AMERICAN BANKRUPTCY INSTITUTE

Consumer Practice Extravaganza

The Anatomy of Hidden Assets (Including Valuation) in Consumer Cases: From Pre-Filing Considerations to the Evidentiary Process

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CONCURRENT SESSION

2023

American Bankruptcy Institute – 2023 Consumer Practice Extravaganza (CPEX)

"*The Anatomy of Hidden Assets (Including Valuation) in Consumer Cases: From Pre-Filing Considerations to the Evidentiary Process*"

Friday, November 3, 2023 at 12:45 p.m. (PST)/3:45 p.m. (EST) – 1:45 p.m. (PST)/4:45 p.m. (EST)

Panelists:

The Honorable Brian D. Lynch (W.D. Wash.)
The Honorable Tiiara N.A. Patton (N.D. Ohio)
Jennifer A. Giaimo – U.S. Department of Justice, Office of the U.S. Trustee (Phoenix, AZ)
Richard A. Marshack – Marshack Hays, LLP

Panel Description/Learning Objective: Panelist will explore practice pointers professionals should consider when evaluating an individual's case and assets at the pre-filing stage, post-filing stage, particularly if there is an inquiry from the case trustee and/or the Office of the United States Trustee, and the trial stage if litigation is instituted regarding an assets value. Participants will learn about typical practice pitfalls when a debtor fails to adequately disclose and value certain assets.

Program Outline

A. Introduction – Laura L. Donaldson (Law Offices of Laura L. Donaldson, LLC)

B. Pre-planning Considerations – Hon. Brian D. Lynch (W.D. Wash.) (10 – 15 minutes)

1. Risks Regarding Asset Valuations

    a. Post-Petition, Pre-Conversion Appreciate Belongs to Estate - *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052 (9th Cir. 2023)

    b. Post-Petition, Pre-Conversion Appreciate Belongs to Debtor - *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. 2022)

2. Carveouts by Trustee of Under-secured Homesteads – Whether the Carveout is Subject to the Debtor's Exemption

3. Risks of 11 U.S.C. §§ 522(p) and (q) in States with Increased Exemptions

    a. Practice Pointers

    b. Be Aware of Split in Authority

C. Post-Filing Issues – Consequences/Ramifications of Undisclosed Assets (25 Minutes)

1. The Risk and Implications of Non-Disclosure – Richard A. Marshack (Marshack Hays, LLP)

    a. Requirements to Disclose – 11 U.S.C. § 521(a)(1)(B)(i)

    b. Where and When to Schedule – 11 U.S.C. § 554(c) and Rule 1009(a) of the Federal Rules of Bankruptcy Procedure

    c. Exemption Issues – 11 U.S.C. §§ 522(g), 541(d), and 522(p)(1)

2. From the Perspective of the Office of the United States Trustee – Jennifer A. Giaimo (U.S. Department of Justice, Office of the United States Trustee)

    a. Ramifications of failure to disclose assets (discovery, objection to discharge under 11 U.S.C. § 727, Chapter 11 issues, potential criminal referrals)

    b. How issues are raised – fraud referrals from exes (spouses, business partners, and friends)

    c. Tips for Rule 2004 examinations after non-disclosure of assets discovered

D. Contested Matters/Trial Best Practices – Hon. Tiiara N.A. Patton (N.D. Ohio) and Hon. Brian D. Lynch (W.D. Wash.) (25 Minutes)

1. Know Your Judge – Review Local Rules, Practices and Procedures, and Scheduling Order

2. Identifying and Preparing Your Expert –

    a. Lay Witness v. Expert Witness – Rule 701 of the Federal Rules of Evidence

3. Expert Disclosures, Discovery and Reports – Rule 26(a) of the Federal Rules of Civil Procedure

    a. Failure to Make Adequate Disclosures – Rule 37 of the Federal Rules of Civil Procedure

4. Testimony of an Expert Witness – Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (applies *Daubert* standards to all experts, not just scientific experts)

