: Yes, that's protected.

MS. AUSTIN: Yes. That's protected. That's a legal obligation. Though I had a case where the trustee did sue, despite the fact there was a separation agreement approved by the court. But I think it's twenty-five states have laws that allow family court judges to order or approve settlements that require parents to pay for the undergraduate education of their children, and that's a legal obligation. That's in my opinion—

MR. GORDON: That's 548(d)(2). It says that value is defined as the satisfaction or securing of a present or antecedent debt of the debtor. So that becomes a legal obligation that is being satisfied. So the transfers to satisfy legal obligation are by definition of 548 value. And so you don't have—

[Inaudible question from audience]

MS. AUSTIN: Well, if you're going to put that onus on those colleges, then you're going to have to say okay let's get the financial records four years back or five years, six years, depending upon the statute which is just obviously something colleges are not equipped to do. In talking about legal obligations, it's very clear that in Congress' judgment parents should be the first source of funding. I look to the financial aid laws where family income must be considered. If you have a child in school, you get to declare a tax exemption up to the age of twenty-four. If they're not in school, it ends at eighteen. You've got the 529 plans. You have all kinds of incentives in the laws of the United States that make it very clear that you expect the family to be the first source of funding. So if Judge Glenn in his case can say that because the age of majority in New York is age twenty-one, despite the fact there is no legal obligation in New York for a parent to educate their child beyond the age of seventeen-and-a-half, that seems to me a little fuzzy right there. If you look to that as an obligation to support your child and reasonably equivalent value, why aren't all these other laws which infer that parents must pay for the support of their children through the—for college education.

MR. GORDON: You know, in *Palladino*, your case, if they had contributed to a 529 plan years earlier and that's where the payments came from, we wouldn't have a case at all because nobody would challenge it. It wouldn't be property of the estate.

MS. AUSTIN: And that's exactly my point.

MS. XERRAS: That's an interesting point. This is policy, and this is where I get—this is why I started writing about this. So basically if a parent contributes to a 529 plan over the course of as the child is aging, growing up—

MR. GORDON: Or grandparent.

MS. XERRAS: Grandparents, yes. But for here these cases are largely parents. So they're putting in money every year. They're saving. They're putting it in a 529 plan to obtain the tax benefits. A lot of times, these parents to be able to afford tuition, they're employed and there's litigation or some sort of one-time event that interferes with their ability to pay their debts, so it's not like their excessive use of credit cards usually. It's like an event that they could not anticipate. So there's no intentional fraud here. These aren't people that are throwing money into their 529 plans so they don't have to pay their creditors; they're putting money away so they can pay for their kids' education.

If that parent happens to file bankruptcy, let's say two years after they stopped funding, and then—let's back up. So they use the 529 plan to pay tuition. They file bankruptcy, and the trustee makes a demand let's say, goes through the bank statements and sees these payments were funded from the checking account to the university, issues a demand. If those funds were placed—let's say the parents took the money out of the 529, put it in his or her bank account and then paid the university, and those funds had been in the 529 plan for at least two years, then that money is off limits. So that 541 is the definition of property of the estate, as I'm sure you know, and it excepts funds that had been placed in a 529 plan from property of the estate. So there's this weird dynamic: it's okay to use your 529 plan but you can't use your checking account. But that's what Congress enacted.

MR. GORDON: Sometimes there's a tracing problem where you claim it's from a 529 plan but it doesn't match up with the contributions to it. So that brings up some other issues. But basically what you're saying is right.

MS. XERRAS: You have to use those funds. There is one case where the judge just said, you put that money in your account, but you had already paid one of your tuition bills, and then it looks like you were paying your groceries with that money, too, and then you wrote a check two months later. And the debtor or the university just couldn't prove that.

MS. AUSTIN: The university in that case won and lost. They traced the money.

MS. XERRAS: Yes. They ended up settling for five grand I think.

