AMERICAN BANKRUPTCY INSTITUTE

# 2018 Rocky Mountain Bankruptcy Conference

CONCURRENT SESSION

*Consumer Workshop I*

# Litigation on a Budget


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2018

# LITIGATION ON A BUDGET

# FOR

# CONSUMER BANKRUPTCY CASES

## 2018 Rocky Mountain Bankruptcy Conference

## A. Deadlines to Object to Discharge and/or Dischargeability

Under Rule 4004(a), a creditor has 60 days after the first date set for the meeting of creditors to file a complaint objecting to a debtor's discharge under Chapter 7, 11 U.S.C. §727(a). The deadline to object to discharge in a Chapter 11 case is no later than the first date set for the hearing on confirmation. In a Chapter 13 case, a motion objecting to the debtor's discharge must be filed no later than 60 days after the first date set for the meeting of creditors.

A new time period for filing complaints objecting to discharge commences when a Chapter 11 or Chapter 13 case is converted to a Chapter 7 case. No new time period is available, however, if a case started in Chapter 7, and the applicable period expired in that original chapter, and the case thereafter was converted to Chapter 11 or 13 and then reconverted to Chapter 7. *See* Fed.R.Bankr.P. 1019(3).

Similarly, under Rule 4007 of the Bankruptcy Rules, a complaint to determine the dischargeability of a debt under 11 U.S.C. §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a) in a Chapter 7, Chapter 11, or Chapter 13 case.

All of these deadlines are typically identified on the Notice of Bankruptcy Case, Meeting of Creditors, & Deadlines issued by the Bankruptcy Court and sent to the creditors. Counsel should calendar the deadlines and consult with the creditor to

determine whether it is appropriate to object to a debtor's discharge and/or the dischargeability of the creditor's debt.

## B. Types of Objections to Discharge and Dischargeability

In a Chapter 7 case where the debtor is an individual, the court must grant the debtor a discharge of all debts unless one or more of 12 different factors are met. 11 U.S.C. §727(a). Such factors include a debtor's fraudulent transferring of assets, concealment of assets, destruction of records, making a false oath, failing to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. *Id.* This provision is typically referred to as the "fresh start" provision and/or the "big discharge." "Exceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, any doubt is to be resolved in the debtor's favor." *In re Sandoval*, 541 F.3d 997, 1001 (10th Cir. 2008) (quotation omitted).

Generally, all a debtor's debts are subject to discharge in bankruptcy. Under 11 U.S.C. §523(a), there are certain types of debts that cannot be discharged. Such debts include:

> (1) taxes or customs duty to the Federal government;
> (2) money, property, services or extension or renewal of credit obtained by false pretenses; or by use of a statement in writing that is materially false; respecting the debtor's or an insider's financial condition; on which the creditor reasonably relied.
> (3) unscheduled debts, if known to the debtor;
> (4) any debt for fraud, defalcation while acting in a fiduciary capacity, embezzlement or larceny;
> (5) domestic support obligation;
> (6) any debt for willful or malicious injury by the debtor to another or to property of another;
> (7) government penalty or fine;
> (8) unless excepting the debt would impose undue hardship on the debtor and dependents for any educational loan;
> (9) debt for death or personal injury caused while operating a vehicle while intoxicated;
> (10) debt scheduled in a prior case in which the debtor waived discharge or

was denied discharge;
(11) debt owed to FDIC under an order or to an insured credit union;
(12) debt for malicious or reckless failure or fulfill any commitment to the FDIC;
(13) payment of an order of restitution that was issued under Title 18, U.S.C.;
(14) incurred to pay a tax owed to a state or other governmental unit that would be nondischargeable pursuant to paragraph 1 or fines or penalties imposed under Federal election law;
(15) payments to a spouse, former spouse, or child of the debtor under a separation agreement or divorce decree;
(16) home owner's association dues and assessments;
(17) fee imposed on a prisoner for filing a case, motion, complaint, or appeal;
(18) debt owed to pension fund or profit sharing plan; and
(19) debt incurred due to violation of Federal Securities Laws.

As with a claim under Section 727(a), claims under Section 523(a) are construed liberally in favor of the debtor and strictly against the creditor. *In re Warren*, 512 F.3d 1241, 1248 (10th Cir. 2008)(quoting *Gullickson v. Brown*, 108 F.3d 1290, 1292 (10th Cir.1997)).

## C. Elements of a Dischargeability Claim for Fraud Arising From A Mechanic's Lien

11 U.S.C. § 523(a)(4) excepts from a debtor's discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The burden of proof is by preponderance of the evidence. *Grogan v. Garner*, 498 U.S. at 291. Under federal law, "embezzlement" is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Klemens v. Wallace (In re Wallace)*, 840 F.2d at 765 (citations omitted).