VALUATION OF EXEMPT PROPERTY — MAYBE FILING OR CONVERTING TO CHAPTER 7 IS NOT SUCH A GOOD IDEA

BY BRIAN LYNCH, U.S. BANKRUPTCY JUDGE, WESTERN DISTRICT OF WASHINGTON

1. Circuit Split: Post-Petition, Pre-Conversion Equity Appreciation

a. Post-Petition, Pre-Conversion Appreciation Belongs to the Estate

Castleman v. Burman (In re Castleman), 75 F.4th 1052 (9th Cir. 2023)

In *Castleman*, the debtors converted their chapter 13 case to chapter 7 twenty months after confirmation. At the original filing date, the property was valued at $500,000, and subject to a $375,000 mortgage and debtors claimed an exemption of $124,923 (the Washington State maximum at the time was $125,000). During the chapter 13, the home value increased $200,000. The chapter 7 trustee sought to sell the property. The debtors objected, arguing that the increased equity belonged to them pursuant to section 348(f)(1)(A). The bankruptcy court agreed with the trustee that the appreciation belonged to the estate upon conversion.

A split Ninth Circuit agreed with the bankruptcy court. The court began with the text of section 348(f)(1)(A), which defines property of the estate at the time of conversion. Determining that "property of the estate" was a term of art, the court turned to section 541. The court relied on subsection 541(a)(6), which provides that estate property includes "proceeds, product, offspring, rents, or profits of or from property of the estate[.]" Citing previous Ninth Circuit opinions, the court concluded that post-petition pre-conversion appreciation falls under section 541(a)(6) and therefore belongs to the bankruptcy estate, not the debtor. The court found "no textual support" for concluding that property of the estate as described in section 541(a) has a different meaning upon conversion. Finally, the court was not persuaded that section 1327(b) changes the analysis.

Goetz v. Weber (In re Goetz), 651 B.R. 292 (B.A.P. 8th Cir. 2023), *appeal docketed*, No. 23-2491 (8th Cir. June 23, 2023)

The Eighth Circuit B.A.P. similarly concluded that property of the estate encompasses the entire asset, including any changes in its value that occur post-petition. Further, citing to *Harris v. Viegelahn*, 575 U.S. 510 (2015), the B.A.P. concluded that section 1327(b) and the confirmation order cease to apply once the case is converted.

b. Post-Petition, Pre-Conversion Appreciation Belongs to the Debtor

Rodriguez v. Barrera (In re Barrera), 22 F.4th 1217 (10th Cir. 2022)

In *Barrera*, the chapter 13 debtors sold their home and pocketed the sale proceeds prior to converting to chapter 7. The trustee argued that the nonexempt portion of the proceeds belonged to the estate. The Tenth Circuit noted that there is a distinction between "legal and equitable interests," as that term is used in section 541(a)(1), and "proceeds," as that term is used in section 541(a)(6). Accordingly, pursuant to section 348(f)(1), the sale proceeds did not become property of the estate because the underlying property as of the

date of filing—the home itself—was no longer in the debtors' possession or under their control.

The court left open the question of what the result would be had the chapter 13 case converted to chapter 7 before the home was sold.

2. Carveouts by Trustees of Undersecured Homesteads

Ordinarily, a chapter 7 trustee should abandon, not administer, over-encumbered property. *See, e.g.*, *In re KVN Corp., Inc.*, 514 B.R. 1, 5 (B.A.P. 9th Cir. 2014). During the Great Recession, carveout agreements were commonly made between the trustee and a mortgage creditor of a debtor whereby the trustee sells an asset in a "short sale," and the creditor agrees to "carveout" a portion of its proceeds to provide the trustee with funds to make distributions to the debtor's creditors.

When the asset involved in these agreements is the debtor's home, one of the most contentious issues was whether the carveout is subject to the debtor's homestead exemption. The issues around carveouts are making an appearance again.

a. The Carveout is Subject to the Debtor's Exemption

In re Stark, 2022 WL 2316176 (E.D.N.Y. June 28, 2022)

Reversing the bankruptcy court, the district court concluded that the carveout negotiated between the creditor and the trustee involved "value" that was attributable to the debtor's property rights in the house, thereby implicating the homestead exemption.

