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2019 Annual Spring Meeting

Consumer

Circuit Splits and Other Hot Topics in the Consumer Arena

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CONCURRENT SESSION

2019

American Bankruptcy Institute Annual Spring Meeting 2019

April 13, 2019
The Marriot Marquis
Washington D.C.

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Consumer Hot Topics:
Automatic Stay for Repeat Filers, Discharge Violations, and Pawn Law

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I. Introduction

These materials cover a potpourri of interesting and timely "hot topics" in consumer bankruptcy for the Spring of 2019. First, we discuss the scope of the automatic stay applicable to repeat filers under 11 U.S.C. § 362(c)(3). *Second*, we provide an update on recent splits in authority on discharge issues. Third, and finally, we examine hot topics in the intersection of state pawn law and bankruptcy.

II. Scope of the Automatic Stay for Repeat Filers

A Overview

Section 362(c)(3) of the Bankruptcy Code limits the availability of the automatic stay for certain debtors who have filed bankruptcy a second time within one year of their first filing. Specifically, this section applies to individual debtors who filed for bankruptcy, had a bankruptcy filed on their behalf, or had a bankruptcy that was pending but later dismissed, within *one year* prior to their current bankruptcy proceeding. Section 362(c)(3) applies to prior single or joint filings under Chapters 7, 11, or 13.

Section 362(c)(4) of the Bankruptcy Code similarly limits the availability of the automatic stay for individual debtors who had two or more bankruptcies pending within one year prior to their current filing.

However, section 362(c)(3) and (c)(4) limit the scope of the automatic stay using different language.[1] Section 362(c)(3)(A) provides that the automatic stay terminates "with respect to the debtor," and "with respect to a debt or property securing such debt or with respect to any lease" on the 30th day after the filing of the new bankruptcy petition. Section 362(c)(4) provides that the automatic stay "shall not go into effect" upon the filing of the latter case. 11 U.S.C. § 362(c)(4)(A)(i).

Under either section (c)(3) or (c)(4) the automatic stay may be extended as to any and all creditors upon a showing that the latter case was filed in good faith.

As described in the case law section, below, the majority of courts initially interpreted § 362(c)(3) to terminate the stay as to actions against the debtor and the debtor's property but not as to actions against property of the bankruptcy estate. *See*, *e.g*., *Jumpp v. Chase Home Fin., LLC, (In re Jumpp)*, 356 B.R. 789 (B.A.P 1st Cir. 2006); *U.S. Bank Nat'l Ass'n v. Mortimore (In re Mortimore)*, Civil Action No. 11-955 (RMB), 2011 U.S. Dist. LEXIS 146423 (D.N.J. Dec. 21, 2011). However, a growing minority of courts read the provision to terminate the entirety of the

[1] These sections were added to the Bankruptcy Code as part of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA").

automatic stay. *See, e.g., Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 581 (1st Cir. 2018).

The following cases highlight this split in authority.

B *Case Law*

***Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 578 (1st Cir. 2018)**
Facts
Chapter 13 debtor filed his third petition in three years. Invoking § 362(c)(3)(A), the debtor alleged that his petition operated as a stay of actions against himself, personally, his property, and property of the estate. More than 30 days after the filing of the most recent petition, a creditor moved for an order confirming the extent to which the automatic stay had terminated.
Analysis
The court found that the phrase in § 362(c)(3)(A) which terminates the stay "with respect to the debtor" does not lend itself to a single clear reading. Therefore, the court turned to other canons of interpretation: statutory context and congressional purpose. For its contextual interpretation, the court considered the scope of the automatic stay applicable to first time filers (the stay is permanent until lifted or the case closes), and applicable to subsequent filers under § 362(c)(4) (the stay does not go into effect at all). Accordingly, delaying the extinction of the stay in its entirety for second-time filers seemed like a reasonable middle-ground sought by Congress. For its congressional purpose analysis, the court cited a House Judiciary Report on BAPCPA stating that, at the heart of the Act, were "provisions intended to deter serial and abusive bankruptcy filings." Among these reformed provisions was § 362(c)(3).
Holding
Section 362(c)(3)(A) terminates the automatic stay <u>in its entirety</u> 30 days after the filing of a second petition; however, this termination only occurs if the procedure for extending the stay, in which the debtor or a creditor has the burden of demonstrating good faith, has not been successfully invoked.

***In re Goodrich*, 587 B.R. 829 (Bankr. D. Vt. 2018)**
Facts
Chapter 13 debtor filed his current bankruptcy within one year of the date of dismissal of his prior Chapter 13 filing. Based on prior case law from the District of Vermont, *In re McFeeley*, 362 B.R. 121 (Bankr. D. Vt. 2007), the automatic stay would not terminate as to "property of the estate" under § 362(c)(3). A creditor moved for the court to reconsider its prior interpretation of § 362(c)(3).
Analysis
In reconsidering its initial position, the court analyzed case law developments in the analysis of § 362(c)(3) throughout the country and Supreme Court guidance with respect to how to interpret BAPCPA provisions.

Holding
The court revised its prior holding and adopted the "minority approach." It held that when a debtor files a second bankruptcy case within one year of his or her prior bankruptcy case being dismissed, the automatic stay terminates, in its entirety, 30 days after the filing of the second petition unless, within that initial 30-day period, the debtor or a party in interest proves the debtor filed the second bankruptcy case in good faith. However, because the court altered its position, upon which the debtor reasonably relied, the court granted the debtor an additional 30-day period within which to establish he filed his latter case in good faith.

***In re Smith*, No. 1:18-bk-13703-SDR, 2019 Bankr. LEXIS 308 (Bankr. E.D. Tenn. Feb. 1, 2019)[2]**
Facts
Due to cancer, which caused the debtor to lose her job, and child support payment issues, the debtor filed for her second bankruptcy in less than one year. Her creditor, Habitat for Humanity of Cleveland, moved to lift the automatic stay as to the debtor's home.
Analysis
The court considered the split in the case law interpreting § 362(c)(3) and acknowledged that the majority opinion may be shifting. However, the court noted that a majority of courts within its own circuit, the Sixth Circuit, following the "majority" rule, that the automatic stay under this section does not terminate with respect to property of the debtor's estate.
Holding
Following the majority of courts within its Circuit, this court held that the automatic stay under § 362(c)(3) does not terminate as to "property of the estate."

***In re Bender*, 562 B.R. 578 (Bankr. E.D.N.Y. 2016)**
Facts
Chapter 13 debtor had prior Chapter 13 case dismissed within one year of her pending bankruptcy. Her creditor moved to confirm that the automatic stay terminated in the current case 30 days post-filing.
Analysis
The court found that both the majority and minority approaches based their conclusions on faulty interpretations of § 362(c)(3). Instead, this court focused its analysis on the portion of § 362(c)(3)(A) which terminates the stay with as to any "action taken" with respect to a debt or property securing such debt or with respect to any lease. With this language, the court inferred that the statute lifts the stay as to *specific actions* with respect to *specific property*. Accordingly, a two-time filing debtor must seek protection from the court after the expiration of 30 days in order to avoid specific creditor actions against specific property, e.g., foreclosure.

[2] *See also In re Wood*, 590 B.R. 120 (Bankr. D. Md. 2018) (holding same).