A claim of embezzlement under 11 U.S.C. § 523(a)(4) has five elements that must be proved: (1) entrustment (property lawfully obtained originally); (2) of property; (3) of another; (4) that is misappropriated (used or consumed for a purpose other than that

for which it was entrusted); (5) with fraudulent intent. *Alternity Capital Offering 2, LLC et al. v. Ghaemi (In re Ghaemi)*, 492 B.R. 321, 325 (Bankr. D. Colo. 2013); *see also, e.g., DRCK, LLC v. Chong (In re Chong)*, 523 B.R. 236, 249 (Bankr. D. Colo. 2014). The fifth element, "fraudulent intent," requires a showing of "*animus furandi*" or an intent to steal. *In re Ghaemi*, 492 B.R. at 327.

The United States Supreme Court's decision in *Bullock v. BankChampaign, N.A.* set forth the necessary intent required to prove embezzlement under Section 523(a)(4). *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013). In holding that there is a uniform, heightened standard to prove "defalcation while acting in a fiduciary capacity," the Supreme Court employed the doctrine of *noscitur a sociis* and looked to the "linguistic neighbors" of "defalcation" in Section 523(a)(4). *Bullock*, 569 U.S. at 274. Relying on precedent, the Supreme Court concluded that "defalcation" should be treated similarly to "fraud," which means "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, *as does embezzlement*; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." *Bullock*, 569 U.S. at 273 (citing *Neal v. Clark*, 95 U.S. 704, 709 (1878) (emphasis added)); *see also Driggs v. Black (In re Black)*, 787 F.2d. 503, 507 (10th Cir. 1986), abrogated on other grounds ("[e]mbezzlement, for purposes of 11 U.S.C. § 523 . . . requires fraud in fact, involving moral turpitude or intentional wrong").

## D. Elements for a Dischargeability Claim for Actual Fraud

Pursuant to 11 U.S.C. § 523(a)(2)(A), (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt—....

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by— (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the

debtor's or an insider's financial condition[.]

A creditor must prove five elements in order to establish that a debt is non-dischargeable claim 11 U.S.C. §523(a)(2)(A). Specifically, that: "[t]he debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was reasonable; and the debtor's representation caused the creditor to sustain a loss." *In re Riebesell*, 586 F.3d 782, 789 (10th Cir. 2009)(*quoting Fowler Bros. v. Young (In re Young),* 91 F.3d 1367, 1373 (10th Cir.1996).

Reliance must be "justifiable" which is a subjective test of reasonableness rather than an objective test. *In re Riebesell*, 586 F.3d at 791-92 (*citing Field v. Mans*, 516 U.S. 59, 74-75 (1995). When examining whether a creditor's reliance was justifiable, a court should look to "the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than [applying] a community standard of conduct to all cases." *Id.* (*quoting Field v. Mans*, 516 U.S. at 71 (internal quotation omitted).

At the beginning of a relationship, there may be some trust based upon the dynamics of the relationship. *Rayner, et al. v. Reeves (In re Reeves)*, 09-1611 SBB, slip op. at 10 (Bankr.D.Colo. June 21, 2011)(Brooks, J.)(*citing In re Riebesell*, 586 F.3d at 792). When looking at a settlement agreement, trust can be increased if appropriate safeguards and penalties for falsehood are included (or increased) under the circumstances. *Id.*

It is axiomatic that when one has been induced to enter into a contact because of the material misrepresentations on the part of another party, the person may sue for damages based on the deceit. *Ackmann v. Merchants Mortgage & Trust Corp.*, 659

P.2d 697 (Colo. App. 1982), *rev'd on other grounds*, 679 P.3d 399 (Colo. 1984). Even if a settlement agreement contains releases of claims, the creditor can still make a claim for money obtained by fraud under 11 U.S.C. §523(a)(2)(A). *Archer v. Warner*, 538 U.S. 314 (2003). When a settlement agreement itself is procured by fraud, such debt can be nondischargeble. *In re Turner*, 179 B.R. 273 (Bankr.D.Colo.1995)(government's reliance on false information submitted to it by former accountant via his computer to induce settlement justified).

Courts face difficulty in determining whether a debtor acted with fraudulent intent because, ordinarily, the debtor will be the only person able to testify directly concerning his intent and he is unlikely to state that his intent was fraudulent. *In re Calder*, 907 F.2d 953, 955-56 (10th Cir. 1990) (*citing Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 252 (4th Cir.1987). Therefore, fraudulent intent may be deduced from the facts and circumstances of a case. *Id.* (*citing In re Devers,* 759 F.2d 751, 754 (9th Cir.1985); *see also Farmers Co-op. Ass'n v. Strunk*, 671 F.2d 391, 395 (10th Cir.1982)("Fraudulent intent of course may be established by circumstantial evidence, or by inferences drawn from a course of conduct.")).