In re Wilson, 494 B.R. 502 (Bankr. C.D. Cal. 2013)

In *Wilson*, the debtor amended her schedules to utilize a wild card exemption for two homes after she learned of the carveout agreements between the trustee and her creditors. The bankruptcy court held that funds generated through a section 363 sale, including through the use of a carveout, is subject to valid exemptions, such as the wild card exemption.

b. The Carveout is not Subject to the Debtor's Exemption

In re Bunn-Rodemann, 491 B.R. 132 (Bankr. E.D. Cal. 2013)

The bankruptcy court held that the debtor's exemption in property of the estate is determined as of the petition filing date. Therefore, the post-petition "increase" in the equity as a result of the trustee's carveout agreement does not entitle the debtor to exempt the proceeds.

In re Diener, 2015 WL 4086154 (Bankr. N.D. Ga. 2015)

The *Diener* court, citing favorably to *In re Bunn-Rodemann*, concluded that a carveout represents a "value that was added from the trustee's efforts and powers, *not* value of the Property itself." Accordingly, the debtor's homestead exemption could not attach to the proceeds, because such value did not exist at the time the petition was filed.

In re Babaee, 2022 WL 2191369 (B.A.P. 9th Cir. June 17, 2022)

The Ninth Circuit B.A.P. held that the debtors lacked standing to challenge the carveout agreements approved by the bankruptcy court because if the agreements were rejected or undone, there would still be no funds available for the debtors' homestead exemption. Accordingly, the debtors cannot show that the court can redress any injury to them.

3. Risks of 11 U.S.C. §§ 522(p) & (q) in States with Increased Exemptions

Under certain circumstances, the Bankruptcy Code prevents the debtor from taking full advantage of state homestead exemptions. These limitations are found in sections 522(o), (p), and (q).

Two of the limitations found in section 522 limit the homestead exemption to an actual monetary amount. Section 522(p) imposes a national monetary exemption limit currently $189,050 to the extent the debtor acquired an interest in that property 1215 days [3.33 years] preceding the petition date. Section 522(q) imposes a monetary limit of $189,050 if the debtor has been convicted of certain criminal conduct, or if the debtor owes a debt arising from certain wrongful conduct. For additional commentary regarding section 522(q), see Michael A. Rogers, *Both Time and Crime May Trigger Cap on Homestead Exemptions*, AM. BANKR. INST., Oct. 2022, at 32. *See also In re Cotton,* 648 B.R. 104 (Bankr. W.D. Wash. 2021) (11 U.S.C. 522(q)(1) barred the exemption claim in excess of $170,350 if the debtor has been convicted of a felon under section 3156 of title 18); *In re Oliver,* 649 B.R. 206 (Bankr. E.D. Cal. 2023).

a. Practice Pointers

Historically, sections 522(p) and (q) have been most relevant in jurisdictions with large or unlimited homestead exemptions. *See, e.g.*, Fla. State. Ann. § 222.01-02 (unlimited homestead exemption); Tex. Prop. Code § 41.001-002 (same).

However, if your state legislature increases the homestead exemption amount, or if the rise in home prices continues to increase the debtor's equity, these limitations may become more significant. Be mindful of these limitations as you counsel your clients.

b. Be Aware of Split in Authority

Subsections 522(p) and (q) each include the phrase "as a result of electing under subsection (b)(3)(A)." A split has emerged in lower courts regarding the meaning and effect of this phrase. Some courts adopt a strict interpretation and hold that subsections (p) and (q) do not apply to opt-out states because those debtors cannot "elect" state exemptions. *See, e.g.*, *In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005). Other courts have refused to follow *McNabb* because *McNabb*'s construction of that phrase is contrary to the legislative intent behind the subsections. *See, e.g., In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005).