Holding
The court held that the stay terminates as to the debtor's property *and* property of the estate, but only if the property was the subject of a judicial, administrative, or other formal proceeding commenced prepetition. <u>Note</u> that this case is often cited as the “third approach” or “Bender approach” to interpreting § 362(c)(3).

***U.S. Bank N.A. v. Mortimore (In re Mortimore)*, Civil Action No. 11-955 (RMB), 2011 WL 6717680, 2011 U.S. Dist. LEXIS 146423 (D.N.J. December 21, 2011)**
Facts
Chapter 13 debtor filed his second Chapter 13 petition within one year. The second bankruptcy was dismissed, but later reinstated. As part of its reinstatement, the bankruptcy court held that the debtor would be required to file an adversary proceeding in order to maintain the automatic stay for longer than 30 days, according to 11 U.S.C. § 362(c)(3). The bankruptcy court later reversed its decision, holding that the adversary proceeding would not be required because, under § 362(c)(3), the automatic stay would expire only as to the “debtor” and not “property of the estate.” Creditor U.S. Bank appealed the decision, which stayed its foreclosure action indefinitely.
Analysis
The plain language of § 362(c)(3) demonstrates that the stay terminates only <u>with respect to the debtor</u> on the 30th day after a petition is filed. This plain reading of the words, "with respect to the debtor," makes sense and is entirely consistent with other provisions of § 362 and other sections of the Bankruptcy Code. If Congress desired for the automatic termination provision to apply to "property of the estate," it would have explicitly said so, as it did in other sections of § 362.
Holding
The Bankruptcy Court properly interpreted the automatic stay termination language under § 362(c)(3)(A) to apply only to non-estate property and leases.

***Jumpp v. Chase Home Fin., LLC, (In re Jumpp)*, 356 B.R. 789 (B.A.P 1st Cir. 2006), *abrogated by Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576 (1st Cir. 2018) (discussed above)**
Facts
Chapter 13 debtor had previously been a debtor in a case that was dismissed a few months prior to the filing of her second petition. When the automatic stay terminated 30 days after commencement of her second case, the debtor moved for a determination that § 362(c)(3)(A) did not terminate the stay as to “property of the estate.” The bankruptcy court denied the motion, holding that § 362(c)(3)(A) terminates the stay in its entirety—as to the debtor, property of the debtor, and property of the estate. The debtor appealed to the Bankruptcy Appellate Court.
Analysis
The B.A.P. began by considering whether the language of § 362(c)(3)(A) is ambiguous regarding the scope of the automatic stay. The court contrasted the phrase in § 362(c)(3)(A) which terminates the stay “with respect to the debtor,” to the broader language of § 362(c)(4)(A)(i), which terminates the stay “under subsection [362](a).” Applying the principle that, “[w]here Congress includes particular language in one section of a statute but omits it

in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," the court found a congressional intent to treat the scope of the stay differently for debtors who have filed only once previously, rather than two or more times. Additionally, the court found that a literal application of § 362(c)(3)(A) would not produce an absurd result because the debtor would still be penalized by a partial lift of the stay and, therefore, still deterred from abusive filings.
Holding
The Bankruptcy Appellate Court vacated the bankruptcy court's decision, holding that the stay under § 362(c)(3)(A) was not terminated as to "property of estate," specifically, the debtor's principal residence.

III. Discharge Injunction Hot Topics

A Overview

Section 524(a) of the Bankruptcy Code protects a debtor who receives a bankruptcy discharge. A discharge is one of the most basic bankruptcy protections afforded to individual debtors. The discharge effectuates the central goal of bankruptcy by providing debtors a fresh financial start. It discharges the debtor's personal liability for pre-bankruptcy debts and operates as an injunction against acts to collect or recover any discharged debt as a personal liability of the debtor.

Entry of a discharge order in favor of a debtor extinguishes the automatic stay and creates the discharge injunction.[3] The injunction prohibits an act to collect, recover or offset any discharged debt as a personal liability of the debtor, whether or not discharge of such debt is waived.[4]

Section 524 does not provide an express enforcement mechanism. Debtors have enforced the discharge injunction by reopening their bankruptcy and filing an adversary proceeding or requesting that the offending party be held in contempt.[5]

B Is there a "good faith" exception for violations of the discharge injunction?

A contemnor is liable for its willful violations of the discharge injunction. To prove a claim of a discharge violation, a debtor must show that the alleged contemnor: (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction.[6] The standard

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[3] 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]").
[4] *Id*.
[5] Some courts find that no private right of action for violation of the discharge injunction exists. *See, e.g.*, *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000).
[6] *Rogerson v. Shaw (In re Shaw)*, No. 1:14-BK-11318, 2017 WL 2791663 (B.A.P. June 27, 2017) (unpublished); *In re Zilog*, Inc., 450 F.3d 996, 1007 (9th Cir. 2006).

of proof may be clear and convincing evidence,[7] or preponderance of the evidence,[8] depending on the jurisdiction.

Courts differ on the requisite level of knowledge required to prove a discharge violation. Some jurisdictions require the contemnor's actual knowledge that the discharge injunction was applicable.[9] However, other jurisdictions also permit a finding of constructive knowledge.[10] In constructive knowledge jurisdictions, "the state of mind with which the contemnor violated the court order is irrelevant and therefore good faith, or the absence of intent to violate the order, is no defense."[11]

Actual knowledge requires the contemnor to be aware of the discharge injunction and aware that it applied to his or her claim.[12] In some jurisdictions, a belief, even an unreasonable one, that the injunction did not apply to the claim, could preclude willfulness.[13]

The United States Supreme Court has recently granted certiorari on the precise issue of whether a creditor may defense against an allegation that it violated the discharge injunction by citing to its "good faith belief" that the injunction was inapplicable.

***Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018), *cert. granted sub nom. Taggart v. Lorenzen*, 202 L.Ed.2d 511 (U.S. 2019)**
Facts
The facts of *Taggart* are complex. The following is a somewhat simplified rendition of the relevant facts: The debtor, Taggart, is a real estate developer. Prior to his bankruptcy, he was being sued by former business partners in state court. These business partners sought attorney's fees. Before the state-court litigation closed, Taggart filed Chapter 7. The state-court litigation was stayed, but resumed after Taggart received his discharge. The former business partners were thereafter successful in their state-court claims against Taggart, and continued their pursuit of attorney's fees. However, they limited their request for fees against Taggart to those incurred only after the date of his discharge. The fee request argued that Taggart "returned to the fray" of litigation after his discharge. Taggart reopened his bankruptcy and sought to hold his former business partners and their attorney in contempt for violation of the discharge injunction by seeking attorney's fees against him. The bankruptcy court held the business partners and their attorney in contempt for "knowingly" violating the discharge injunction. On appeal, the B.A.P. reversed, finding that they had a good faith belief that the injunction did not apply to their attorney's fees claim. The decision was appealed to the Ninth Circuit Court of Appeals.