## E. Elements for an Objection to Discharge for Failure to Disclose Assets

The purpose of 11 U.S.C. §727(a)(2)(B) is to deny the discharge to a debtor who fails to disclose transactions regarding her assets subsequent to her bankruptcy filing. *Johnson v. Johnson*, 384 B.R. 728 (Bankr.S.D.Ohio 2008).

Proof of actual intent can be determined from circumstantial evidence or inferences drawn from a debtor's course of conduct. *In re Calder*, 907 F.2d 953 (10th Cir. 1990). A debtor acts with an intent to hinder and delay when the debtor makes it more difficult for creditors to reasonably collect on their debts. *Pher Partners v.*

*Womble*, 289 B.R. 836 (Bankr.N.D.Tex. 2003). A debtor acts with an intent to hinder and delay if the debtor intended to slow or postpone her creditors. *Bank of Oklahoma v. Boudrot*, 287 B.R. 582 (Bankr.W.D.Okla. 2002).

## F. Elements for a Claim of Revocation of Discharge

Section 727(d)(1)-(2) provides that "[o]n request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

> (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
>
> (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee.

11 U.S.C. § 727(d)(1)-(2).

As the party seeking revocation of discharge, the plaintiff must prove each element of § 727(d)(1) or (2) by a preponderance of the evidence. *See First National Bank v. Serafini (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991). The preponderance of the evidence standard requires the Court to decide whether the existence of a contested fact is more probable than its nonexistence, and under such standard, where the evidence is evenly balanced, the party with the burden of proof must lose. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

In order to show that a debtor committed acts of fraud sufficient to deny his discharge, a plaintiff must show that the debtor had an "actual intent to defraud

creditors." *In re Carey*, 938 F.2d

1073, 1077 (10th Cir. 1991). As the Tenth Circuit explained:

> To infer fraudulent intent, courts look for specific indicia of fraud. Actions from which fraudulent intent may be inferred include situations in which a debtor conceals prebankruptcy conversions, converts assets immediately before the filing of the bankruptcy petition, gratuitously transfers property, continues to use transferred property, and transfers property to family members. Courts also consider the monetary value of the assets converted in determining whether the debtor acted with fraudulent intent. The cases, however, are peculiarly fact specific, and the activity in each situation must be viewed individually.

*Id.* at 1077 (citations and quotations omitted), *quoted in Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 612 (10th Cir. BAP 2001), *aff'd without published opinion*, 35 Fed.Appx. 811 (10th Cir. May 23, 2002).

To deny the Debtor a discharge . . . , the Court must be able to find that the Debtor intended to defraud and mislead the other parties in the case." *McVay v. Phouminh (In re Phouminh)*, 339 B.R. 231, 242 (Bankr. D. Colo. 2005).

Not only must the plaintiff show that a debtor committed fraud, but it also must show that the plaintiff was unaware of the debtor's fraud at the time the debtor's discharge was entered. *See Lincoln Natn'l Life Ins. Co. v. Silver (In re Silver)*, 367 B.R. 795, 806-07 (Bankr. D.N.M. 2007), *aff'd without published opinion*, 378 B.R. 418 (10th Cir. BAP Oct. 2, 2007). "In order for a plaintiff or creditor to succeed in an action for revocation of discharge, he must meet his duty to investigate any possible fraud before the discharge is given, when the possibility of fraud is reasonably suspected." *Keeffe v. Natalie*, 337 B.R. 11, 14 (N.D.N.Y. 2006); *see also Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, (8th Cir. 1991) ("[T]he burden is on the creditor to investigate diligently any possibly fraudulent conduct before discharge.")

## Considerations when Prosecuting or Defending an Adversary Case

1. Expert Witness—do I need one? What will the testimony be? How much will it cost? Who do I know who can help on the cheap?
2. Deposition. Is it necessary? What about a private investigator interviewing witnesses instead of a depo?
3. No money for a depo? Do I have the element of surprise at trial?
3. Rule 30.b.6. Do I need a corporate representative?
4. Fact Witness who is also an Expert. Better than hired gun. And cheaper. Disclose per Rule 26, but not needed.
5. File List of Witnesses and Exhibits early—just in case.
6. Ask opposing counsel to stipulate to exhibits before trial.
7. Draft Closing Argument on a laptop—easy to edit as trial proceeds.

## United States Bankruptcy Court for the District of Colorado Local Bankruptcy Rules, effective December 1, 2017

Discovery

L.B.R. 7026-1. Discovery – General

(a) Discovery and Trial Schedule. When an adversary proceeding is at issue, the Court may direct the parties to develop a discovery plan and pretrial deadlines and file a joint report on the same pursuant to Fed. R. Civ. P. 26(f) or, in its discretion, may set a trial.