[Inaudible question from audience]

MS. XERRAS: One was a practicing doctor. There was a practicing OB who with changes in reimbursement for her insurance caused a decline in revenue for her medical practice. It looked like her net income was about a million a year for many years and then it dropped to like a hundred.

MS. AUSTIN: I had a situation where, like I said with the *Palladino* case, they were, the father ended up going to jail and the mother was on probation, but they were convicted of participating in a Ponzi scheme, although in talking to the debtors, there's two sides to every story.

In another case, the case where we had the divorce decree, the mother lost her job. So there's a whole host of scenarios. In another case, one of the parents got very sick and they ran up medical bills.

MR. GORDON: I've got one right now where the debtor had a limited amount of money, and I don't know why she did it this way, but she was not advised. She did not see a lawyer. She was not counseled properly. She basically didn't pay her mortgage on a very nice home for three years and instead used the money to finance the education at Harvard of her two youngest kids. And when she came into the bankruptcy case, this was just a disaster all around. She filed the chapter 7 three years after getting a discharge in her earlier chapter 7, so she wasn't even going to get a discharge. The only purpose in filing I think was to get an automatic stay to stop this foreclosure, but she filed the case thirty minutes after the foreclosure sale. Then she went on a trip somewhere, and while she was gone—it was not a credit bid by the lender which is what you normally see. This was a third party investor that had come in and bought it. By the time she got back, she had been evicted and all of her stuff was out on the street. This is the story anyhow, and all the books and records were gone. That was the story anyhow. I keep saying that because I wasn't able to independently verify that.

But I mean, we do know that the home was foreclosed. We do know that she didn't pay the mortgage for several years, and she said it was because she used all the money to pay for the kids' education. Why she didn't do this in a different way or have them take out—you're talking about presumptions and greater likelihood. Well, when you go into Harvard there's a greater likelihood that you're going to get a good job afterwards and you're going to be able to pay your student loans if you had taken them out, which they didn't.

So there are stories when these things happen, like the Ponzi scheme. You've got these backstories that sometimes don't come out at all, but you talk about a tragic event, and she doesn't even get a discharge in the chapter 7. So it's completely pointless, the whole case for her. She gets no benefit from it at all.

MR. DUEDALL: Neil, are you suing Harvard?

MR. GORDON: No, the judge went to Harvard so I decided not to. But in actuality, this is the case where I sued the—we haven't talked about it yet but we will I think, the direct Parent PLUS loans which is another vehicle. We couldn't get the records from this debtor but we got the records from the banks that we had subpoenaed and from Harvard and we saw that a lot of this was direct Parent PLUS loans, which the cases say you can't go against the institution because this is not property of the debtor. No money ever passes through the debtor parent's hands at all. It goes right from the lender. This comes out, if you're not familiar, with the Higher Education Act of 1965. I only became familiar with it because of these cases. It was a funding vehicle for the education of these children. And these Parent PLUS loans go from the lender to the school.

They don't go through a bank account of the parent. The parent never touches the money. So I could not sue the university under these cases for the monies they received under that Act, these direct Parent PLUS loans.

And so we looked at it and I said, well, one thing I can do is I can sue to avoid the incurrence of the debt. Most people think of 548 as only avoiding fraudulent transfers, fraudulent transfers. But when you read it, it also talks about avoiding the fraudulent incurrence of the debt. You have the same reasonably equivalent value issue of course, and you don't get around that. You're still going to have to fight that out, but to me the parent received no economic value. That's the argument we're having, that the parent received no economic value, so that the debt was fraudulently incurred. And to me, the student is the party for whose benefit the debt was incurred. And so we went after the student. That's the case I told you I'd done that because the student has a really big job at Microsoft and is making a lot of money, and I said, I'm going to avoid getting into all of the weeds with Harvard. We're just going to go right after the student and so that's like the one example. But people do overlook -

MS. XERRAS: Did you bring that suit? Or was it—

MS. AUSTIN: That's pending.

MS. XERRAS: It's pending. Oh, we can't talk about that.