[7] *Shaw,* 2017 WL 2791663 at *5.
[8] *Sprague v. Williams, et. al. (In re Van Winkle),* No. 13-11743 T7, 2017 WL 2729069 (Bankr. D.N.M. June 23, 2017).
[9] *Shaw*, 2017 WL 2791663 at *5 (holding that the bankruptcy court applied an incorrect standard when it failed to consider whether the alleged contemnor knew the discharge injunction applied to her cause of action).
[10] *See Erhart v. Fina (In re Fina)*, 2012 LEXIS 163855 (E.D. Va. 11/14/12); *In re Nassoko*, 405 B.R. 515, 522 (Bankr. S.D.N.Y. 2009).
[11] *In re Cherry,* 247 B.R. 176, 187 (Bankr. E.D. Va. 2000); *Scott v. Wells Fargo Home Mortg., Inc.,* 326 F. Supp. 2d 709, 718 (E.D. Va. 2003).
[12] *Id.*
[13] *Zilog,* 450 F.3d at 1009; *see also Romanucci & Blandin, LLC v. Lempesis,* 2017 Bankr. LEXIS 71526 at *12 (N.D. Ill. 5/4/17).

Analysis
The Court of Appeals reviewed the B.A.P.'s decision *de novo*. It examined that two-part test for determining whether a discharge violation has occurred: the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction. Only the first prong—knowledge—was in dispute. The court cited favorably to prior precedent, *In re Zilog, Inc.*, 450 F.3d 996 (9th Cir. 2006), which held that a creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable. It also noted that subsequent Ninth Circuit opinions created "tension" with *Zilog*, but did not dispose of the good faith exception to discharge violation liability. The court then noted that the B.A.P. found that Taggart's former business partners and their attorney had a good faith basis to believe that the discharge injunction did not apply to their request for post-discharge attorney's fees because Taggart "returned to the fray" of the state court litigation.
Holding
A creditor who did not "knowingly" violate the discharge injunction because it had a subjective good faith belief that the discharge injunction did not apply is not liable for contempt for violation of the discharge injunction, even if the creditor's belief was unreasonable. Note: The United State Supreme Court granted certiorari on the issue of whether a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt. At the time of submission of these materials, the matter was set for oral argument on April 24, 2019.

***IRS v. Murphy*, 892 F.3d 29 (1st Cir. 2018)**
Facts
The debtor received a Chapter 7 discharge of tax liabilities totaling over $500,000. The discharge order listed common types of debts that are not discharged in bankruptcy, including "debts for most taxes." The IRS never objected to entry of the discharge order in favor of the debtor. After entry of the discharge, the IRS issued levies against several insurance companies with which the debtor did business in an attempt to collect on his tax obligations. The IRS did not believe that the discharge relieved the debtor of his tax obligations because 11 U.S.C. § 523(a)(1)(C) excepts from discharge any tax if "the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." Based on prior investigations into the debtor, the IRS believed that he had willfully attempted to evade taxes during all of the years in question. The debtor filed an adversary proceeding against the IRS for violations of the discharge injunction. The bankruptcy court ruled in favor of the debtor, but the district court vacated the decision. The IRS and the debtor then entered into a settlement which permitted the IRS to appeal the bankruptcy court's construction of willful violation of the discharge injunction. The IRS appealed this issue.
Analysis
We note that the appellate court's analysis related initially to 11 U.S.C. § 7433(e), but was expanded to sections 362 and 524. By examining cases interpreting "willful" in the context of violations of the automatic stay and discharge injunction, the court surmised that, by the time § 7433(e) was drafted in 1998, the phrase "willful violation" had an established meaning. Therefore, Congress adopted this 1998 understanding of "willfulness." Additionally, post-1998 decisions indicated that the generally accepted definition of a "willful violation," one that is not susceptible to a "good faith" defense, should continue to control.

Holding
A good faith belief that the discharge injunction does not apply to a creditor's action is not a defense to liability for violation of the discharge injunction. However, a creditor's good faith could limit the debtor's recovery of actual damages.

C Are punitive damages permitted for violations of the discharge injunction?

Section 524 does not specify a particular remedy for a discharge violation. As a result, courts rely both on their statutory powers under 11 U.S.C. § 105(a) and on their inherent powers to sanction discharge injunction violations.[14] Courts award a variety of damages for discharge injunction violations; however, courts in different jurisdictions may or may not choose to award damages at all, even in similar factual circumstances.

In a majority of courts, an award of punitive damages also is available for discharge violations.[15] These courts rely on the broad language of § 105(a), allowing the court to issue "any order" necessary to carry out the provisions of title 11 to justify an award of punitive damages.[16]

However, some courts hold that punitive damages awards are impermissible as criminal contempt sanctions, which are outside the purview of the bankruptcy courts.[17] A contempt proceeding for violation of the discharge injunction is civil in nature which should be designed to remedy past misconduct and deter future violations.[18]

***In re Beschloss,* No. 15-12139 (MEW), 2018 Bankr. LEXIS 1364 (Bankr. S.D.N.Y. May 8, 2018)**
Facts
The debtor received a discharge in Chapter 7 bankruptcy. The debtor included in his schedules a claim of approximately $55,000 for a law firm that conducted pre-petition work on the debtor's behalf. The debtor received a discharge and the law firm received notice of the discharge. There was no reaffirmation agreement between the parties; however, there was some evidence that the debtor discussed making payments to the law firm even if his obligations were discharged in bankruptcy. On the basis of this pre-petition "agreement," the law firm initiated post-discharge attempts to collect its debt, even filing suit to collect. The debtor moved to hold the law firm in contempt for violation of the discharge injunction and requested punitive damages.
Analysis
When considering whether an award of punitive damages was permissible, the court found that the standard for punitive damages is higher than the standard for finding a violation of the injunction. In order to award punitive

[14] *See, e.g., In re Riser*, 298 B.R. 469, 472 (Bankr. M.D. Fla. 2003).
[15] *See, e.g., Romanucci & Blandin, LLC v. Lempesis (In re Lempesis*), No. 16 C 9710, 2017 U.S. Dist. LEXIS 71526, at *23 (N.D. Ill. May 4, 2017) ($50,000.00); *Mejia v. Partners for Payment Relief LLC (In re Mejia)*, Nos. 12-12090-TJC, 13-00501, 2018 Bankr. LEXIS 1754 (Bankr. D. Md. June 13, 2018) ($25,000).
[16] *Lempesis*, at *20.
[17] *See, e.g., In re Northlund,* 494 B.R. 507, 521 (Bankr. E.D. Cal. 2011).
[18] *In re Diaz,* Order and Judgment on Debtors' Motion for Sanctions for Violation of the Discharge Injunction, Doc. No. 51, No. BKS-10-25047-BTB (Bankr. D. Nev. Oct. 23, 2017) (fines for future violations "are intended to deter (creditor's) contemptuous conduct and (creditor) may avoid these fines by not sending further correspondence to the Debtors.").

damages, the court must find something that amounts to malevolent conduct that demonstrates a complete and utter disrespect for the bankruptcy law.
Holding
Punitive damages for violations of the discharge injunction are permitted for malevolent behavior and were awarded in the amount of $4,000 in this case.

***In re Humbert*, 567 B.R. 512 (Bankr. N.D. Ohio 2017)**
Facts
The former Chapter 7 debtor's landlord violated the discharge injunction by pursuing a claim in state court against the debtor for post-petition rent.
Analysis
The court noted that, generally, damages in contempt proceedings are meant to vindicate the affront to a court order, and not compensate private harm. However, the modern trend in civil contempt proceedings is for courts to award actual damages for violations of § 524's discharge injunction, and, where necessary to effectuate the purposes of the discharge injunction, a debtor may be entitled to reasonable attorney fees.
Holding
The court held that punitive damages awards are impermissible as criminal contempt sanctions, which are outside the purview of the bankruptcy courts. Because a violation of the discharge injunction is civil in nature, criminal contempt sanctions would be inappropriate.

