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LUNCHEON PLENARY

The 'Bad Debtor' Myth: Bias, Narrative and Power in Court

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The 'Bad Debtor' Myth: Bias Narrative, and Power in Bankruptcy Court

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Two Requests. Same Court. Same Code.

Debtor A

- Mid-market Chapter 11
- Energy / construction / outdoor manufacturing
- Debtor's Counsel: National firm, familiar professionals
- Delay due to "system migration"

Debtor B

- Mountain town small business, rural Western Slope corridor
- Records kept manually because accountant quit
- Debtor's counsel: Local, known to the community, new to the court
- Delay due to seasonal cash flow & disruption

Both get the extension.

Only one keeps the court's confidence.

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Prepetition Planning

Debtor A

- Sponsor-backed Front Range company
- Engaged in aggressive prepetition restructuring
- Insider loans, asset ring-fencing, liability management
- Described as:
  - "Strategic"
  - "Industry-standard"
  - "Prudent"

Debtor B

- Owner-operated business
- Paid family expenses before filing
- Kept operating informally while behind on taxes
- Described as:
  - "Abusive"
  - "Self-dealing"
  - "Gaming the system"

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When does planning become misconduct – and who gets to cross that line?

See *In re Paige*, 685 F.3d 1160 (10th Cir. 2012) – 'Bad faith determinations are fact-driven and depend on the overall context of the filing

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Who gets the label -- ”bad debtor”?

- Bad debtor descriptors: unsophisticated, disorganized, emotional, strategic (not the good kind), gaming the system
- These labels often correlate with race, gender, immigration status, disability, and/or class

The system punishes messiness – and messiness correlates strongly with structural inequality.

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Two Ambitious Plans

Plan A

- Mid-market Chapter 11
- Supported by lenders and professionals
- Everyone knows the projections are rosy
- Court confirms with comments about 'giving the business a chance'

In re Sandia Resorts, 557 B.R. 217 (B.A.P. 10th Cir. 2016) – feasibility requires 'reasonable assurance of success,' not a guarantee.

Plan B

- Debtor works two jobs, caregiving responsibilities
- Plan is tight and fragile
- Court expresses skepticism about feasibility
- No margin for:
  - I-70 closures
  - Missed shifts
  - Family emergencies
  - Childcare disruptions

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Why are we more comfortable letting one debtor fail rather than another?

Same Code. Same standard. Different Stories.

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What Changes if We Admit We Have Biases?

For Lawyers: Challenge the stories we tell. Rethink access. Widen the network

For Judges: Interrogate instincts. Apply discretion consistently. Be explicit on the record

For the System: Neutrality ≠ Fairness. DEI shapes outcomes. Legitimacy requires trust

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Closing and Resources

Selected Authorities

- *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983)
- *In re Gier*, 986 F.2d 1326 (10th Cir. 1993)
- *In re Paige*, 685 F.3d 1160 (10th Cir. 2012)
- *In re Sandia Resorts*, 557 B.R. 217 (B.A.P. 10th Cir. 2016)
- *In re Mullet*, 817 F.2d 677 (10th Cir. 1987)
- Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012)
- Katherine Porter, *The Pretend Solution*, 90 Tex. L. Rev. 103 (2011)

Written materials available – see conference handout

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THE MYTH OF THE "BAD DEBTOR": Bias, Narrative, and Power in Court

Presented at the ABI Rocky Mountain
Bankruptcy Conference
Ciara L. Rogers
Waldrep Wall Babcock & Bailey PLLC

June 4, 2025

Course Description

This program examines how discretion, narrative framing, and credibility determinations influence outcomes in bankruptcy cases. While bankruptcy law is facially neutral, its application often depends on subjective judgments regarding good faith, feasibility, and debtor credibility. This presentation explores how those judgments may produce unequal outcomes, particularly for small businesses, consumer debtors, and historically marginalized groups. The session integrates substantive bankruptcy doctrine with principles of diversity, equity, and inclusion (DEI) to encourage more intentional and equitable practice.

