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CONCURRENT SESSION

Consumer

Consumer Bankruptcy Legal Update

H. David Cox
Cox Law Group; Lynchburg, Va.

Hon. Mary Grace Diehl
U.S. Bankruptcy Court (N.D. Ga.) Atlanta

Eric W. Goering
Goering & Goering, LLC; Cincinnati

Dennis J. LeVine
Kelley Kronenberg; Tampa, Fla.

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CONSUMER LEGAL UPDATE

Hon. Mary Grace Diehl, Moderator
United States Bankruptcy Judge
1215 United States Courthouse
75 Ted Turner Drive, S.W.
Atlanta, GA 30303

David Cox
Cox Law Group, PLLC
900 Lakeside Dr.
Lynchburg, VA 24501

Dennis J. LeVine
Kelley Kronenberg
1511 N. Westshore Blvd., Suite 400
Tampa, FL 33607

Eric W. Goering
Goering & Goering LLC
220 West Third Street
Cincinnati, OH 45202

I. Dismissals Under § 707

STUDENT LOAN AS CONSUMER DEBT FOR PURPOSES OF § 707(B)

***In re Robinson*, 560 B.R. 352 (Bankr. D. Colo. 2016)**

Debtor filed chapter 7 asserting that her debts were primarily non-consumer debts. The UST disagreed, asserting that Debtor's debts were primarily consumer debts, and filed a motion to dismiss Debtor's case under § 707(b). Section 707(b) is inapplicable to Debtors whose debts are primarily non-consumer debts. Therefore, in a case where a party moves to dismiss the case pursuant to § 707(b), "the threshold issue is whether the debtor owes primarily consumer debts." The key disagreement here was whether student loan debts were properly classified as consumer or non-consumer debts because Debtor's student loan debt constituted more than half of her total debt.

"The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). "Non-consumer" debt is not defined by the Bankruptcy Code and is anything that does not qualify as "consumer debt."

The Court held that Debtor's student loan debt would be properly classified as consumer debt. The Court explained that student loans are "consumer debts because they are not incurred 'with a motivation to benefit an existing business or in furtherance of an ongoing job or business requirement'" and because, here, Debtor used the student loans to "satisfy quintessentially personal interests and those obligations fall squarely within the definition of consumer debts under §101(8)."

STUDENT LOANS NOT CONSUMER DEBT FOR § 707

***Palmer v. Laying* (*In re* Palmer), 559 B.R. 746 (D. Colo. 2016)**

Debtors filed for relief under chapter 7 and listed a debt of $91,312.00 in student loans. The United States trustee moved to dismiss their case under § 707(b)(1), arguing that their debts, including the student loan debt, were primarily consumer in nature and the presumption of abuse arose under § 707(b)(2). The parties agreed that if the student loan debt was consumer in nature, the motion should be granted, and if not the motion should be denied. It was undisputed that all of the student loan debt was used to pay for tuition and books. The bankruptcy court granted the motion to dismiss after an evidentiary hearing on the matter. The District Court for the District of Colorado reversed holding that the student loans were not consumer debt.

Both courts used the "profit motive" test in their analyses. The Tenth Circuit utilized the test in *Stewart v. U.S. Trustee,* 175 F.3d 796 (10th Cir. 1999), where it explained that a debt incurred with a profit motive is not a consumer debt. The bankruptcy court articulated a narrow test to determine whether the debt was incurred with a profit motive. It stated that "the debtor must demonstrate a tangible benefit to an existing business, or show some requirement for advancement or greater compensation in a current job or organization." The district court took issue with both pieces of the test. First, with respect to the tangible benefit to an existing business, the district court explained that this part of the test incorrectly puts the emphasis on the benefit to or investment in debtor's employer, rather than debtor. Next, with respect to the employer requirement for advancement or greater compensation, the district court took issue with this requirement being linked to an employer mandate. Specifically, the court reasoned that the motivation to pursue an education must be profit rather than an employer mandate. Additionally, the court noted that the Tenth Circuit opinion did not suggest a requirement that the debtor must have incurred the student loan debt or pursued his education while currently employed. And the employer mandate requirement removes employee initiative from the decision to seek further education.

The district court was also unconvinced by the bankruptcy court's rationale for creating such a narrow test, concluding that the bankruptcy court's test turned the profit motive test into "a profit requirement test" or "an employer required profit/benefit test." Instead, the district court stated that the relevant inquiry was whether Debtor's "education can be properly characterized as a business investment in himself." Applying this standard, and in light of Debtor's testimony indicating that he pursued his doctorate in business administration in order to own his own business and, more specifically, to purchase and run the company he was then employed at, the district court concluded that the student loan debt was incurred with a profit motive.