***Ocwen Loan Servicing, LLC v. Marino (In re Marino)*, 577 B.R. 772 (B.A.P. 9th Cir. 2017), *denying appeal without prejudice,* Nos. 18-60005, 18-60006, 2018 U.S. App. LEXIS 10493 (9th Cir. Apr. 24, 2018)**
Facts
The bankruptcy court held that mortgage loan servicer Ocwen violated the discharge injunction by sending letters and making telephone calls to the debtor which exceeded acts necessary to protect and enforce its liens. The bankruptcy court awarded the debtor $119,000 for emotional distress ($1,000 for each improper contact), but held that it lacked authority to award punitive damages under Ninth Circuit precedent. The debtor and servicer appealed.
Analysis
The B.A.P. noted that the Ninth Circuit has stated that bankruptcy courts are prohibited from assessing any "serious" punitive damages, but left open the possibility of relatively mild noncompensatory fines.
Holding
The B.A.P. vacated the bankruptcy court's holding that it lacked the authority to award punitive damages. The B.A.P. ordered the lower court to consider whether it should award "relatively mild noncompensatory fines," issue proposed findings and a recommended judgment of punitive damages for district court review, or refer the issue of contempt to the district court.

IV. State Pawn Law and Bankruptcy

A Overview

The Bankruptcy Code often interacts with state property laws. Recently, bankruptcy courts have been divided when interpreting state pawn laws applicable to "pledged" collateral, because these laws may affect whether such property remains "property of the [bankruptcy] estate" under 11 U.S.C. § 541(a)(1).

B Case Law

***TitleMax v. Northington (In re Northington)*, 876 F.3d 1302 (11th Cir. 2017)**
Facts
The debtor case entered into a pre-petition pawn transaction in which he pledged his car in exchange for a loan, defaulted on the loan by failing to repay it on time, and then, shortly before the expiration of the 30-day redemption period—during which he could pay off his debt (with interest) and thereby regain title to his car—filed a Chapter 13 bankruptcy petition. Georgia's "pawn" law states that any "pledged"—*i.e.*, pawned—item that is not "redeemed" within a statutorily prescribed grace period is automatically forfeited to the pawnbroker by operation of law, and any ownership interest of the pledgor is automatically extinguished in the pledged item. Ga. Code Ann. § 44-14-403(b)(3). Although all parties agreed that the pawned vehicle was initially "property of the estate," they disagreed as to whether the vehicle was thereafter forfeited to the pawnbroker by operation of law upon the expiration of the redemption period under Georgia's pawn law. The debtor proposed to modify TitleMax's rights under § 1322(b)(2) through his plan. Instead of objecting to plan confirmation, TitleMax filed a motion for relief from stay. The plan was confirmed.
Analysis
The court considered the debtor's argument that the status of the vehicle as "property of the estate" was "frozen in time" upon the filing of the bankruptcy, thereby forestalling the operation of state-law rules that define and regulate the property interests that comprise the estate. The court noted that, even in the uniquely "federal" bankruptcy context, property interests are created and defined by state law. Accordingly, analyzing a bankruptcy estate requires two tiers of inquiry, first into the assets of the estate, and then into the underlying property rights and interests that constitute each asset. The second, more granular inquiry examines the nature of a debtor's property interest in a particular estate asset, which turns on state law. With respect to the vehicle at issue here, the state law is clear that the item is forfeited to the pawnbroker upon the expiration of the redemption period.
Holding
Under the Georgia pawn statute, O.C.G.A. § 44-14-403(b)(3), following his loan's maturity date, the debtor had a conditional right to possess the car and a right to redeem it, but after the expiration of the prescribed period, he had no rights in the car, and his rights had been automatically extinguished and forfeited to the creditor. The car ceased to be "property of the estate" upon the expiration of the redemption period. Note: The Bankruptcy Code did extend the debtor's grace period to redeem for an additional 60 days post-filing under 11 U.S.C. § 108. However, the debtor still failed to redeem.

***Schnitzel, Inc. v. Sorensen (In re Sorensen)*, 586 B.R. 327 (B.A.P. 9th Cir. 2018)**
Facts
Pre-petition, the debtor pledged five pieces of jewelry as collateral for pawn loans. Prior to the termination of the loans, she filed for Chapter 13 bankruptcy. Her proposed plan sought to repay the pawn loans and retain the jewelry. Pursuant to California state pawn law and bankruptcy law under § 108 extending the grace period for redemption, the pawnbroker issued a statutorily-required notice of termination at the expiration of the state law redemption period. The debtor filed an adversary proceeding, alleging that the jewelry was part of the bankruptcy estate and therefore subject to the automatic stay. The pawnbroker countered that the jewelry ceased to be "property of the estate" upon the expiration of the redemption period.
Analysis
The court initially determined that the jewelry at issue became part of the estate upon the filing of the petition. However, it found that, unlike the Georgia pledge law in *Northington*, California's pawn law does not forfeit pawned property to the pawnbroker by operation of law upon the expiration of the redemption period. Instead, the pawnbroker is required to mail a notice of intent to terminate the loan. Upon the expiration of 10 days after this notice, the pawned collateral is forfeited to the pawnbroker.
Holding
The Ninth Circuit found that, by sending the statutorily required notice of termination, the pawnbroker violated the automatic stay. The court held that, instead, the pawnbroker should have sought stay relief prior to sending the required notice.

Recent Exciting Chapter 13 Cases

By: Henry (Hank) E. Hildebrand, III
Chapter 13 Trustee
Nashville, TN

***Barbour-Freeman*, 590 BR 147 (Bankr. E.D. Mich. 2018)**
Facts
Debtors' attorney did not file a claim for a creditor that neglected to file its own claim. The bankruptcy was filed in order to cure their default on their mortgage.
Holding
While it was not malpractice for the attorney to not file a claim pursuant to Rule 3004, the attorney's fee may be disgorged since the attorney did not achieve the debtors' intent to cause the mortgage to be cured by filing the chapter 13.

***McBride v. Riley*, No. 1:17-01302, 2018 WL 1768602, 2018 U.S. Dist. LEXIS 62935 (W.D. La. 2018)**
Facts
Debtor's counsel requested reimbursement for funds advanced by the attorney to obtain a pre-petition briefing, a credit report, and the filing fee in the case. This request was to be in addition to the no-look fee. The trustee requested clarification and essentially opposed the debtor's counsel's request.
Holding
The district court affirmed the bankruptcy court in holding that the filing fee, the counseling fee, and the credit report were not administrative expenses which would be compensable under § 330. The maximum no-look fee established by local rule was $3,000, enhanced by a success factor at the end of the case to $3,600. Section 503(b) allows the reimbursement of administrative expenses, such expenses must be for the actual, necessary costs of preserving the estate. Such does not include the expenses requested by counsel. Paying the filing fee occurred prior to the filing of the petition and, accordingly, was not a post-petition expense but a pre-petition expense that benefited the debtor personally and not the estate. Section 330 allows a court to award <u>compensation</u> but is silent about expense reimbursements. This eliminates any basis for reimbursing attorney's expenses under § 330. Accordingly, the enhanced reimbursement was disallowed.