Learning Objectives

After completing this program, participants will be able to:

1. Identify where subjective discretion enters bankruptcy decision-making, particularly in good faith and feasibility determinations.
2. Understand how narrative framing and credibility assessments can influence outcomes across Chapters 11 and 13.
3. Recognize how implicit bias and structural inequality may affect debtor treatment despite neutral legal standards.
4. Apply practical strategies to promote equitable decision-making without compromising efficiency or legal rigor.
5. Analyze Tenth Circuit authority on good faith, feasibility, dismissal, and credibility, and evaluate how those doctrinal standards interact with discretionary decision-making.
6. Identify strategies for addressing implicit bias in bankruptcy practice, including awareness of language, framing, and narrative construction in pleadings and judicial opinions.

I. Discretion Is Central to Bankruptcy Law

Bankruptcy adjudication relies heavily on judicial and professional discretion. Courts routinely assess concepts that resist precise definition, including "good faith," "feasibility," "cause," and "best interests of creditors." These determinations are unavoidable and essential to the functioning of the system.

For example, courts evaluate good faith at multiple stages of a case, including at filing, plan proposal, and confirmation. Although articulated differently across jurisdictions, good faith is commonly assessed through a "totality of the circumstances" analysis. See *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994); *Matter of Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986). In *Flygare v. Boulden*, 709 F.2d 1344, 1347-48 (10th Cir. 1983), the court articulated a nonexclusive list of factors relevant to good faith in Chapter 13 plan confirmation, cautioning that no single factor is dispositive. These factors include the debtor's employment history and earning ability, the accuracy of schedules and statements, the "motivation and sincerity" of the debtor, and the burden placed on the trustee. In the Tenth Circuit, this flexible approach has been repeatedly affirmed. The *Flygare* framework highlights how subjective assessments—such as sincerity and motivation—are integral to bankruptcy outcomes and may be influenced by implicit assumptions about debtor credibility. Similarly, in *In re Gier*, 986 F.2d 1326 (10th Cir. 1993), the court reaffirmed that good faith requires courts to consider the "honesty of intention" of the debtor, a concept that necessarily incorporates credibility judgments. Because these standards are inherently flexible, they invite judgment calls shaped not only by law and facts, but also by credibility, familiarity, and narrative coherence.

II. Credibility and Narrative in Chapter 11 Practice

Chapter 11 cases depend heavily on trust. Debtors-in-possession are afforded significant authority based on the presumption that they will act in the estate's best interests. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985).

In practice, courts often assess:

- The perceived competence of management
- The professionalism of retained counsel and advisors
- The plausibility of projections and restructuring narratives

Repeat players—such as national firms, financial advisors, and institutional lenders—benefit from familiarity and reputational capital. Courts may extend interpretive charity to such parties, framing missteps as business judgment rather than misconduct. By contrast, small businesses, first-time debtors, and owner-operators may face heightened scrutiny when records are incomplete or plans appear fragile, even when no fraud or bad faith is alleged.

Illustrative Hypothetical: Prepetition Planning and Differential Framing

Consider two debtors, each seeking an extension of a filing deadline:

Debtor A is a mid-market Chapter 11 debtor in the energy, construction, or outdoor manufacturing sector. Its counsel is a national firm with familiar professionals. The extension is needed because of a "system migration." The court grants the request with minimal scrutiny.

Debtor B is a small business in a mountain town or rural corridor. Records were kept manually because the accountant quit. Debtor's counsel is a local solo or small-firm practitioner. The extension is needed because of seasonal cash flow disruption. The court also grants the request—but with greater skepticism about the debtor's overall credibility and case viability.

Now consider prepetition planning. Debtor A, a sponsor-backed Front Range company, engaged in aggressive prepetition restructuring—insider loans, asset ring-fencing, and liability management transactions. Courts describe this conduct as "strategic," "industry-standard," and "prudent." Debtor B, an owner-operated business, paid family expenses before filing and continued operating informally while behind on taxes. That conduct is described as "abusive," "self-dealing," and "gaming the system." Both debtors engaged in prepetition transactions that benefited insiders. Both made choices that prioritized some stakeholders over others. The conduct is parallel; the framing is not.