MR. GORDON: It's pending.

MS. XERRAS: So, if you think about it, so basically you cannot just take funds out of your checking account and pay a university, but a parent can—well, depending on the type of loan, if a parent takes out a Parent PLUS loan, and those funds are used to pay the tuition, then no one can be sued. Basically the courts are holding that those funds never become property of the estate because they, under the Higher Education Act or whatever the statute is, they could never be property of the parent because they have to go to the university. They could never be used to pay creditors. So those cases are pretty clear. There's I think two or three of those now.

MS. AUSTIN: On top of that, the loan is a nondischargeable debt. The parents would have to repay regardless of the bankruptcy.

[Inaudible question from audience]

MS. AUSTIN: I raised that as a defense and actually warded off an action being filed because in my response to the demand letter I made a good argument that

they weren't insolvent based on the information I could locate and the trustee decided not to fight that battle with me because I think at least for the majority of the payments I think the trustee would've had a hard time showing they were insolvent at the time they made the payment.

MR. GORDON: The trustee has to investigate that as best the trustee can. I just brought one where I took the Debtor's 2004 exam before I filed the lawsuit, and he admitted that, he wasn't fighting the issue, but he acknowledged that his liabilities greatly exceeded his assets at the time of the transfers. But I took that examination before I brought the lawsuit.

In the Southern District of Georgia in the *Dunstan* case, which was Judge Coleman's case, it went the other direction because when he looked at the evidence, it looked like, and the Debtor was a very sophisticated, formerly well off debtor and had personal financial statements, had loan applications out there, so he sort of had a trajectory towards the bankruptcy that showed that she was very solvent. And so the trustee lost a lot of the claims on solvency alone. The 529 was also part of this but there were some tracing issues, so it couldn't be granted on summary judgment.

And then the judge on reasonably equivalent value said that, no, it's not reasonably equivalent value. So there's something in that decision for everyone, depending on how you look at this. But the solvency point was that he found that the debtor was solvent for most of the transfers, not rendered insolvent.

The ones that they got avoided in that case were not subject to summary judgment I should say—I think it settled before they got to the end—were the ones that were close in time to the bankruptcy where you could look at the schedules, fifty-something days after the last transfers and see that things had turned and she became massively insolvent by the time of the bankruptcy. But it is a big issue and all the defenses that exist under 548 normally exist here. There are just some other ones as well because the 529 plans, the Parent Direct PLUS loans, we're going to talk about commercial conduits in a minute. But there are just some other defenses that you don't typically see that apply in this area.

[Inaudible question from audience]

MR. GORDON: Well, what I've been reading is that education is going to be free for everybody, so none of this is going to matter in a few years.

MS. AUSTIN: Under the federal financial aid laws, you have—it all depends upon the family finances, the student's finances, as to what type of loans they're

going to be able to get. So depending upon their financial status, it will dictate what type of federally insured loans. And yes, I guess to answer your question, if the education is being financed by a government-guaranteed loan, that is non-dischargeable, and there I guess is a better chance that the university is going to be able to collect on that debt.

MR. IMBER: You have to be mindful of concentration risk in any business where your sources of revenue are coming from, and you can point at the for-profit higher education business and get a good sense of what happened there when they started cutting off loans for kids that weren't really getting the education and then those businesses went out.

MR. GORDON: And also, back to Bob's question about solvency, Judge Diehl and Judge Ellis-Monro both have opinions from our district on pleading, what is required to plead constructive versus actual fraud. One is Rule 9, greater requirements, more specificity in the constructive fraud, lesser pleading standards. So if you're going to be pleading one of these, those are good opinions to look at to know what thresholds you need to clear to survive a motion to dismiss for instance.

MS. XERRAS: We will talk a little bit about things that I think colleges and universities need to do. They're very slow moving to react, but I think we're going to segue into a couple of things, or one concept that appears to be working.

MR. DUEDALL: The portals?