***In re Fioriglio*, 2018 WL 1629779, 2018 Bankr. LEXIS 906 (Bankr. E.D. N.Y. 2018)**
Facts
The debtor filed a chapter 13 petition owning property in Brooklyn and Yaphank, New York. The debtor did not have personal liability on the Yaphank mortgage but did own a 50% interest. The outstanding principal amount on the Brooklyn property was about $950,000. The Yaphank property was subject to a $246,000 lien. The combined secured obligation would place the debtor above the debt limits but the debtor asserted that the motion to dismiss was brought too late and the creditor was subject to laches. Further, if the debtor did not have personal liability on the mortgage, the mortgage obligation should simply "not count" for the purpose of calculating the debt limits.
Holding
It is irrelevant whether the debtor had personal liability on the secured obligation. The bankruptcy code defines a lien on property owned by the debtor as a claim or debt. The determination of eligibility for chapter 13 should not be limited to the schedules filed by the debtor, when adding secured debts this debtor exceeded the debt limits and the doctrine of laches would not apply to prevent the objecting creditor from raising eligibility.

***In re Berry*, 582 BR 86 (Bankr. D. S.C. 2018)**
Facts
The debtor was obligated on a student loan and was enrolled in both the Public Service Loan Forgiveness Program and the Income-Driven Repayment Plan when she filed the chapter 13 petition. The debtor's plan proposed to pay the student loan directly and, upon receiving notice that the FedLoan Servicing had placed the loan in administrative forbearance as a result of the filing of the bankruptcy, amended her plan to indicate she would be allowed to maintain her enrollment in the IDR or the PSDF programs. The debtor committed to reenroll in the applicable IDR program every year (as required by the program), allowed the creditor to provide notices to her directly, and specifically provided that the bankruptcy was not seeking to discharge the debt. When the student loan creditor continued to hold the payments in abeyance (administrative forbearance), the debtor sought sanctions.
Holding
The obligations to FedLoan Servicing may be nondischargeable, but the terms of the plan, however, are binding upon FedLoan Servicing. See *United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010). The debtor was required to file a motion to enforce the confirmation order to compel compliance with the terms of her plan. As a result of these actions, FedLoan Servicing is liable for the damages it caused due to its failure to follow the plan. The rules governing FedLoan Servicing do not limit their compliance with the terms of a confirmed chapter 13 plan nor do they insulate the agency from respecting court orders. As a result, FedLoan Servicing was liable for the debtor's attorney's fees and costs and would be compelled to certify that it was in compliance with the order requiring them to follow the plan.

In re Shelton, 592 BR 193 (Bankr. N.D. Ill. 2018)
Facts
The debtor's Chapter 13 plan proposed to make payments to the trustee but distributions from the trustee to creditors would first be directed to the debtor's attorney and then payments to secured creditors would be increased from an "adequate protection" amount to a larger monthly payment. No creditor objected but the Chapter 13 trustee argued that "step" payments were impermissible.
Holding
The code's requirement that payments to creditors be made in "equal monthly payments" is enforceable and the Chapter 13 trustee has standing to pursue the issue. "Step" payments proposed to secured creditors, solely to advantage the debtor's attorney were impermissible. Debtors should be precluded from ballooning payments to secured creditors who are delayed in receiving payments because such shifts the risk of early failure of plans to the junior creditors, diverting payments to the attorneys. Further, the failure of a secured creditor to object to the debtor's proposed plan does not constitute acceptance of the plan. By equating silence to acceptance, debtors invert the burdens under § 1325 to creditors rather than the debtors where the code places it. The debtor has the burden of demonstrating that the plan has been accepted. Preclusion and waiver do not equate to acceptance.

In re Miceli, 587 BR 492 (Bankr. N.D. Ill. 2018)
Facts
The debtor's Chapter 13 plan proposed to "cure and maintain" a mortgage obligation to Associated Bank. It proposed the arrearages would be paid in full through disbursements to the trustee but only after the attorney's fees had been fully satisfied. It proposed to pay the "conduit" payments directly by the debtor. The bank opposed confirmation, noting that it was not receiving "equal monthly payments" on the arrearage payment.
Holding
Section 1325(a)(5)(B)(iii)(I) requires that if payments to a secured creditor are to be made in periodic payments, those payments must be equal in amount. The courts have divided on the issue of whether a cure under § 1322(b)(5) is governed by the equal monthly payment mandate of § 1325(a)(5). Section 1322(b)(5) is not "at odds" with § 1325(a)(5)(B)(iii)(I) and nothing in § 1322(b)(5) indicates that the "equal monthly payments" does not apply to a cure and maintenance of a secured claim through a plan.

***In re Lee*, 2018 WL 2138774 (Bankr. N.D. Ohio 2018)**
Facts
When the debtors' mortgage company did not file a proof of claim in their Chapter 13 case, the debtors filed a claim on their behalf pursuant to Rule 3004. The debtors asserted a mortgage obligation of $175,000 with an arrearage of $15,000. Fourteen months later, the mortgage company filed an amendment to the debtors' claim asserting a mortgage arrearage in the amount of $150,000. The debtors contested the ability of the creditor to file an amendment to the debtors' claim after fourteen months.
Holding
The claims bar deadline was June of 2016. The creditor did not file a proof of claim by that date. The debtors filed one on behalf of the mortgage creditor and it was not until fourteen months later that the creditor sought to amend the claim. The Advisory Committee on Rules indicates that since Rule 3004 no longer permits a creditor to file a proof of claim that would supersede a claim filed by the debtor or the trustee. The suggestion is the amended mortgage arrearage claim should not be considered. While a number of courts have held that the court has the discretion to allow a creditor to amend a claim, where fourteen months has elapsed, the notice was adequate, and the debtors had performed under the plan for that period of time, the amendment would not be permitted. The creditor's amended claim would be disallowed because the creditor is bound by the terms of the plan.

***In re Quinn*, 586 BR 1 (Bankr. E.D. Mich. 2018)**
Facts
The debtors' Chapter 13 plan proposed to classify a student loan obligation to receive a minimum of $850 per month and all available funds before any distribution to unsecured creditors would be made. Because the debtors' student loan obligation exceeded $192,000, it was unlikely that the other unsecured creditors would receive anything. The trustee objected on the grounds that the plan unfairly discriminated amongst unsecured creditors.
Holding
Chapter 13 plans may classify amongst unsecured creditors including the classification of a student loan obligation. In this case, however, the different between what the debtors were proposing and what the trustee asserted would be paid was the different between the debtors owing $6,000 more on their student loan after their Chapter 13 plan or reducing their student loan by $212. Not only does the favorable treatment of student loans help the debtors, it might be consistent with Congressional intent to protect the fiscal health of the student loan programs administered by the federal government. In this case, however, the debtors failed to articulate a sufficient reason as to why making a different distribution should be a fair discrimination. Even applying a totality of the circumstances test to determine whether it is appropriate to provide more favorable treatment to a student loan debt does not help the debtors. A student loan debt may be given a more favorable treatment but, where the amount of the difference is so unfair in that the debtor would still be in default under the student loan, the debtor would have a significant obligation on the student loan at the end of the plan, and unsecured creditors would receive nothing, the plan proposed by the debtors was unfairly discriminatory.