Hidden Assets: The Risks and Implications of Non-Disclosure

By: Richard A. Marshack, D. Edward Hays, and Bradford N. Barnhardt

1. **Requirement to Disclose All Assets**

    a. Section 521(a)(1)(B)(i) requires the debtor to file, unless the court orders otherwise, "a schedule of assets and liabilities."

2. **Where and When to Schedule**

    a. *Stevens v. Whitmore (In re Stevens)*, 15 F.4th 1214 (9th Cir. 2021):

        - Facts: The debtors filed Chapter 7 bankruptcy while they had a pending state-court lawsuit against their mortgage servicing company. The debtors identified the lawsuit in their SOFA, but not in their schedules. The debtors discussed the lawsuit with the bankruptcy trustee and sent him documents pertaining to the litigation, and the Trustee filed a no-distribution report. "A couple of years" after the bankruptcy case was closed, the mortgage servicing company contacted the bankruptcy trustee about a settlement. The trustee reopened the bankruptcy case, settled the lawsuit, and obtained court approval. The bankruptcy estate received the funds from the settlement. The debtors appealed the bankruptcy court approval of the settlement.

        - Held: At the end of bankruptcy proceedings, property that has not been otherwise administered can generally be abandoned to the debtor only if it has been "scheduled." 11 U.S.C. § 554(c). Section 554(c) requires property to be disclosed on a literal schedule, and thus that, absent Trustee or court action, property disclosed only on a statement (e.g., the Statement of Financial Affairs) cannot be abandoned under § 554(c).

        - Observation: The fact that the Trustee had actual notice of the lawsuit did not suffice for technical abandonment. The asset must be scheduled.

        - Observation: Underlying this decision is the rule that if an asset is not properly scheduled, it is not technically abandoned and remains property of the bankruptcy estate. The bankruptcy case can therefore be reopened years later to administer the asset.

    b. In general, under Federal Rule of Bankruptcy Procedure 1009(a), a debtor has a right to amend the petition, lists, schedules, or statements as a matter of course until the case is closed. 9 COLLIER ON BANKRUPTCY P 1009.02 (2023). No court approval is necessary for an amendment filed before the case is closed. *Id.* If a

case is reopened, there is a "strong argument" that it should be treated as open for purposes of Rule 1009, with amendments freely permitted. *Id.*

3. Exemption Issues

A. **Section 522(g)**:

a. When the trustee recovers property fraudulently conveyed or concealed, the debtor may not claim an exemption in the recovered property. 4 COLLIER ON BANKRUPTCY P 522.08 (2023). See also, 11 U.S.C. § 522(g).

b. *Glass v. Hitt (In re Glass)*, 60 F.3d 565 (9th Cir. 1995): Where a debtor voluntarily transfers property in a manner that triggers the trustee's avoidance powers or the debtor knowingly conceals a prepetition transfer or an interest in property, and such property is returned to the estate as a result of the trustee's actions directed toward either the debtor or the transferee, the debtor is not entitled to claim an exemption under § 522(g)(1). It is not necessary for the trustee to commence a formal adversary proceeding or obtain a final judgment to prevail on an objection to a debtor's claim of exemption pursuant to § 522(g)(1).

c. *Elliott v. Weil (In re Elliott)*, 523 B.R. 188 (B.A.P. 9th Cir. 2014): Debtor engaged in bad faith prepetition and post-closure transfers of his residence between himself and his LLC, and he did not schedule his interest in the property. After debtor filed amended schedules in his reopened case and claimed a homestead exemption, the trustee filed an exemption objection. The bankruptcy court sustained the objection on the basis of bad faith, which ruling was abrogated by *Law v. Siegel*. On appeal, the BAP stated, in dicta, that § 522(g) would be a basis to deny Debtor's homestead exemption because the trustee had filed a § 542 turnover action for recovery of the property and succeeded. (While the appeal was pending, the bankruptcy court entered a judgment revoking the debtor's discharge and vesting title of the property in Trustee.)