MS. XERRAS: Yes.

MR. DUEDALL: We're going to talk about the portals but we'll take a break right now just real quick just to kind of unpack this because we've covered a lot and I want to make sure everyone's keeping up because I'm even having a hard time.

We've got a 548 action, a constructively fraudulent transfer action. A transfer was made by a debtor, a parent that was insolvent, if they were insolvent, that's a factual issue, to a party that provided no value, the college to the parent, but maybe it provided reasonably equivalent value through indirect benefit, that is concrete and that is quantifiable. Those are factual issues that you have to get into the evidence. So you've got an evidentiary issue on solvency. You've got an evidentiary issue on reasonably equivalent value. You have all of the policy arguments which permutate all of this. You have all these weird concepts that create exceptions that no one thought about.

If you're making the payment pursuant to a divorce decree, well then you're satisfying a debt. The divorce decree puts a debt on the debtor to pay for the kid's education, so then you're satisfying a debt, and 548 says satisfying a debt is not a fraudulent transfer. So you have the divorce decree exception.

You have 529, where if the money was set aside long enough in advance, then it's not property of the estate. If it's not property of the estate, it's not a fraudulent transfer under 548, because 548 talks about a transfer of property in which the debtor has an interest.

So you have all these provisions of the Code that come into play. And then you have all these exceptions created by other parts of the Code or other parts of federal law, and it's really, really fascinating. This is what's so interesting about bankruptcy, is so many different things are coming into play. So everyone's now caught up. Everyone's now achieved mastery on all of these topics. Lynne is going to tell us about another exception to the fraudulent transfer theory. Lynne?

MS. XERRAS: Obviously the easiest way to defend any litigation is to actually rely on the Bankruptcy Code. And once a transfer is avoidable under the face of 548, the trustee still has to get through 550, and 550 provides a defense for not the initial transferee, which would be the college or university. Well, we'll talk about that. They're deemed to be the initial transferee. But the trustee may not avoid the transfer from an immediate transferee that takes for value in good faith.

What has happened very recently, we have two cases from 2019 I believe. We're seeing that when a parent makes a payment for a child's tuition, it is received by university, and a couple of these universities—one is Hofstra, they have set up these electronic portals for each student. So they're basically like a mini bank account. So when the money comes in, it is put in that bank account and it is not released until the student actually starts taking classes, enrolls, and tuition is due. So a lot of times these payments are coming in before the start of the semester. I'm sure they're required to be paid in advance, so they're put in this portal. So what happened in one of these cases, *Pergament v. Brooklyn Law*, is there were a series of payments made over time. And what the university stated was that we were not the initial transferee, we were the immediate transferee. The initial transferee of these funds was the student. We put them in that portal. We could not access them. We had no right to spend that money until that student enrolled.

So if you think about it generally, to me the student is always the initial transferee. It's like you're making a gift to your child. You just happened to give it to someone else. That hasn't really developed in the case law yet. This makes

it cleaner, clearly if you set up a bank account and the university acknowledges that it cannot spend that money. So what the courts are doing is they're looking—let's say eight transfers are made. You just pause time and you go back in time and you look, at that time that that payment was made, was that an advance payment? And if so, if the student had not yet enrolled, the funds were not yet able to be spent by the university, then they are still assets of the student and the universities are able to say, well, we were not the initial transferee and therefore we can bring in 550(b), and since we gave value, and the Code actually doesn't say you have to give value to the party that paid the money. It just—if you give value, it's a little bit less clear in where that value has to go. And if you take that money in good faith, well, of course they did. They had no idea the parents were insolvent. And those are complete defenses.

So we have two of those cases. Two universities are using this portal system that I know of. But that's a nice creative defense that might actually work.

MR. DUEDALL: So, Mike, can't colleges just kind of fix things? We don't want your checks. We don't want your cash. We've set up these portals. They're very simple. Put the money in the portal. Is that the solution to all this lawyer gobbledy-gook?