***In re Washington*, 587 BR 349 (Bankr. C.D. Cal. 2018)**
Facts
In 2012, the debtor obtained a discharge in a Chapter 7 case. In 2017, the debtor filed a Chapter 13 case. In her Chapter 13 case, the debtor sought to strip off the junior lien on her home, noting that the first mortgage on the debtor's property exceeded the value of the home leaving no collateral value to support the junior lien.
Holding
When the court held that the junior lien could be stripped in the Chapter 13 case, the question remained as to whether any claim remained to be paid to the junior lien holder. The debtor argued that this obligation had been discharged in the earlier Chapter 7 so should not receive funds. In order to analyze this, however, the court must pursue a series of steps. Application of § 506(a)(1) means the amount of the secured claim is $0.00. Pursuant to that section, the remainder of the claim is unsecured. Even though, however, the debtor had no *in personam* liability on that obligation, her Chapter 13 program was required by § 506 to treat the deficiency on the stripped claim as totally unsecured in the debtor's Chapter 13 case. Section 1322(b)(2) would still permit the stripping of the junior lien. In order to allow that stripping, the claim must first be held to be a secured claim under § 506. Even though the debtor had no *in personam* liability, the debtor did have a § 506 secured claim. Pursuant to that section, therefore, the wholly underwater junior lien becomes an unsecured claim upon the avoidance of the lien. A Chapter 13 debtor "cannot have its cake and eat it too." The creditor that held the junior lien is the holder of an unsecured claim after the lien avoidance in the Chapter 13 despite the lack of personal liability.

***In re Ayodele,* 590 BR 342 (Bankr. E.D. N.C. 2018)**
Facts
The debtor's Chapter 13 plan proposed to make payments to the trustee to cure a $6,682 arrears on his mortgage while the debtor would pay the "conduit" mortgage payments directly. The Eastern District of North Carolina had a local rule that required Chapter 13 debtors to remit all mortgage payments owed by them to the Chapter 13 trustee for disbursement to the real property creditor unless the court or the trustee found good reason to excuse the debtor from such payments. The debtor challenged the application of the local rule and requested the ability to make payments directly to Ditech, the mortgage creditor.
Holding
Though nothing in the bankruptcy code expressly prohibits direct payments to creditors by a debtor in a Chapter 13 plan, it is consistent with the bankruptcy code's purpose to establish a mechanism where a debtor's payments will be timely made throughout the plan. The conduit process creates an orderly procedure by which monthly mortgage payments are disbursed and detailed records are maintained by the trustee. The trustee making the payments is able to file applications to deem any defaults cured and to deem mortgage loans current at the conclusion of the case and prevents the loss of a discharge as a result of any lapse in direct mortgage payments by the debtor. The benefits to be realized by the debtor out weigh the costs of the trustee's commission.

***In re Peterson*, 585 BR 1 (Bankr. D. Conn. 2018)**

Facts

The debtor filed a *pro se* Chapter 13 petition listing a number of causes of action the debtor against third parties and her plan proposed that the proceeds from these causes of action would be committed to the plan to pay her creditors. The debtor initiated a number of adversary proceedings to collect proceeds. The Chapter 13 trustee did not endeavor to collect anything from these judgments nor did the trustee assist the debtor in pursue her actions against the debtor's debtors.

Holding

The Chapter 13 trustee is not required to pursue the collection of property as is a Chapter 7 trustee. The Chapter 13 trustee had no affirmative duty to undertake either the collection of the alleged obligations of the individuals the debtor asserted owed her money. While a Chapter 7 trustee has an obligation under § 704(a)(1) to convert property of the estate into cash, § 1302(b) does not make reference back to this section. Rather, the debtor is conferred the authority to use property of the estate, and if the debtor proposes to commit those proceeds to the plan, it is up to the debtor to pursue that action under § 1303. The debtor's adversary proceeding brought against the former trustee was dismissed.

***Romeo v. Maney (In re Romeo)*, No. AZ-17-1215-BLKu, 2018 WL 1463850, 2018 Bankr. LEXIS 865 (B.A.P. 9th Cir. March 23, 2018)**

Facts

The debtor's Chapter 13 plan was confirmed by the bankruptcy court in May of 2014. The debtor was a below-median income debtor. She filed a transcript of her 2015 federal income tax return with the court and the trustee sought access to her federal tax return and state tax return for the 2015 tax year. The debtor did not agree that the state tax return could be obtained and contested the trustee's need for the federal tax return.

Holding

BAPCPA requires a debtor, upon request of a party in interest, to file post-petition federal income returns or transcripts with the court for the tax years during which the Chapter 13 case was pending. See § 521(f). BAPCPA required the Administrative Office to promulgate rules on how to obtain access to these tax returns. The standard adopted by the Administrative Office requires a motion with the court which describes the status of the requesting party, a description of the tax information sought, a statement indicating the information could not be obtained from another source and demonstrates need for the information. The debtor's argument that the trustee had no need for such information because the trustee would only use it to increase the debtor's plan payment was rejected. The trustee's request, however, for state tax returns was inappropriate in that § 521(f) only references federal tax returns or transcripts. Thus, the bankruptcy court was in error in requiring the debtor to turn over the state tax returns and directed the trustee to Rule 2004. It was appropriate, however, for the bankruptcy court to allow the trustee access to the filed federal tax returns.

In re Clark, **551 BR 910 (Bankr. N.D. Okla. 2016)**
Facts
The debtor's chapter 13 plan was confirmed to pay approximately 24.4%, containing the provision that the actual payback would depend on which claims were filed and allowed. After confirmation, the trustee sought to disallow a secured claim of LVNV because it violated the statute of limitations. LVNV argued that the trustee was precluded from contesting allowance of a claim after confirmation.
Holding
The allowance or disallowance of an unsecured claim was not part of the confirmation process and the trustee was not precluded from challenging the claim after the plan was confirmed. The Fifth Circuit had held that a <u>secured</u> claim must be acted upon before confirmation (*Simmons v. Saveli (In re Simmons),* 765 F.2d 547 (5th Cir. 1985)). Most other courts disagreed. Neither the code or the rules impose a bar date for contesting a claim and the court would not impose one here.

CIRCUIT SPLITS AND OTHER HOT TOPICS IN THE CONSUMER ARENA

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American Bankruptcy Institute
2019 Annual Spring Meeting
Washington, D.C.
April 10-11, 2019

I. Is an Objection Required To Preserve Appellate Standing?

Bankruptcy lawyers tend to treat bankruptcy procedure like a wedding: they make a proposal, invite interested parties to participate, hold their breath as a robed officiant offers one last opportunity to "speak now or forever hold your peace," and—hearing no objection—assume they are in the clear to live happily ever after. Their self-assurance is not unfounded. Indeed, until recently, the majority of circuits viewed the "person aggrieved" standard for appellate standing to be satisfied only where the appellant actually participated in the proceedings by attending the hearing and raising an objection. *Compare In re Weston*, 18 F.3d 860, 864 (10th Cir. 1994); *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1992); *In re Szostek*, 886 F.2d 1405, 1413 (3d. Cir. 1989); *In re Commercial W. Fin. Corp.*, 761 F.2d 1329, 1334-35 (9th Cir. 1985); *with In re Urban Broad. Corp.*, 401 F.3d 236, 243-44 (4th Cir. 2005).