(b) Depositions. Unless otherwise agreed by the parties and the deponent or ordered by the Court, reasonable notice for the taking of depositions or conducting examinations under Fed. R. Bankr. P. 7030 (Fed. R. Civ. P. 30(b)(1)) is at least 14 days. 51

(c) Discovery Materials. (1) The term "Discovery Materials" includes without limitation deposition transcripts, interrogatories and responses, requests for production or inspection and responses, requests for admission and responses, and initial and supplemental disclosures. (2) Discovery Materials should not be filed with the Court, unless the Court orders otherwise. (3) If a party anticipates using Discovery Materials, or a portion of them, at trial or hearing, then that party must mark and prepare excerpts of relevant portions to be offered into evidence.

(d) Discovery Disputes. (1) If there is a discovery dispute, parties must meet and confer in a meaningful way to try to resolve any issues prior to requesting a discovery hearing. (2) If the parties cannot resolve all disputes without the assistance of the Court, then one or more parties may request a Court hearing by sending an email to the courtroom deputy/judicial assistant of the assigned judge at the chambers' email address listed on the Court's website, copied to all parties. (3) No written discovery motions will be permitted without Court authorization, except that motions for protective orders pursuant to Fed. R. Civ. P. 26(c) may be filed. (4) The Court will schedule a hearing as promptly as possible. (5) No later than five days prior to the hearing, each party to the dispute must file a report identifying the discovery issue(s) in dispute without elaboration or argument. The report may not exceed two pages in length. It may contain citations to critical supporting legal authority but, no written motions, briefs, copies of written discovery, or any other attachments may be filed, unless expressly requested by the Court. (6) Parties and attorneys must appear in person at the hearing, unless otherwise authorized by the Court. (7) If a discovery dispute arises in the course of a deposition, one or more parties may telephone the chambers of the assigned judge at the chambers' telephone number listed on the Court's website, to request an emergency hearing on the matter. If available, the Court may hold an immediate hearing on the dispute, by telephone or in person, as the Court specifies.

(e) Stipulated Protective Orders. A request for an order of the Court approving a stipulated confidentiality or protective order may be filed with the Court at any time.

(f) Application. This Rule applies to contested matters as well as adversary proceedings.
52 L.B.R. 7026-2.

# LITIGATION ON A BUDGET: HEARINGS AND ADVERSARY PROCEEDINGS

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## I. Tactics to Streamline Litigation That May Result in Cost Savings in the Long Run of Your Case

A. Preliminary Matters - Research Your Claims/Defenses

Start with the elements of the claim you are trying to prove or defend—limit your scope, tailor your issues. Narrowly tailoring the evidence and exhibits you need to prove up or defend your claims may reduce costs by allowing you to stick to your roadmap of required elements. Do this at the beginning so you and your client have a clear path to follow.

B. Prepare a Budget

1. Think through your entire case or specific litigation issue (the Motion for Relief, the 2004 exam, etc.) and prepare a reasonable outline of fees and costs, from start to finish.

2. Include ranges for certain items that can't be pinpointed at the outset. Provide the entire budget to the client with estimates at the outset so that your client is aware of potential fees and costs going forward.

3. Consider the value of settlement as opposed to the cost and uncertainty of trial. If trial renders the issue too expensive, and thus, impractical to litigate, advise client accordingly and consider all non-litigation alternatives.

C. Discovery, Generally

1. No "kitchen sink discovery" requests; "scorched earth" litigation is generally not cost-effective. However, complete, sufficient discovery to understand and

evaluate your chances of success on the merits going forward can be a cost effective strategy for your case and increase possibilities for settlement.

2. Narrowly tailor your discovery requests for discreet issues. This generally allows the parties to reduce the cost of the litigation all around and doesn't infuriate your opposing counsel (although that appears to be a strategy used by some).

D. Importance of Document Subpoenas:

1. In lieu of serving interrogatories and requests for admission, often times it will be faster and more economical to get documents directly from the source to prove your claim, i.e., serving the bank directly for the bank's records relating to the debtor's checking account. Additionally, getting documents directly from the source allows you to confirm the validity and accuracy of the records (or identify false representations) that may have been independently produced, either in whole or in part, by the debtor.

2. Under Fed.R.Civ.P. Rule 45, a subpoena must:

(i) state the court from which it is issued;

(ii) state the title of the action and civil action number;

(iii) command each person to whom it is directed to do the following at the specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

3. A subpoena may be issued by the court clerk or an attorney who is authorized to practice in the issuing court. Fed.R.Civ.P. 45(a)(3). A copy of the notice of

subpoena must be served on all parties prior to the subpoena being served on the party to whom the subpoena is directed. Fed.R.Civ.P. 45(a)(4).