MS. AUSTIN: I think you might be surprised as to how many universities are possibly already using that method. I think the *Pergament* case which was decided by Judge Craig in 2018 was the first of those cases, and I think it was highly creative that they looked at that and were able to assert that defense.

I'm having the colleges that I represent, in particular Sacred Heart University because I had several cases for them, and I'm having them look at the way they do things and see if they don't in fact do it that way because a lot of the stuff I'm going back and looking at, it seems like they may actually be doing something similar. And if not, then you're right. The university should fix it so they are doing it that way.

MR. GORDON: But if they are doing it that way, then you have on the appeal the refundable, non-refundable aspect to it.

MS. AUSTIN: Right, because of the recent decision out of Connecticut, a very recent decision by Judge Tancredi, he found for the University of Connecticut that anything that was paid and at the time it was paid was refundable, then that was not recoverable as a fraudulent transfer but the minute it became non-refundable, it was paid and it was non-refundable, then that portion there was no reasonably equivalent value.

MR. GORDON: No longer a commercial conduit.

MS. XERRAS: That was a key point. So basically these cases turn on the fact that the money that was put in that portal was refundable to the student, not to the parent. So once it hits that portal only the student can access those funds, which kind of solidifies that the students are the initial transferee.

MR. GORDON: I think I should just say that last month I was presenting this in Colorado. Again, I was fortunate not to have opposition with me, but I actually changed it. I originally had it as part of a consumer case law update, but I was also doing a business case law update, and I moved it to the business case law update. The reason I did that is because so often when I send demand letters or file suit, I get these giant law firms from around the country who are defending the universities who are the top lawyers in their area, and you're dealing with cases like *Bonded Financial*, which you only usually see in a chapter 11 setting. You don't even hear about that in consumer cases. I said, you know what? I'm going to move this to the business case law update, and the business lawyers in there were fascinated by it. I think they probably have, from the bigger firms, have people in their law firms that represent universities and were going to be looking into it to see if they could get some business out of it. And slow times as it is, I guess, for bankruptcy lawyers. I know this is a consumer session, but I really think that this appeals to the business law community, too.

MR. IMBER: I hope that satisfies your question, Mark.

MR. DUEDALL: I'm not sure if it does, but this is a—and that's what's so interesting about this. We're all so passionate about it, we love it so much, but this is a financial issue as much as it is a consumer issue. That's one of the things that's so interesting about this.

MS. XERRAS: 548 concepts carry.

MR. DUEDALL: Yes, they do. And they're absolutely designed to. I would note as well that the Connecticut decision that they're talking about is in the materials. It's called *Mangan v. University of Connecticut, In re Hamadi*, favorably cited the *Emory Bankruptcy Developments Journal*, a student comment written two years ago. So what you're doing matters. It matters. It's read. People think about it. It's a very, very powerful piece.

MR. GORDON: Mark, there's a statistic. I was going back through some of my older stuff that I don't use anymore. There was an article in *The Wall Street Journal*, May 5 of 2015, almost four years ago. At that time, they were able to identify twenty-five cases. Now it's like twenty-five a month. Twenty-five total

cases at that point in a May 5, 2015 article, where universities had been sued on these tuition clawbacks.

MS. AUSTIN: And there are numerous others that have been settled without a lawsuit being brought. I know of a lot of them in Connecticut.

MR. GORDON: What is going on in Connecticut, by the way? Half the reported decisions come out of Connecticut it seems like.

MS. AUSTIN: Well, Connecticut is a pretty broken state right now financially, and the economy is in very bad shape. So it may have to do with the fact that we have a lot of debtors who are having to file bankruptcy and they pay for college tuition in university. I don't know. Altogether every system in Connecticut unfortunately is very broken.

MR. GORDON: Maybe your trustees in Connecticut got into this earlier than in other places, too.

MS. AUSTIN: We have one particular attorney. He's not a trustee, but he latched onto this issue very early on, and he goes to the trustees and says, I'll represent you on a contingency fee basis. He was actually written up in *The Wall Street Journal*.