However, the Ninth Circuit recently muddied the waters on this issue in *In re Point Center Financial, Inc.*, 890 F.3d 1188 (9th Cir. 2018), when it held that an appellant's failure to attend and object at a bankruptcy court hearing *does not* affect whether the appellant is a "person aggrieved" for the purposes of appellate standing. In *Point Center Financial*, the debtor ("PCF") was an originator and servicer of residential and commercial loans. Private investors funded the loans offered by PCF to its customers. In return, the investors would typically receive a fractionalized interest in the loan and in the deed of trust securing the loans. When defaults occurred, PCF would foreclose on the loans and place the property into a new single-purpose limited liability company. The investors would then be given membership interests in the LLC.

In once such instance, PCF formed Dillon Avenue 44, LLC to hold title to property obtained after a foreclosure and gave the membership interests to the applicable investors. After PCF filed for bankruptcy, the court set a deadline for the chapter 7 trustee to assume or reject

PCF's executory contracts, including Dillon Avenue 44, LLC's operating agreement. The trustee did not do so. Instead, three months after the deadline, the trustee filed a motion asking for permission to assume the operating agreement retroactively. Since no parties filed objections or appeared at the hearing to oppose the assumption motion, the court granted it. When the investors learned that the operating agreement had been assumed, they filed an emergency reconsideration motion, which the bankruptcy court denied. The investors then appealed the bankruptcy court's written opinion on the assumption motion. At the district court, the trustee moved to dismiss the appeal on the grounds that the investors had not object to or attend the hearing on the assumption motion. The district court agreed and dismissed the appeal for lack of standing.

The Ninth Circuit reversed, noting that, although there was a circuit split on the issue, there were no controlling opinions in the Ninth Circuit addressing whether a person who has a pecuniary interest affected by a bankruptcy proceeding and received adequate notice of a bankruptcy court hearing, but failed to appear and object, may be found to satisfy the "person aggrieved" requirement for appellate standing.[1] The court held that requiring participation in the lower court proceedings as a prerequisite to having appellate standing conflates the basic notion of standing with notions of waiver and forfeiture. Rather, since there was "no question that [the investors] pecuniary interests [were] directly and adversely affected by the bankruptcy court order in question," the court found that the investors qualified as "aggrieved persons" for the purposes of appellate standing. However, it noted that it was still possible that the investors *forfeited* the

[1] In *Commercial Western*, the Ninth Circuit noted that "attendance and objections should usually be prerequisites to fulfilling the 'person aggrieved' standard[,]" but excused the failure to object in that case for lack of notice. 761 F.2d at 1334. In *Center Point Financial*, the Ninth Circuit characterized this statement in *Commercial Western* as dicta.

arguments raised on appeal by failing to timely object. The Ninth Circuit therefore remanded the case to the bankruptcy court to determine that issue.

Shortly thereafter, in *In re Wrightwood Guest Ranch, LLC*, 896 F.3d 1109 (9th Cir. 2018), the Ninth Circuit provided additional guidance on this issue, explaining that:

> When it comes to the attendance and objection requirement, the dispositive question is whether there is any evidence in the bankruptcy-court record that an attorney entered an appearance on behalf of the would-be appellant, objected to the relevant order on behalf of the would-be appellant, or otherwise informed the bankruptcy court that he or she was representing the interests of the would-be appellant. When a party has not objected to an order in writing and the record contains no explicit indication that a party meant to object, a party has normally failed to preserve its objection to that order. Requiring parties to make their objections clear on the record is not an onerous burden, and it is one that ensures that the bankruptcy court is squarely presented with the facts and legal arguments necessary to reach a reasoned decision considering the interests of all affected parties. Whether we refer to the attendance and objection requirement as one of "standing," or now as one of "forfeiture," it serves the same interests of economy, efficiency, and notice that are crucial to the orderly functioning of the bankruptcy system.

Id. at 1116-17 (internal citations omitted).

In other words, the Ninth Circuit's recent divergence from the majority approach is not as drastic as it may seem at first glance. The Ninth Circuit simply views the lack of appellate standing stemming from the failure to timely object as an issue of waiver/forfeiture, rather than of the appellant's status as a "person aggrieved." Although the Ninth Circuit's approach is less of a bright line (e.g., the court is willing to consider whether anything in the record is indicative of an intent to object), the result will likely be the same in more cases than not.

II. The Title 11 Deathtrap: Nondischargeability of Homeowners' and Condominium Association Dues Where Secured Creditor Refuses to Accept Surrender of Property

Section 523(a)(16) of the Bankruptcy Code, which was enacted in 2005 as part of BAPCPA, provides for the nondischargeability of condominium fees and assessments that become due and payable postpetition for as long as the debtor or the trustee "has a legal, equitable or possessory ownership interest" in the property. Prior to BAPCPA, postpetition fees and assessments were dischargeable as long as the debtor did not occupy or rent the property. Section 523(a)(6) was meant to render postpetition condominium fees and assessments nondischargeable "[i]rrespective of whether or not the debtor physically occupies such property ... during the period the debtor or the trustee has legal, equitable, or possessory ownership interest." H.R.Rep. No. 109-31, at 88 (2005), U.S. Code Cong. & Admin. News 2005 at pp. 88, 154.

As a result, debtors can no longer sidestep the nondischargeability of postpetition condominium fees by physically leaving the property; they now must divest themselves of all legal and equitable interest in the property as well. For this reason, section 523(a)(16) poses quite a problem for debtors who, for whatever reason, are unable to rid themselves of their property interests. For example, if the property is underwater, the debtor might try to surrender the property to the secured creditor. But what if the secured creditor does not want the property and refuses to accept the surrender?

On this issue, one court explained that "[c]ase law, while limited, generally indicates that a secured creditor cannot be forced to accept surrendered property, even when post-petition costs, including those assessed by a HOA, continue to accrue." *Bank of N.Y. Mellon v. Watt*, 2015 U.S. Dist. LEXIS 54041, at *17 (D. Or. Apr. 22, 2015) (citing *In re Rosa*, 495 B.R. 522, 523-525

(Bankr. D. Haw. 2013); *In re Rose*, 512 B.R. 790, 793-96 (Bankr. W.D.N.C. 2014); *Holoka v. Deutsche Bank Nat'l Tr. Co. (In re Holoka)*, 525 B.R. 495, 499 n.38 (Bankr. N.D. Fla 2014)).

In *Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault)*, 456 B.R. 627, 630 (Bankr. S.D. Ga. 2011), the court refused to confirm a chapter 13 plan that sought to compel a secured creditor to accept title to property. The court held that "[u]nder Florida law, a mortgage does not transfer title, possession or any other interest in property other than the lien… Since [the lender] has not foreclosed on the Property, Debtors remain the owners." The *Arsenault* court held that "a plan cannot require a secured creditor to accept a surrender of property or take possession of or title to it." 456 B.R. at 629-30. Similarly, in *In re Khan*, 504 B.R. 409, 410-14 (Bankr. D. Md. 2014), the court granted a homeowners association relief from stay to collect post-petition fees, despite noting that "none of the secured creditors has gone forward with foreclosure, and Debtor cannot compel them to accept his surrender pursuant to 11 U.S.C. § 1325(a)(5)(C)")."