d. *In re Perez*, 628 B.R. 327 (B.A.P. 9th Cir. 2021): Pre-petition, on the advice of counsel, Debtor granted his sister, Maria Perez, a third position lien ("DOT") on his residence. During the § 341(a) meeting, the Chapter 7 trustee questioned Debtor about the DOT and informed him that she intended to have a realtor look at his house, but she did not mention the DOT's potential avoidability. Debtor then hired new counsel and promptly took steps to have the DOT reconveyed. He also amended his exemptions to claim a $175,000 homestead exemption. Trustee objected on the ground that, under § 522(g), Debtor was not entitled to a homestead exemption because the DOT had been avoided and recovered for the estate due to Trustee's efforts. While it was not necessary that Trustee commence a preference action to bar Debtor from asserting an exemption, the BAP agreed with the bankruptcy court's

determination that the limited Trustee action fell below the level required to invoke § 522(g).

B. **Poor man's estate planning and § 541(d)**— There are situations in which a parent puts a child on title with a joint tenancy vesting. The purpose is to avoid probate and have the right of survivorship pass title. If the child files bankruptcy, is this asset property of the child's bankruptcy estate? Section 541(d) excludes from the estate any property in which debtor only has legal title and not an equitable interest.

   a. Because a debtor has a duty to disclose all interests in property, even if such an interest is only bare title, these interests should be disclosed.
   b. If not administered, then any potential interest is deemed abandoned.
   c. Should a potential debtor remove their name from title prior to any bankruptcy? Any time a debtor makes any transfer prior to bankruptcy, it gives rise to an appearance of misconduct. It could also give rise to a 727 claim to deny discharge. But, if the debtor never had an interest, the transfer would not be subject to avoidance because Section 548 only permits a trustee to avoid the debtor's transfer of an interest in property. If that interest was only bare title and would not be property of the estate, then no avoidance action would lie. *Mitsui Mfrs. Bank v. Unicom Comput. Corp. (In re Unicom Comput. Corp.)*, 13 F.3d 321 (9th Cir. 1994). But, whether the transfer is made or not made, the debtor will have to prove to the trustee's satisfaction that they never had an interest in the property. Also, consider whether a trustee would have Section 544(a)(3) rights has a hypothetical bona fide purchaser if debtor remains on title as of the petition date.
   d. Caveat: Be sure to get documentation from the client prior to filing their case that will prove the interest is only bare naked title. The bankruptcy trustee will surely demand it and clients may say one thing where documents may show something different. You should also warn the clients in writing that there is a risk that the trustee will seek to prove that the interest is an equitable one and not merely bare title and that you as counsel are not guaranteeing any result.

C. **Section 522(p)(1)**

   a. 11 U.S.C. § 522(p) imposes a monetary limit of $189,050 on the amount of a debtor's interest in homestead property that may be exempted to the extent that there has been an acquisition of a homestead interest within a period of 1,215 days before the commencement of the case. 4 COLLIER ON BANKRUPTCY P 522.13[1] (2023). The amount of the cap is subject to adjustment so be sure to always check for the current amount.

   b. *In re Jamie Lynn Gallian*, Case No. 8:21-bk-11710-SC: Debtor's single-member LLC took title to the mobilehome in which she lived and was the owner of record on the petition date. She claims that the LLC released title to her personally a few months before the bankruptcy filing. We argue that even

if that were the case, her homestead exemption would be capped by 11 U.S.C. § 522(p)(1). The issue is currently on appeal.

c. *Kane v. Zions Bancorporation, N.A.*, 2022 U.S.Dist.LEXIS 177905 (N.D. Cal. Sept. 29, 2022): The debtor, NHL player Evander Kane, through his 100% owned LLC purchased residential real property in which debtor lived. On the day prior to bankruptcy, the debtor had the LLC transfer title to him. The bankruptcy court held that the debtor had no interest in the property when it was owned by the LLC and that he only acquired his interest when title was transferred to him on the eve of bankruptcy. Based on § 522(p), the District Court affirmed the bankruptcy court's ruling that debtor had no interest upon which a homestead could be based when the property was owned by the LLC and that his exemption was thus capped.