MR. GORDON: Would you give him my name please?

MS. AUSTIN: Actually after I won at the bankruptcy court in *Palladino* he went to Mark DeGiacomo and said I'll handle the appeal for you pro bono.

MR. GORDON: Really? Is he doing a good job?

MS. AUSTIN: I think he did a very good argument at the First Circuit, in all fairness.

MR. GORDON: One thing about the First Circuit sitting back while they handle I guess these Puerto Rico issues, is there's a lot of decisions at the bankruptcy court level coming out since this case was originally certified, a lot of decisions, and a lot of them from your state.

MS. AUSTIN: That is accurate.

MS. XERRAS: I was thinking about this last night as just for policy or things to talk about, what about chapter 11? Could a parent know that insolvency is coming, know that it needs a chapter 11 restructuring, and decide to make payments to the college, file a chapter 11 plan, file a chapter 11 case, and then

bring suit against the university and then recover those funds to pay its creditors? Would that work?

MS. AUSTIN: That's an interesting question. Most cases that I have been involved in, the parents have been supportive. If a university does have the ability, I think in that situation the university definitely would turn around and bring the student in as a third party. In my cases, the universities have determined not to do that for their own policy reasons and publicity reasons.

MR. IMBER: PR.

MS. AUSTIN: PR, absolutely. But in that case I think that I would certainly advise my client to bring that student, and the student if they're still a student they could refuse to allow the student to participate in classes. They could withhold their degree. I wasn't involved in the case, but I know of one situation where a trustee sued and the college refused to allow the kid to graduate and get their degree, and withhold transcripts. They'd have a lot of ability to cause injury to the student if a debtor decided to be hostile.

MR. GORDON: You can pay all four years in advance. You can prepay tuition. It's not always that you're paying quarterly or a semester. So these can come up in different ways. But if you prepay somebody for four years and did it that way, I don't think the reaction would be very welcoming from the university. I think that they would react pretty harshly to that. And of course, the debtor might wait until the student has graduated before—

MS. XERRAS: That would be better timing.

MR. IMBER: Kiss your alumni donations goodbye.

MS. AUSTIN: And I also know where some colleges have made settlements with the trustee and they turn around and make demands on the parent or the student, and they've gotten repaid by the parent after settling the lawsuit for a minimal amount.

MR. DUEDALL: We have a question over there. What's your name? Yes, Riley.

[Inaudible question or comment from audience]

MS. XERRAS: What it means is the reason why I think this trend has started is because college is so expensive now. Those payments are so high that the trustees, they have to focus. They have a fiduciary duty to recover assets. If you

see a \$25,000 check that used to be lower amounts, I don't think they were on the radar, but they certainly are large now.

MS. AUSTIN: These lawsuits and these recoveries that the trustees are making or attempting to make, this goes to the bottom line of the college's bottom line and they have to make up those losses in some way, so this is contributing to the increase in cost of education.

MR. GORDON: Also, Riley, one of the benefits, if you want to call it that, or the opposite, of being a trustee is we see everybody's bankruptcy schedules when they file, and the amount of student loans that we see is staggering, just staggering. I'm assigned generally once a week twenty-five cases, and some of them are couples and some of them are individuals, a husband and wife can file and it's one case, but we look at the schedules, and I used to see a small amount of student loans. I would say at least two-thirds of the cases that I see now, and this is strictly the Atlanta division. I'm not speaking for the country, but in my division I'd say two-thirds of the cases have student loans, which are almost always going to be non-dischargeable. And the bankruptcy a lot of times has to do with you've got to get rid of everything else to be able to start paying back the student loans. There's not enough money to go around.