The Tenth Circuit's decision in *In re Paige*, 685 F.3d 1160 (10th Cir. 2012), is instructive. The court affirmed dismissal of a Chapter 11 case for bad faith filing, emphasizing that courts must consider the debtor's intent and the economic realities of the case. The court acknowledged that bad faith determinations are "fact-driven and depend on the overall context of the filing." *Id.* at 1164. *Paige* demonstrates how courts distinguish between legitimate restructuring efforts and abusive filings by evaluating narrative coherence, timing, and perceived debtor motivation—factors that may disproportionately disadvantage unsophisticated or first-time debtors.

III. Parallels in Consumer Bankruptcy and Chapter 13

Discretionary dynamics are particularly visible in Chapter 13 practice, where courts regularly assess feasibility, good faith, and debtor compliance. Chapter 13 has been widely studied for its disparate outcomes, including higher dismissal rates for debtors of color and low-income filers.

Empirical research demonstrates that Chapter 13 often functions as a system of conditional relief, where failure is common and consequences are severe. See Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103 (2011); Pamela Foohey et al., *Life in the Sweatbox*, 94 Notre Dame L. Rev. 219 (2018).

These disparities matter to Chapter 11 practitioners because they reveal how narrative expectations and moral judgments about debt influence outcomes across chapters, even when legal standards appear uniform.

Illustrative Hypothetical: Feasibility and Unequal Skepticism

Consider two plans submitted for confirmation:

Plan A is a mid-market Chapter 11 plan supported by lenders and professionals. The projections are optimistic—described by some as a "hockey-stick revenue curve"—but the court confirms with comments about "giving the business a chance."

Plan B involves a debtor who works two jobs and has caregiving responsibilities. The plan is tight and fragile. The court expresses skepticism about feasibility, and there is no margin for error—no room for highway closures, missed shifts, or family emergencies. The court asks why it should believe this debtor can perform when the plan leaves so little room for disruption.

The Tenth Circuit's Bankruptcy Appellate Panel addressed feasibility in *In re Sandia Resorts, Inc.*, 557 B.R. 217 (B.A.P. 10th Cir. 2016), emphasizing that feasibility under § 1129(a)(11) requires a "reasonable assurance of success," not a guarantee. *Id.* at 231. Nonetheless, courts retain discretion to assess the credibility of projections and management's ability to execute the plan. The evaluation of feasibility often turns on the debtor's past performance, the sophistication of management, and the perceived realism of projections—factors that may intersect with implicit bias when courts equate professionalism and polish with reliability.

The question these hypotheticals pose is straightforward: Why are we more comfortable letting one debtor proceed with optimistic assumptions while subjecting another to heightened skepticism? When the legal standard is "reasonable assurance of success"—not certainty—what explains the differential treatment?

IV. Implicit Bias and the "Bad Debtor" Archetype

Implicit bias research shows that decision-makers may unconsciously associate credibility, competence, and trustworthiness with factors such as race, gender, accent, education, and socioeconomic status. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

In bankruptcy, this can manifest through:

- Greater skepticism toward debtors with nontraditional records
- Moralized interpretations of financial distress
- Disparate tolerance for risk and failure

The "bad debtor" archetype—disorganized, irresponsible, or abusive—often overlaps with structural disadvantage rather than misconduct. When courts and practitioners conflate messiness with bad faith, equity concerns arise even in the absence of discriminatory intent.

Credibility Determinations and Appellate Deference

The risk of implicit bias is compounded by the degree of deference afforded to trial-level credibility determinations. The Tenth Circuit has consistently deferred to bankruptcy courts on such assessments. In *In re Mullet*, 817 F.2d 677 (10th Cir. 1987), the court noted that appellate courts give "due regard" to the bankruptcy court's opportunity to judge witness credibility. *Id.* at 680. This deference is appropriate as a matter of appellate procedure, but it also means that if bias enters the system, it enters at the point of first impression—and is very difficult to correct on review.