4. When serving a subpoena for documents, do keep in mind that the rules impose limitations on where the subpoena may command production of documents. Specifically, a subpoena may only be issued within 100 miles of where the person resides, is employed, or regularly transacts business in person. Fed.R.Civ.P. 45(c)(2).

E. Importance of Taking a Deposition in an Adversary if Factual Discrepancies Exist for Trial:

1. Although a deposition can equate to additional costs for the party requesting the deposition, a deposition can also be helpful to a party pursuing or defending an adversary action. A deposition allows the deposing party to learn what the other party is anticipated to say at trial. If the deposed party does not testify as expected at trial, you can use the deposition to refresh a witness's recollection or for impeachment purposes. After all, if you don't know what the either side is going to say on the stand at trial, you shouldn't be asking the question.

a. Pursuant to Rule 7032, Fed. R. Bankr. P., at a hearing or trial, generally, all or part of a deposition may be used against a party if the party was present or represented at the deposition and had reasonable notice of it, if it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying, and the use is otherwise allowed under the Federal Rules. Fed. R. Bankr. P. 7032(1). Additionally, deposition testimony can be used for impeachment purposes or for any purpose if the court finds that the witness is dead, the witness lives more than 100 miles away from the hearing or trial, the witness cannot testify because of age,

illness or incarceration or the witness's attendance could not be procured at the hearing or trial through use of a subpoena. Fed. R. Bankr. P. 7032(2) and (4).

b. Knowing what the other side will say at trial is also extremely helpful in evaluating the party's position regarding the merits of the case and whether settlement is truly the best option under the circumstances.

3. Flushing through exhibits – if you know what the party is going to say on the stand at trial, you will also know what exhibits you should ask the witness about.

4. Under Rule 7030, Fed. R. Bankr. P., a parties' deposition may be taken with or without leave of court, and may be compelled by a subpoena, if necessary.

F. Burden Shifting – Importance of Meeting Your Burden of Proof and Shifting the Burden: Meeting your burden of proof and/or shifting the burden to the other side is critical in streamlining your case. Additionally, shifting the burden to the other side can be a cost-effective trial strategy. *See In re Anthem Communities/RBG, LLC*, 267 B.R. 867 (Bankr. D. Colo. 2001).

G. Bifurcation – Fed.R.Bankr.P. Rule 42(b): To reduce costs at trial, examine whether claims should be bifurcated. For example, damages/liability; declaratory judgment/punitive damages; or other related, but factually distinguishable claims.

H. Evidence at Trial

1. Request for Judicial Notice – F.R.E. 201: If a fact of your case is not subject to reasonable dispute and generally known or capable of determination through sources that cannot reasonably be disputed, a request for judicial notice of a fact can be a cost effective way to get evidence before the court.

2. Self-Authenticating Documents – F.R.E. 902: If you are using a document under seal, a certified document or acknowledged document, etc. (*see* F.R.E. 902(1-12)), it is important to note that extrinsic evidence of authenticity is not required to admit certain documents into evidence. Therefore, the use of these documents can be cost effective in lieu of a witness to authenticate the document.

## II. Hearings and Other Evidentiary Matters: Considerations for Potential Cost Savings

A. Valuation Hearings

1. Lien Strips:

a. While lien strips are becoming less common in our thriving economy, with prior modifications becoming due or having reached the waterfall of higher interest rates, there are still properties out there with second and third liens that may be stripped off.

b. Should a debtor want to strip off a junior lien, debtor's counsel should review Fed. R. Bankr. P. 3012, 11 U.S.C. § 506 and local procedural rules in your jurisdiction to accomplish a lien strip.

c. While the debtor can testify to the value of his own property, the creditor should obtain an expert for the valuation. "A person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." *LifeWise Master Funding v. Telebank*, 374 F.3d 917 (10th Cir. 2004); *Doddy v. Oxy USA*, 101 F.3d 448 (5th Cir. 1996). "Admittedly, the law permits the owner of a business to give his lay opinion as to the business' value." *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1216 (10th Cir. 2011). *But see In re Behrends*, 2017 Bankr. LEXIS 3674 (Bankr. D. Colo. Apr. 10, 2017). "[T]he

Court determines the weight and credibility of [debtor's] testimony. Based on the surrounding circumstances, the Court does not find Debtor's valuation testimony credible."