§ 707 DISMISSAL FOR ABILITY TO PAY EVEN IF MEANS TEST PASSED

***In re Lowe*, 561 B.R. 688 (Bankr. N.D. Ill. 2016)**

Debtor filed for relief under chapter 7. Her annual gross income was approximately $115,000.00, and Debtor elected to surrender one of her properties: a condominium that was underwater. In her amended schedule J, Debtor listed expenses including $500 in student loan repayments and $180 in tutoring costs for her child. Debtor passed the means test, thus the presumption of abuse under § 707(b)(2) did not arise. But, the United States trustee moved to dismiss the case under § 707(b)(3), asserting that the student loan and tutoring payments constituted "luxury expenses," and therefore abuses under the totality of the circumstances test found in § 707(b)(3)(B). Debtor admitted that she had the ability to pay her creditors, but argued that the United States trustee must prove something more than the ability to pay in order to have the case dismissed under § 707(b)(3)(B).

Noting the Debtor's high income and the fact that she had approximately $2,300 a month available to make payments to creditors after subtracting expenses, including the student loan and tutoring payments, the bankruptcy court granted the motion to dismiss. Specifically, the court reasoned that because § 707(b)(3) provides for dismissal even when debtors pass the means test and given the separate requirement that the court dismiss a case when the petition was filed in "bad faith" contained in § 707(b)(3)(A), a case can be dismissed for abuse under the totality of the circumstances test based solely on debtor's ability to pay. And, the money Debtor saved by surrendering her condo was relevant to the court's determination of whether she could repay her creditors for the purposes of § 707(b)(3). Thus, because Debtor had an increased disposable income due to her decision to surrender her condo, which resulted in an ability to repay her creditors even with the student loan and tutoring payments, her case could be dismissed under § 707(b)(3). The court declined to make a finding as to whether the student loan and tutoring payments constituted luxury expenses.

ABILITY TO PAY NOT GROUNDS FOR DISMISSAL UNDER § 707(a)

***In re Chovev*, 559 B.R. 339 (Bankr. E.D.N.Y. 2016)**

Debtor—a licensed dentist—filed for relief under chapter 7. The case was a no asset case. The unsecured creditor holding the single largest claim against Debtor moved to dismiss the case under § 707(a) for bad faith. The creditor alleged two bases for dismissal: 1) the Debtor's sole motivation for filing was to avoid collection efforts on a judgment the creditor obtained against Debtor for malpractice; and 2) Debtor artificially inflated his scheduled expenses and minimized his scheduled income. After an evidentiary hearing, the bankruptcy court denied the motion, finding that the creditor failed to meet his burden under § 707(a).

After discussing the split of authority regarding whether bad faith can serve as a basis for dismissal under § 707(a), the bankruptcy court found it unnecessary to decide whether bad faith alone can serve as "cause" for dismissal under § 707(a) because it concluded that the result would be the same under either the bad faith or for cause analysis. First, the court explained that filing to stave off collection efforts was not, by itself, sufficient to establish cause for dismissal under § 707(a). Next, the court explained that the creditor failed to allege misconduct so egregious as to fall within the "bad faith" standard for dismissal under established case law.

Specifically, creditor's allegation that Debtor had the means to repay the judgment but failed to adjust his lifestyle in order to do so was not sufficient to show bad faith for three reasons. First, looking to the legislative history of § 707(a), the court found evidence of congressional intent that the mere ability to pay one's debts alone cannot serve as the basis to dismiss a chapter 7 case for cause under § 707(a). Second, can-pay debtors are subject to dismissal under the abuse provision contained in § 707(b) and the presumption arises when the filer fails the means test. Third, even if the "for cause" inquiry includes consideration of the ability to repay debt, the creditor failed to introduce any evidence refuting Debtor's testimony that he did not maintain a lavish lifestyle.

Last, with respect to the creditor's assertion that Debtor inflated his scheduled expenses and minimized his income, the court found this allegation similarly failed to establish cause for dismissal under § 707(a) for two reasons. First, the court found that the creditor failed to produce any evidence indicating Debtor had actually inflated his expenses or minimized his income. Second, § 727(a)(4) specifically addresses instances where a Debtor has made a false oath by denying a Debtor's discharge. Thus, the court reasoned that the allegation could not serve as cause under § 707(a) for dismissal because it was already addressed by another section of the code.

II. Chapter 13 Issues

DATE & AMOUNT OF CLAIM FOR STRIP OFFS

***In re Rougier* , --- B.R. ----, 2016 WL 5109803 (Bankr. D. R.I., Sept. 16, 2016) (case no. 1:16-bk-10571).**

The issue identified by the Court was whether a creditor holding secured claims for the first and second mortgages may waive certain pre-petition interest, costs, and fees to which it is entitled under the loan documents in order to show equity in the debtor's property in order to block the avoidance of its second mortgage under the debtor's action to strip off the same.

The parties agreed that, as of the petition date, the balance due under the first mortgage on the Chapter 13 debtor's residence, including interest, escrow, penalties, fees, and costs, was $186,195, which exceeded the $180,200 value of the property. The mortgage creditor, which held both the first and the second mortgages on the property, however, purported to waive, interest of $6,654 and foreclosure costs of $1,439 in order to reduce the amount of its first mortgage claim to less than the value of the property and create equity to support the second mortgage.