D. **Holding property in corporation's name:**

a. *Hunt v. Goodrich (In re Hunt)*, 2014 Bankr.LEXIS 1173, at *7 (B.A.P. 9th Cir. Mar. 26, 2014): "The right to claim property as exempt from property of the estate under § 522(b) is afforded only to 'individual' debtors."

b. *In re Farokhirad*, 8:21- bk-10026-MW, ECF No. 98 (Bankr. C.D. Cal. Apr. 29, 2021): Sustaining chapter 7 trustee's objection to a debtor's claimed homestead exemption under CCP § 704.730 where title to the property was held by an LLC in which debtor was the sole member.

4. Consequences of Non-Disclosure

A. **Denial of Discharge and Criminal Prosecution**

a. Section 727(a)(2) prevents the discharge of a debtor who attempts to avoid payment to creditors by concealing or otherwise disposing of assets. 6 COLLIER ON BANKRUPTCY P 727.02 (2023).

b. Section 727(a)(4)(A): A debtor may be denied a discharge if he or she "knowingly and fraudulently, in or in connection with the case made a false oath or account." This ground also constitutes a bankruptcy crime under 18 U.S.C. § 152(2) or (3). 6 COLLIER ON BANKRUPTCY P 727.04 (2023).

c. Section 727(a)(5) provides for denial of discharge where the debtor "has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

d. Case Illustration: *Houser Bros. Co. v. Jamie Lynn Gallian*, Case No. 8:21-ap-01097-SC, Docket No. 81 (May 23, 2023): Debtor hid several assets in her bankruptcy schedules, including: (1) taking title to her residence in the name

of a single-member LLC to defraud creditors; (2) omitting a secured claim she held against the residence; and (3) failing to properly schedule her interest in a second LLC. The Court, for these reasons and others, denied her discharge under §§ 727(a)(2)(A) and (a)(4). Debtor also disposed of $214,000 from the sale of her previous residence prepetition and failed to account for her expenditure of the money, which was not scheduled. The Court therefore denied her discharge under § 727(a)(5).

e. *See generally* 18 U.S.C. § 152, "Concealment of assets: false oaths and claims; bribery."

B. **Judicial Estoppel**

c. *Ah Quin v. Cty. of Kauai DOT*, 733 F.3d 267 (9th Cir. 2013):

- Facts: Kathleen Ah Quin, while pursuing an action against her employer, filed bankruptcy but did not disclose the action in her schedules. The district court held applied judicial estoppel[1] to dismiss her claim.

- Holding: On appeal from the dismissal, the Ninth Circuit vacated the district court's judgment, holding that the district court had applied the wrong standard. According to the Ninth Circuit, based on the Supreme Court's holding in *New Hampshire v. Maine*, 532 U.S. 742 (2001), "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." Where a plaintiff-debtor has reopened the bankruptcy proceedings and corrected the initial filing error, rather than applying a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood.

- But see *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286-87 (11th Cir. 2002); *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999): Asking only whether the debtor knew about the claim when he or she filed the bankruptcy schedules and whether the debtor had a motive to conceal the claim.

d. *Cloud v. Northrop Grumman Corp.*, 67 Cal.App.4th 995 (1998):

- Facts: After plaintiff's employer terminated her employment, she filed Chapter 7 bankruptcy but did not schedule any claim or potential claim against her former employer. While the bankruptcy case was pending,

[1] Judicial estoppel is an equitable doctrine invoked by a court at its discretion. Its purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Ah Quin*, 733 F.3d at 270.

plaintiff-debtor filed a wrongful termination and sexual harassment action against the employer. The employer filed a motion for judgment on the pleadings, arguing, *inter alia*, that plaintiff was judicially estopped from bringing suit based on her bankruptcy schedules.