2. Homeowner Association Lien Strips – Could Result in a Much Cheaper Homeowner Association Debt for the Debtor

a. When evaluating the debtor's ability for the most cost-effective fresh start, it is important to keep in mind that in addition to stripping off junior mortgages that are wholly unsecured, a debtor may also strip off the junior portion of a homeowners' association ("HOA") lien.

b. *See In re Lopez*, 512 B.R. 663 (Bankr. D. Colo. 2014). [1]-Where a condominium association (COA) had a lien on the debtor's condo for unpaid assessments, pursuant to the Colorado Common Interest Ownership Act, Colo. Rev. Stat. § 38-33.3-316, the lender's first deed of trust was senior to the COA lien, except for those common assessments that would have become due during the six months preceding the institution of either the lender's or the homeowners' association foreclosure proceedings; [2]-The antimodification clause of 11 U.S.C. § 1322(b)(2) did not apply because the COA lien was a statutory lien; [3]-Only the super priority portion of the COA lien was supported by value to which its lien could attach. The remainder of the COA lien was void under 11 U.S.C.S. § 506(d) upon completion of the plan, and therefore, the junior portion of the HOA lien could be stripped off.

B. Motions for Relief from Automatic Stay

1. Relief "For Cause" Under 11 U.S.C. Section 362 (d)(1)

a. A party can bear the initial burden of going forward even if it does not bear the ultimate burden of persuasion. If a party fails to carry its initial

burden, the court will dismiss its application without requiring the party that bears the ultimate burden of persuasion to offer any evidence. In order for the court to shift the burden to the debtor, the creditor must make a showing that there is a lack of adequate protection, meaning there is insufficient equity for the benefit of the estate. *See In re Anthem*, 267 B.R. 867 (Bankr. D. Colo. 2001).

b. The United States Supreme Court has defined the secured creditor's right to adequate protection as including the right to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay. Evidence of the erosion of the creditor's position or of a threatened erosion satisfies this initial burden. The erosion may be shown through evidence of declining property values, the increasing amount of the secured debt through interest accruals or otherwise, the non-payment of taxes or other senior liens, failure to insure the property, failure to maintain the property, or other factors that may jeopardize the creditor's present position. It may be necessary to show a combination of these factors and/or to show that the circumstances as a whole are sufficient to jeopardize the creditor's interest in the property. *See In re Anthem Communities/RBG, LLC*, 267 B.R. 867 (Bankr. D. Colo. 2001).

c. An ongoing post-petition default in a debtor's payment of the regular mortgage payments can constitute sufficient cause for relief from the automatic stay. *See In re Binder*, 224 B.R. 483 (Bankr.D.Colo. 1998); *In re Ellis*, 60 B.R. 432 at 435 (9th Cir. BAP 1985). However, generally, it is also necessary to show there is no equity in the property for the benefit of the estate. *See* 11 U.S.C. § 362(d).

2. Relief Under 11 U.S.C. Section 362 (d)(2)

a. As opposed to there being no equity in the property for the benefit of the creditor, here, the court must find that the debtor has no equity in the property and/or the stay is contributing to a decline or erosion of the lien holder's position. In addition, the court must find that the property is not necessary for an effective reorganization. *See In re Anthem*, 267 B.R. 867 (Bankr. D. Colo. 2001).

b. Stipulation to Cure Arrearage or a Stipulation Granting Relief from Stay as to Property Alone may be the most economical to the debtor in certain circumstances. If it appears that there is no equity in the property for the benefit of the estate and the property is not necessary for an effective reorganization, then, a stipulation to cure the arrearages or a stipulation granting relief from stay to the creditor may be the most cost-effective legal option for the debtor.

C. Motions to Dismiss: 11 U.S.C. Section 1307(c)

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1. A Motion for Judgment on the Pleadings can be a cost effective strategy for a plaintiff to the extent that, based upon the pleadings alone, plaintiff is entitled to judgment as a matter of law; the process provides for a shortcut to judgment in the event that a judgment can be rendered based upon the allegations in the pleadings alone.

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b. "The determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir.1999).

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F. Motion for Summary Judgment – Fed.R.Bank.P. 7056

1. A Motion for Summary Judgment can be cost effective if the disputed issue is solely a legal issue and the parties agree to stipulate to all issues of fact.

2. If factual issues exist for the trier of fact, a Motion for Summary Judgment is generally not the most cost effective approach as courts routinely deny these motions on the basis that there are material facts in dispute which prohibit entry of summary judgment.

3. However, in certain circumstances, a Motion for Summary Judgment can lead to meaningful settlement discussions as the parties will lay out the framework of their case for trial in their Motion for Summary Judgment. Therefore, in certain situations, a Motion for Summary Judgment can lead to a more cost effective resolution to the case in lieu of proceeding forward to trial.

# LITIGATION ON A BUDGET: HEARINGS AND ADVERSARY PROCEEDINGS

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## I. Tactics to Streamline Litigation That May Result in Cost Savings in the Long Run of Your Case

A. Preliminary Matters - Research Your Claims/Defenses

Start with the elements of the claim you are trying to prove or defend—limit your scope, tailor your issues. Narrowly tailoring the evidence and exhibits you need to prove up or defend your claims may reduce costs by allowing you to stick to your roadmap of required elements. Do this at the beginning so you and your client have a clear path to follow.