Some courts have addressed this problem by allowing the property to be sold free and clear of all liens, claims, and other interests pursuant to section 363(f) of the Bankruptcy Code. For example, in *In re Pigg*, 453 B.R. 728 (Bankr. M.D. Tenn. 2011), the debtor's condominium was severely damaged in a flood, rendering the home inhabitable. The debtor filed a chapter 7 petition and sought to surrender property. However, the secured creditor declined to foreclose, leaving the debtor responsible for post-petition HOA fees and with potential liability for failure to clean up the property. Viewing that result as inequitable, the *Pigg* courted commented that: "victims of natural disasters such as Ms. Pigg, would lose their homes and be required to continue to pay HOA fees for houses they no longer occupy, have surrendered in bankruptcy, but cannot force lenders to accept by deed in lieu of foreclosure or force foreclosure." *Id.* at 733-734. To avoid that result, the court directed the chapter 7 trustee to sell the property free and clear of all liens pursuant to section 363(f). To satisfy the requirements of section 363(f), the court found that the secured creditors' inaction constituted their consent to the sale. *Id.*

In *In re Wiley*, 581 B.R. 444 (Bankr. D. Md. 2018), the court agreed with *Pigg* that the section 363(f) sale process is a good solution to the problem created by section 523(a)(16). *Id.* at 450-51. However, since *Wiley* involved a chapter 13 debtor, rather than a chapter 7 debtor like Ms. Pigg, the court refused to appoint someone to sell the property on the grounds that the debtor possessed the power to do so himself. *Id.*

Section 363(f) does not fully resolve the dilemma, however. What if it takes a long time to find a purchaser or one cannot be found at all? In that case, one solution might be for the court to authorize the debtor or trustee to quitclaim the debtor's interest in the property to a liquidating trust, with the bankruptcy trustee (in his/her individual capacity) designated as liquidating trustee and the debtor's creditors designated as beneficiaries. While this step seems absurdly redundant in a chapter 7 case, it would divest the debtor and its estate of legal and equitable title to the property, which—at least in theory—should cut off the applicability of section 523(a)(16). The liquidating trustee and the court could then determine the best way to dispose of the property without depriving the debtor of his or her fresh start.

III. Does a Late-Filed Tax Return Render Tax Debt Permanently Nondischargeable?

Courts have historically differed on whether consumer debtors may discharge tax debts for which they failed to file timely tax returns. Recent opinions, though, have uniformly concluded that such tax debts are not dischargeable. In response, the IRS and the ABI Committee on Chapter 7 have recommended reforms that would provide a discharge to debtors who were excusably late in filing their tax returns.

The Bankruptcy Code excepts certain tax debts from discharge. In particular, an individual cannot discharge tax debts "with respect to which a return, or equivalent report or notice, if required (i) was not filed or given; or (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition." 11 U.S.C. § 523(a)(1)(B)(i)-(ii).

A "return" is defined as:

> a return that satisfies the requirements of applicable nonbankruptcy law (*including applicable filing requirements*). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

Id. § 523(a)(*) (emphasis added). Congress added this definition to the Code in 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").

In the time since BAPCPA, every circuit court that has considered the issue has concluded that debtors cannot discharge tax debts for which they failed to file timely tax returns. These courts have read a filing deadline as the sort of "applicable filing requirement" referenced in the definition of "return" in section 523. *See, e.g., In re Fahey*, 779 F.3d 1, 5 (1st Cir. 2015) ("a return filed after the due date is a return not filed as required, *i.e.*, a return that does not satisfy 'applicable filing requirements'"); *In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014) ("because the applicable filing requirements include filing deadlines, section 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a return"); *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012) ("a state income tax return that is filed late under the applicable nonbankruptcy state law is not a 'return' for bankruptcy discharge purposes under § 523(a)"); *accord In re Giacchi*, 856 F.3d 244, 248-49 ("Forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law. . . Giacchi's belated filings . . . do not constitute returns").

As these courts put it, a late-filed tax return does not count as a "return" that was properly filed under section 523 of the Bankruptcy Code. The associated tax debt is therefore excepted from discharge. However, prior to BAPCPA's enactment, the courts applied a multifactor test to determine whether a late-filed return should still be considered properly filed, such that the associated tax debt could be discharged. One factor looked to whether the late-filed return "evinced an honest and genuine endeavor to satisfy the law." *In re Payne*, 431 F.3d 1055, 1057 (7th Cir. 2005). If the late-filed return did so, a court might overlook its tardiness and allow the associated tax debt to be discharged. *See, e.g., id.*; *IRS v. Smith*, 1999 U.S. App. LEXIS 39579, at *2 (5th Cir. 1999) (affirming bankruptcy court order disallowing IRS claims for discharged tax debts, even though associated tax returns were filed late); *contra In re Smith,* 96 F.3d 800, 802-803 (6th Cir. 1996) (in pre-BAPCPA case, finding tax debt non-dischargeable when return filed late and within two years of the petition date).

Some judges have argued that the pre-BAPCPA test should continue to apply, but the current dominance of textual modes of statutory interpretation suggests that courts will not displace the plain meaning of the statute through the application of a historical, multifactor test. *Compare*

Fahey, 779 F.3d at 17 (Thompson, dissenting) (arguing that the pre-BAPCPA factors remain relevant), *with id.* at 10 (majority op.) (rejecting that argument).

In sum, courts today are unlikely to allow debtors to discharge tax debts if they failed to file timely tax returns for those debts. Courts are likely to reach this result notwithstanding the harshness or unfairness to debtors that can result—*e.g.*, even if debtors are late in filing their tax returns by one day, the associated debts might still not be dischargeable. *See Fahey*, 779 F.3d at 9 ("Congress might disfavor debtors who both fail to pay their taxes and also fail to timely file the returns that would alert the taxing authority to the failure to pay").

The IRS disagrees with this interpretation of the Bankruptcy Code. It focuses on the language in subsection (ii) of section 523, which states that a tax debt is non-dischargeable when the associated tax return was filed late and *within two years of the petition date*. The IRS argues that this language recognizes that some late-filed returns still qualify as "returns" under the Bankruptcy Code—namely, those returns that are filed late but more than two years before the petition date. Tax debts related to those returns can be discharged in the IRS' view. The IRS thus argues that a rule holding that *all* late-filed returns cannot be discharged is overbroad. The IRS also maintains that such a rule is overly-punitive to debtors.

The IRS suggests that the rule instead should focus on whether the late return was filed in time to assist the IRS (or a state/local taxing authority) with the prompt assessment of a tax debt. If the late-filed return was timely enough to assist the authorities, the associated debt should still be able to be discharged. In practice, this means that a late-filed return is effective for discharge purposes up to the point that the IRS issues an assessment on the unpaid taxes. *See In re Hindenlang*, 164 F.3d 1029, 1035 (6th Cir. 1999) (holding that return filed late and after IRS issued assessment was not "return" for purposes of section 523, and so associated tax debt was non-dischargeable).

These issues will be addressed in the ABI's Consumer Report.