- Held: Nondisclosure in bankruptcy filings, standing alone, is insufficient to support the finding of bad faith intent necessary for the application of judicial estoppel. Judicial estoppel applies only when the debtor engages in an effort to obtain an "unfair advantage" and engages in a "scheme to mislead the court." In that situation, any inconsistencies in the debtor's position must be "attributable to intentional wrongdoing" and "tantamount to a knowing misrepresentation to or even fraud on the court." A "good faith mistake" cannot support judicial estoppel. The court was unable to make the evidentiary determinations necessary for application of judicial estoppel in the context of a motion for judgment on the pleadings.

e. Additional Case Illustration: The individual debtor held a minority ownership interest in a business not disclosed in his bankruptcy schedules. After the bankruptcy filing, the minority owners were ousted. The minority owners brought suit. There may be an argument that the debtor will lack standing to bring a cause of action because the business interest became property of the bankruptcy estate. There are also issues of non-disclosure/judicial estoppel.

5. Chapter 11 and 13 Issues

f. Lease ride-through in Chapter 11: In a chapter 11 case, where a debtor has failed to expressly assume or reject a prepetition lease agreement or executory contract, that lease or contract will be unaffected by the bankruptcy filing. *In re Silver Fox, LLC*, 2010 Bankr.LEXIS 2066, at *14 (Bankr. D.N.J. June 24, 2010); *see also Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.)*, 371 B.R. 412, 422 (B.A.P. 9th Cir. 2007) (adopting the "ride through" doctrine). Therefore, pursuant to 11 U.S.C. § 1123(b)(2), plans should provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected.

g. Non-disclosure can bring up bad faith issues for Chapter 13 plan confirmation.

- Section 1325(a)(3) requires that a plan be proposed in "good faith and not by any means forbidden by law." One relevant factor in this inquiry is "whether the debtor has misrepresented facts in his or her petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed the Chapter 13 petition or plan in an inequitable manner." *In re Varner*, 2009 Bankr.LEXIS 1291, at *23 (Bankr. D. Idaho May 22, 2009).

- Section 1325(a)(4) requires that a chapter 13 plan provide for property to be distributed in settlement of each allowed unsecured claim in an amount

not less than the amount that would be paid if the estate of the debtor were liquidated under chapter 7. 8 COLLIER ON BANKRUPTCY P 1325.05 (2023). Of course, if the debtor has omitted assets, the debtor's analysis will not be accurate.

- The standards for evaluating good faith in § 1327(a)(7) include determining whether the debtor correctly represented facts in his petition, fully disclosed assets and financial dealings, and correctly completed schedules. *In re Ezell*, 2022 Bankr.LEXIS 1689, at *20 (Bankr. D. Or. June 14, 2022). In other words, lack of good faith under § 1325(a)(7) can be shown by the debtor's failure, without justification or excuse, to correctly complete the schedules and SOFA. *Id.*

h. Non-disclosure can bring up issues for Chapter 11 plan confirmation

- Section 1129(a)(2) requires that the proponent of the plan comply with all the applicable provisions of 11 U.S.C. § 101 *et seq.* Under § 521, the duties of the debtor include filing a schedule of assets and liabilities. By failing to schedule assets, a debtor's plan may not be confirmable. *Cf. In re Wermelskirchen*, 163 B.R. 793, 796 (Bankr. N.D. Ohio 1994) (finding that § 1129(a)(2) prevented confirmation of a plan because the debtors had violated § 521 by not scheduling all creditors).

6. Any upshot to not scheduling?

a. All property that would be property of the estate under § 541 is property of the Estate whether scheduled or not. *See, e.g.*, *Stevens v. Whitmore (In re Stevens)*, 15 F.4th 1214 (9th Cir. 2021) (reopening a case years after its disclosure for the trustee to administer an unscheduled litigation claim).

b. Big takeaway: Disclose everything, or else.