B. Prepare a Budget

1. Think through your entire case or specific litigation issue (the Motion for Relief, the 2004 exam, etc.) and prepare a reasonable outline of fees and costs, from start to finish.

2. Include ranges for certain items that can't be pinpointed at the outset. Provide the entire budget to the client with estimates at the outset so that your client is aware of potential fees and costs going forward.

3. Consider the value of settlement as opposed to the cost and uncertainty of trial. If trial renders the issue too expensive, and thus, impractical to litigate, advise client accordingly and consider all non-litigation alternatives.

C. Discovery, Generally

1. No "kitchen sink discovery" requests; "scorched earth" litigation is generally not cost-effective. However, complete, sufficient discovery to understand and

evaluate your chances of success on the merits going forward can be a cost effective strategy for your case and increase possibilities for settlement.

2. Narrowly tailor your discovery requests for discreet issues. This generally allows the parties to reduce the cost of the litigation all around and doesn't infuriate your opposing counsel (although that appears to be a strategy used by some).

D. Importance of Document Subpoenas:

1. In lieu of serving interrogatories and requests for admission, often times it will be faster and more economical to get documents directly from the source to prove your claim, i.e., serving the bank directly for the bank's records relating to the debtor's checking account. Additionally, getting documents directly from the source allows you to confirm the validity and accuracy of the records (or identify false representations) that may have been independently produced, either in whole or in part, by the debtor.

2. Under Fed.R.Civ.P. Rule 45, a subpoena must:

(i) state the court from which it is issued;

(ii) state the title of the action and civil action number;

(iii) command each person to whom it is directed to do the following at the specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

3. A subpoena may be issued by the court clerk or an attorney who is authorized to practice in the issuing court. Fed.R.Civ.P. 45(a)(3). A copy of the notice of

subpoena must be served on all parties prior to the subpoena being served on the party to whom the subpoena is directed. Fed.R.Civ.P. 45(a)(4).

4. When serving a subpoena for documents, do keep in mind that the rules impose limitations on where the subpoena may command production of documents. Specifically, a subpoena may only be issued within 100 miles of where the person resides, is employed, or regularly transacts business in person. Fed.R.Civ.P. 45(c)(2).

E. Importance of Taking a Deposition in an Adversary if Factual Discrepancies Exist for Trial:

1. Although a deposition can equate to additional costs for the party requesting the deposition, a deposition can also be helpful to a party pursuing or defending an adversary action. A deposition allows the deposing party to learn what the other party is anticipated to say at trial. If the deposed party does not testify as expected at trial, you can use the deposition to refresh a witness's recollection or for impeachment purposes. After all, if you don't know what the either side is going to say on the stand at trial, you shouldn't be asking the question.

a. Pursuant to Rule 7032, Fed. R. Bankr. P., at a hearing or trial, generally, all or part of a deposition may be used against a party if the party was present or represented at the deposition and had reasonable notice of it, if it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying, and the use is otherwise allowed under the Federal Rules. Fed. R. Bankr. P. 7032(1). Additionally, deposition testimony can be used for impeachment purposes or for any purpose if the court finds that the witness is dead, the witness lives more than 100 miles away from the hearing or trial, the witness cannot testify because of age,

illness or incarceration or the witness's attendance could not be procured at the hearing or trial through use of a subpoena. Fed. R. Bankr. P. 7032(2) and (4).

b. Knowing what the other side will say at trial is also extremely helpful in evaluating the party's position regarding the merits of the case and whether settlement is truly the best option under the circumstances.

3. Flushing through exhibits – if you know what the party is going to say on the stand at trial, you will also know what exhibits you should ask the witness about.

4. Under Rule 7030, Fed. R. Bankr. P., a parties' deposition may be taken with or without leave of court, and may be compelled by a subpoena, if necessary.

F. Burden Shifting – Importance of Meeting Your Burden of Proof and Shifting the Burden: Meeting your burden of proof and/or shifting the burden to the other side is critical in streamlining your case. Additionally, shifting the burden to the other side can be a cost-effective trial strategy. *See In re Anthem Communities/RBG, LLC*, 267 B.R. 867 (Bankr. D. Colo. 2001).

G. Bifurcation – Fed.R.Bankr.P. Rule 42(b): To reduce costs at trial, examine whether claims should be bifurcated. For example, damages/liability; declaratory judgment/punitive damages; or other related, but factually distinguishable claims.

H. Evidence at Trial

1. Request for Judicial Notice – F.R.E. 201: If a fact of your case is not subject to reasonable dispute and generally known or capable of determination through sources that cannot reasonably be disputed, a request for judicial notice of a fact can be a cost effective way to get evidence before the court.