The sad cases are where somebody has spent \$200,000 or \$300,000 and is still trying to get an associate's degree. I don't understand that, but that is the response I get under oath because I ask when I see huge amounts of student loans, what are your degrees, and so on and so forth. A lot of them are online schools from private universities which may not be marketable. If you remember, the Obama Administration started targeting some of those schools, and there was a lot of pushback for a lot of reasons. I look at the number of people that I see that have degrees from those schools that appear to be worthless, just totally worthless.

But, by the same token, the money is so available for the student loans, that do you really have to have your parents pay if you're going to Harvard and you're going to have a great job afterwards, and the mother is not making mortgage payments. I mean, you've got to look at this from all sides, but it is staggering, the amount of student loan debt that is out there. And when you look at the level of education that some of the people actually got for that amount of debt, there is no way they can ever repay that debt. By the same token, of course they signed off. I don't think anybody's been advising these student loan borrowers of what they're getting into.

MS. XERRAS: That's a whole other issue.

MR. GORDON: It's a whole other issue we don't want to get into now. But it is staggering. I always say because there's an alternative, and they nationalized the student loan program about ten years ago, and I'm not going to get into the politics of that or why they did that, but they did it and the money is just like an open spigot. I mean, almost anybody can get it, and so it's just a fact that you deal with. That's just one of my counters to when Liz talks about "but there were other options" where the student would be responsible, maybe the parent wouldn't guarantee it, maybe not.

MS. XERRAS: If you think about it, if you step back, this issue of kind of go back to the basics of these cases is what is a reasonable expense for a parent to pay? What is support? What is okay and what is not okay when you're looking at payments that a debtor made to his or her family? Is it okay to pay for a vacation? Is it okay to pay for your kid's car? Can you pay for their insurance? Can you go out to dinner? Can you have a holiday party? This concept is murky, especially as expenses rise. It comes into play in some other places, too.

So when you file a chapter 13 case, you have to devote your disposable income to the plan. So what if the parent is paying private school tuition? What if the parent has been helping with college tuition? Can the parent continue to do that? I do not focus on chapter 13 and I will not pretend to say that I have true knowledge of that issue, but I know it's out there in this kind of analogy and it also flows into even chapter 11 where you also again have to devote your disposable income to pay creditors under a plan. It's an issue, it's a policy, it is this kind of societal expectation. Apparently kids, I hate to say it, they're not really adults at eighteen. They're still being supported. They certainly are not independent. Let's say that. They are adults of course. You're not truly financially independent anymore at eighteen, not really until you graduate, unless you have a trade or you went in the military or you're doing something other than head off to college. So I think parents that are filing bankruptcy with kids that are between eighteen and twenty-one have to face these issues.

MR. IMBER: Liz, I think one of your experts in here said that the age of financial independence was about twenty-four.

MS. AUSTIN: Right, twenty-four.

MR. IMBER: Then also, I've got twin boys that are going to be twenty-four soon. I can keep them on my healthcare until they're twenty-six. So there is this arbitrary line in the sand about when do kids become financially independent. And everybody, all the law students in here are of majority age, but I'm sure still largely financially dependent upon their parents.

MR. GORDON: There's two different issues there. You're talking about financial independence and I'm talking about legal independence. The reality is what you're talking about.

MR. IMBER: Well I kind of live in reality.

MR. DUEDALL: Mike deals in reality. Mike, this is a law school. Reality lives out there.

MR. IMBER: My wife's opinion is to the contrary.

MS. XERRAS: That is the reality. That's what's going on.

MS. AUSTIN: And speaking of private school education, there was a very aggressive trustee in New York in the Eastern District who sued debtors who paid for private school for their minor children under age eighteen, saying that that was a fraudulent conveyance. Of course the judge shut them down and said, no, that they received reasonably equivalent value, they're minors.

MR. GORDON: Parents have an obligation to pay for the education of a minor child.

MS. AUSTIN: Exactly. But the trustee's argument was they could've gone to public school and received the same education, etc., etc. My point is it's okay for parents to pay for private school for a minor. That's reasonably equivalent value. Then how can it not be reasonably equivalent value for a parent to continue to educate their child based on the fact of not only societal expectations but the way the laws have been written with respect to the provision of education and the tax laws and the 529 plans?