Practitioners should also consider how confidence, demeanor, and presentation style are read differently depending on who exhibits them. A corporate debtor's CEO who speaks forcefully about a turnaround plan may be perceived as "determined" and "committed." A small business owner who does the same may be perceived as "unrealistic" or "not listening to counsel." These micro-level credibility assessments—extensions granted or denied, second chances offered or withheld—are shaped by the stories practitioners and judges tell themselves about who deserves patience and who is wasting the court's time.

V. The Role of Language and Framing

Language matters in bankruptcy pleadings, hearings, and opinions. Terms such as "strategic," "abusive," "gaming the system," or "deserving a chance" carry normative weight and shape perceptions of legitimacy. Scholars have noted that corporate debtors are often described using neutral or positive economic language, while consumer and small business debtors are framed in moral terms. Greater awareness of framing can help legal actors distinguish between conduct that violates statutory requirements and conduct that merely deviates from professional or cultural norms.

VI. Practical Strategies for More Equitable Practice

Equity in bankruptcy does not require eliminating discretion. Instead, it requires intentional use of discretion.

For Practitioners:

- Be mindful of narrative framing in pleadings and oral argument
- Avoid moralized language when describing debtor conduct
- Recognize when access to sophistication, not merit, is driving outcomes

- Challenge language in opposing pleadings and arguments—when a debtor is described as "gaming the system," ask whether that characterization reflects a legal conclusion or a rhetorical move
- Rethink fee structures and access for small debtors, recognizing that if the system works better for those who can afford more sophisticated representation, access is a fairness issue
- Mentor outside your own demographic and firm pedigree to broaden the network of repeat players and reduce the insider-outsider dynamic

For Judges and Trustees:

- Articulate reasons for discretionary decisions on the record
- Examine whether skepticism is tied to evidence or familiarity
- Apply comparable scrutiny across debtor types
- Be explicit about reasoning in dismissals and conversions—if the basis for dismissal is bad faith, articulate the specific grounds rather than relying solely on "totality of the circumstances" as a conclusory standard

For the System:

- Acknowledge that facial neutrality does not guarantee equitable outcomes
- Treat DEI considerations as integral to legitimacy and public trust
- Recognize that legitimacy of the bankruptcy system depends on trust—not just efficiency—and that public confidence erodes when outcomes appear to vary based on who the debtor is rather than what the debtor did

VIII. Conclusion

Bankruptcy promises a fresh start, but that promise is mediated by discretion, narrative, and credibility judgments. When those judgments operate unconsciously or inconsistently, they risk reinforcing inequality rather than alleviating it. By becoming more aware of how stories shape outcomes, bankruptcy professionals can preserve the system's efficiency while advancing fairness, legitimacy, and trust. Equity in bankruptcy is not about abandoning rigor—it is about applying it consistently.

Faculty

Ciara L. Rogers is a partner with Waldrep Wall Babcock & Bailey PLLC in Winston-Salem, N.C., where her practice focuses on debtors' and creditors' rights, chapter 11 bankruptcy, representing bankruptcy trustees in chapter 7 and 11 cases, serving as a subchapter V trustee, and litigating adversary proceedings. In 2022, she was certified as a specialist in business bankruptcy by the North Carolina State Bar Board of Legal Specialization. Ms. Rogers has taught a foundations of bankruptcy course and lectured on bankruptcy topics at local law schools, and she regularly speaks at conferences on various bankruptcy-related topics. In 2023, she was selected as one of the ABI's "40 Under 40" honorees. Previously, Ms. Rogers clerked for Hon. J. Rich Leonard and Hon. Randy D. Doub of the U.S. Bankruptcy Court for the Eastern District of North Carolina. She serves as the director of the Stubbs Bankruptcy Clinic at Campbell University's Norman A. Wiggins School of Law in Raleigh, N.C. In that capacity, she supervises law students in providing *pro bono* bankruptcy representation to low-wealth individuals in the Eastern District of North Carolina. Ms. Rogers received dual B.S degrees in history and political science from Averett University and her J.D. from North Carolina Central University School of Law.