2. Self-Authenticating Documents – F.R.E. 902: If you are using a document under seal, a certified document or acknowledged document, etc. (*see* F.R.E. 902(1-12)), it is important to note that extrinsic evidence of authenticity is not required to admit certain documents into evidence. Therefore, the use of these documents can be cost effective in lieu of a witness to authenticate the document.

## II. Hearings and Other Evidentiary Matters: Considerations for Potential Cost Savings

A. Valuation Hearings

1. Lien Strips:

a. While lien strips are becoming less common in our thriving economy, with prior modifications becoming due or having reached the waterfall of higher interest rates, there are still properties out there with second and third liens that may be stripped off.

b. Should a debtor want to strip off a junior lien, debtor's counsel should review Fed. R. Bankr. P. 3012, 11 U.S.C. § 506 and local procedural rules in your jurisdiction to accomplish a lien strip.

c. While the debtor can testify to the value of his own property, the creditor should obtain an expert for the valuation. "A person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." *LifeWise Master Funding v. Telebank*, 374 F.3d 917 (10th Cir. 2004); *Doddy v. Oxy USA*, 101 F.3d 448 (5th Cir. 1996). "Admittedly, the law permits the owner of a business to give his lay opinion as to the business' value." *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1216 (10th Cir. 2011). *But see In re Behrends*, 2017 Bankr. LEXIS 3674 (Bankr. D. Colo. Apr. 10, 2017). "[T]he

Court determines the weight and credibility of [debtor's] testimony. Based on the surrounding circumstances, the Court does not find Debtor's valuation testimony credible."

2. Homeowner Association Lien Strips – Could Result in a Much Cheaper Homeowner Association Debt for the Debtor

a. When evaluating the debtor's ability for the most cost-effective fresh start, it is important to keep in mind that in addition to stripping off junior mortgages that are wholly unsecured, a debtor may also strip off the junior portion of a homeowners' association ("HOA") lien.

b. *See In re Lopez*, 512 B.R. 663 (Bankr. D. Colo. 2014). [1]-Where a condominium association (COA) had a lien on the debtor's condo for unpaid assessments, pursuant to the Colorado Common Interest Ownership Act, Colo. Rev. Stat. § 38-33.3-316, the lender's first deed of trust was senior to the COA lien, except for those common assessments that would have become due during the six months preceding the institution of either the lender's or the homeowners' association foreclosure proceedings; [2]-The antimodification clause of 11 U.S.C. § 1322(b)(2) did not apply because the COA lien was a statutory lien; [3]-Only the super priority portion of the COA lien was supported by value to which its lien could attach. The remainder of the COA lien was void under 11 U.S.C.S. § 506(d) upon completion of the plan, and therefore, the junior portion of the HOA lien could be stripped off.

B. Motions for Relief from Automatic Stay

1. Relief "For Cause" Under 11 U.S.C. Section 362 (d)(1)

a. A party can bear the initial burden of going forward even if it does not bear the ultimate burden of persuasion. If a party fails to carry its initial

burden, the court will dismiss its application without requiring the party that bears the ultimate burden of persuasion to offer any evidence. In order for the court to shift the burden to the debtor, the creditor must make a showing that there is a lack of adequate protection, meaning there is insufficient equity for the benefit of the estate. *See In re Anthem*, 267 B.R. 867 (Bankr. D. Colo. 2001).

b. The United States Supreme Court has defined the secured creditor's right to adequate protection as including the right to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay. Evidence of the erosion of the creditor's position or of a threatened erosion satisfies this initial burden. The erosion may be shown through evidence of declining property values, the increasing amount of the secured debt through interest accruals or otherwise, the non-payment of taxes or other senior liens, failure to insure the property, failure to maintain the property, or other factors that may jeopardize the creditor's present position. It may be necessary to show a combination of these factors and/or to show that the circumstances as a whole are sufficient to jeopardize the creditor's interest in the property. *See In re Anthem Communities/RBG, LLC*, 267 B.R. 867 (Bankr. D. Colo. 2001).

c. An ongoing post-petition default in a debtor's payment of the regular mortgage payments can constitute sufficient cause for relief from the automatic stay. *See In re Binder*, 224 B.R. 483 (Bankr.D.Colo. 1998); *In re Ellis*, 60 B.R. 432 at 435 (9th Cir. BAP 1985). However, generally, it is also necessary to show there is no equity in the property for the benefit of the estate. *See* 11 U.S.C. § 362(d).

2. Relief Under 11 U.S.C. Section 362 (d)(2)

a. As opposed to there being no equity in the property for the benefit of the creditor, here, the court must find that the debtor has no equity in the property and/or the stay is contributing to a decline or erosion of the lien holder's position. In addition, the court must find that the property is not necessary for an effective reorganization. *See In re Anthem*, 267 B.R. 867 (Bankr. D. Colo. 2001).

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