MR. GORDON: That trustee doesn't attend my seminars or he wouldn't be bringing it against minor children. If the trustee really felt that way, that there was some sort of abuse, the remedy is not what he did. The remedy is report it to the U.S. Trustee under a 707 referral. If he thinks that this is under the totality of circumstances some sort of abuse, which I've seen done. It happened in one of my cases. I did not make the referral, but the U.S. Trustee did bring an action successfully under 707 for the debtor's educating at very expensive private schools. The backstory is too complicated, but the point is that they actually dismissed the case under 707, and that was the remedy that they followed there, for paying the tuition of a minor child.

I actually testified against dismissal for a lot of reasons, including that the debtor was sixty-seven years old and he had small children, and I didn't think

that he'd be able to ever renew a contract when he hit the maturity of that contract, when he was age sixty-nine. I didn't think that they would re-up, and that's what happened to him.

MS. AUSTIN: I'm quite sure the trustee's intent there in bringing the action was not to allege abuse but in order to make a recovery and get a commission.

MR. DUEDALL: And give money to creditors. That's what trustees do.

MR. GORDON: Actually in that case, I had already liquidated all the assets. It was already done, and so that was already going to happen whether it was dismissed or not, that I'd have to be paid. So it wasn't about that. It was about what I thought was a wrong outcome and that somebody of that age I thought wouldn't ever be able to make up the money in the workplace. He didn't have that many working years left, so I thought he needed the discharge and should have gotten it, but that's another story.

MS. XERRAS: The question is where we're going with this, because we're at the point where these cases have been evolving since I think around 2011, and do we think Congress will react. There was a time when trustees used to sue churches and charities. If a debtor had been tithing or making donations to local cancer research organizations, those were gifts. You don't receive technically any economic value from that. So they fall within the face of 548 and Congress reacted, amended the Bankruptcy Code and excepted certain donations to charity. The limit depends on whether you had been donating on a regular basis in the past, and it's tied to a percentage of income.

Do we think we will get there? We have 541 [which] was amended. That's a favorable change to protect 529 plans. Do we think we will get there?

MS. AUSTIN: I'm not confident that Congress is going to do much of anything in the next few years, but I think what we need is we need a split in the circuits so we can get it to the Supreme Court and have the Supreme Court make a decision. Unfortunately I think there's a higher chance of that happening than Congress reacting.

MR. GORDON: Congress might react if there was an adverse ruling to the universities at the Supreme Court level and there was a big enough push.

MS. AUSTIN: Right. Yes. Once again, I think—

MR. GORDON: We know that there are universities in every state and there are lobbyists for every university that can go and call on senators and everybody

in Congress. So if they got together they could make a pretty powerful lobby I think collectively.

MS. AUSTIN: Right. At this point I don't know of any other of these decisions that are actually on appeal at the circuit level.

MR. GORDON: Not that I've heard of.

MS. AUSTIN: No, not that I've heard of.

MS. XERRAS: There was a district court level but I think—

MS. AUSTIN: Judge Craig's, but it was remanded.

MR. GORDON: That was the Carla Craig case that—

MS. AUSTIN: Carla and the issue of the timing of the payments on the portal issue.

MR. DUEDALL: The neat thing is this gives everyone in this room, especially the students, an opportunity now that you've learned about this issue, you've got some materials on this issue and you've thought about this issue, if you want you can start thinking about this issue. You can start writing about this issue. You can start blogging about this issue. There's a lot of outlets out there, and you can do what these fine professionals have done, which is shoe leather thought leadership. One issue at a time, let me try to understand it, let me see what other people are writing about it, let me write about it as well. Not forty pages or sixty pages or eighty pages, just here's something that is going on. Here's a recent decision, and that shoe leather thought leadership will carry you so far in your careers.

I want to thank the panelists for this. This was a great discussion.