Faculty

Jennifer A. Giaimo is a trial attorney with the U.S. Trustee Program in Phoenix, which she joined in November 2009. She previously clerked for U.S. District Judge David Hittner in Houston, served as a trial attorney for the Department of Justice Tax Division in Washington, D.C., then was Assistant Attorney General for the State of Vermont. Ms. Giaimo received her J.D. from St. John's University School of Law in 1992 and her LL.M. in taxation from Georgetown University in 2002.

Hon. Brian D. Lynch is a U.S. Bankruptcy Judge for the Western District of Washington in Tacoma, sworn in on June 1, 2010. He served as Chief Bankruptcy Judge from Oct. 1, 2014, to Sept. 30, 2019, and as chair of the Conference of Ninth Circuit Chief Bankruptcy Judges in 2017. Prior to his appointment, Judge Lynch served as the Standing Chapter 13 Trustee for the Portland Division of the District of Oregon, and as the Standing Chapter 12 Trustee for the District of Oregon. In 2018, he was awarded the National Association of Chapter 13 Trustees Hon. Ralph Kelley Award. Judge Lynch received his J.D. in 1975 from Georgetown University Law Center.

Richard A. Marshack is a founding partner of Marshack Hays Wood LLP in Irvine, Calif., and has been an attorney since 1982. He serves as an attorney and as a professional fiduciary. As an attorney, his focus is on commercial matters arising in bankruptcy proceedings, such as representing debtors/businesses and creditors/creditor committees in reorganization proceedings and representing bankruptcy trustees. After completing law school, Mr. Marshack clerked for Hon. Folger Johnson, Chief Judge of the U.S. Bankruptcy Court for the District of Oregon from 1982-84. He has been in private practice since 1984, working primarily on bankruptcy and commercial law issues. Mr. Marshack is a frequent lecturer and presenter of seminars (over 50) on bankruptcy and commercial law issues. Additionally, he has authored more than 20 articles and materials relating to the practice of law. Mr. Marshack received the 2016 Hon. Peter M. Elliott Award by the Orange County Bankruptcy Forum, and he has been listed as a Super Lawyer. He taught at the University of California at Irvine from 1985-92 and was an adjunct professor of bankruptcy law at Western State College of Law. Mr. Marshack is admitted to practice in California and before the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Courts for the Central, Eastern, Northern and Southern Districts of California. He received his B.A. in 1979 from the University of California, Irvine and his J.D. *magna cum laude* from California Western School of Law. Following law school, he clerked for Hon. Folger Johnson, Chief Judge of the U.S. Bankruptcy Court for the District of Oregon.

Hon. Tiiara N.A. Patton is a U.S. Bankruptcy Judge for the Northern District of Ohio in Youngstown, appointed in 2020. She previously served with the Office of the U.S. Trustee as a trial attorney in Cleveland and Wilmington, Del. Before joining the Office of the U.S. Trustee, Judge Patton worked as an attorney in private practice at Calfee, Halter & Griswold LLP in Cleveland with a practice focused on bankruptcy, and at LeBeouf, Lamb, Greene and MacRae LLP in New York, with a practice focused on business restructuring. She also clerked for Hon. Burrell Ives Humphreys (ret.) of the New Jersey Superior Court in Passaic County, and Judges Novalyn L. Winfield (ret.), Donald H. Steckroth (ret.) and Morris Stern of the U.S. Bankruptcy Court for the District of New Jersey, Hon. Cornelius Blackshear (ret.) of the U.S. Bankruptcy Court for the Southern District of New York, and Hon. Ran-

dolph Baxter (ret.) of the U.S. Bankruptcy Court for the Northern District of Ohio. Judge Patton is a member of ABI and the Mahoning County Bar Association, The Nathaniel R. Jones American Inn of Court, and the National Conference of Bankruptcy Judges's (NCBJ's) Public Outreach and The Honorable Cornelius Blackshear NCBJ Presidential Fellowship Committees, and she is a lifetime member of the Central State University Alumni Association. She received her Bachelor's degree from Central State University and her J.D. from The Ohio State University Moritz College of Law.