The Court reviewed the creditor's proof of claim for its first mortgage and noted the creditor was attempting "to straddle the fence and avoid any risks whatsoever from the novel approach it has pursued here." Although the face of the claim indicated the reduced balance, the exhibit attached to the claim states, "Amount of PCU claim if no waiver is allowed: $186,195.49." Notwithstanding the creditor's "gamesmanship" (as described by the Court), the Court concluded that even if the creditor had, post-petition, unequivocally waived a portion of its first mortgage claim, the outcome would be no different. The Court determined that the controlling date is the petition date under Bankruptcy Code § 502(b) for the determination of the amount of a claim.

Although the creditor may have waived or reduced its claim prepetition, the Court explained that the creditor's efforts to do so postpetition are limited by the Bankruptcy Code. The creditor "does not have an unfettered right to manipulate its claim to the detriment of [the debtor] and her other unsecured creditors. While it might be true that [the mortgage creditor] is entitled to waive its right to fully enforce or collect on its claim, doing so does not change this Court's determination of the amount of the claim…."

The Court found that under Code § 502(b) the amount of a claim was determined "as of the date of the filing of the petition" and permitted the strip off of the second mortgage.

BALLOON PAYMENTS IN CHAPTER 13

***In re Cochran*, 555 B.R. 892 (Bankr. M.D. Ga., Sept. 1, 2016)**

The Court addressed the issue of whether a plan that calls for distributions in the form of monthly payments followed by a balloon payment to a creditor holding a claim secured by the debtor's real property complies with Bankruptcy Code § 1325(a)(5)(B)(iii)(I). Section 1325(a)(5)(B)(iii)(I) states that "Except as provided in subsection (b), the court shall confirm a plan if— … (5) with respect to each allowed secured claim provided for by the plan— … (B) … (iii) if— (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts…."

The parties agreed that the creditor's claim of $649,990.09 was oversecured based on the value of the collateral, but the creditor objected to the plan's provision requiring monthly payments of $2500.00 until a balloon payment would be made within 12 months of confirmation.

The Debtor provided evidence that his nondebtor spouse expected to qualify to refinance the property within the next year. The creditor argued, however, that the contemplated balloon payment would be included in the "periodic payments" that the Bankruptcy Code requires to "be in equal monthly amounts." Thus, according to the creditor, since the balloon payment would not be equal to the $2500 payments, the plan provision did not satisfy the requirements of confirmation under Bankruptcy Code § 1325(a)(5)(B)(iii)(I).

The Court recognized that the majority of reported decisions on this issue take the position that § 1325(a)(5)(B)(iii)(I) proscribes confirmation of a plan with a balloon payment on a secured claim following a stream of periodic payments but also noted that no such decisions were controlling law in the Eleventh Circuit.

In its analysis, the Court explained that it declined to follow the majority rule because such rule goes against the plain language and purpose of § 1325(a)(5)(B)(iii)(I). Courts following the majority rule assume that because a balloon payment occurs as part of, or following, a series of regular payments, it too must be "periodic." Instead, the Court, after explaining that "periodic" payments are regularly reoccurring and balloon payments are not, determined that balloon payments are outside of the scope of § 1325(a)(5)(B)(iii)(I) because balloon payments are not "property to be distributed . . . in the form of periodic payments."

The Court further found that the "property to be distributed under the plan on account of such claim" under § 1325(a)(5)(B)(ii) and -(iii) "does not have to be of a singular type and need not be made in a singular manner." A plan is not limited to proposing to satisfy a particular claim with only one type of property or payment. The Court declined to follow the majority rule and held that balloon payments are not "periodic payments" proscribed by § 1325(a)(5)(B)(iii)(I).

SURRENDER AND VESTING IN CHAPTER 13 PLAN

***Wells Fargo Bank, N.A. v. Sagendorph (In re Sagendorph)*, 562 B.R. 545 (D. Mass. 2017)**

Debtor filed for relief under chapter 13. Debtor's amended plan proposed to vest title to certain property in creditor Wells Fargo in full satisfaction of its secured claims. The bankruptcy court confirmed the plan over Wells Fargo's objection. Wells Fargo appealed to the District Court for the District of Massachusetts. The district court reversed.

Framing the threshold inquiry as "whether the plain language of §§ 1322(b)(9) and 1325(a)(5)(C) requires or allows forced vesting," the district court concluded that it does not. Turning first to the meaning of the term "surrender," the court concluded that, in light of current precedent, for the purposes of § 1325(a)(5)(C) "surrender" is "an offer to cede property rights to another." The court then defined "vesting" as "the acceptance of an offer to transfer ownership."

Working from these definitions, the court disagreed with the bankruptcy court and concluded that forced vesting could not be accomplished under §§ 1322(b)(9) and 1325(a)(5)(C). Further, the court acknowledged the parallel between §§ 1322(b)(9) and 1123(a)(5)(B), which both approve of vesting as a means to discharge debt. But, the court pointed to the mandatory language of § 1123(a)(5)(B), which states that a plan "shall provide" for vesting or other acceptable means of implementation and contrasted that with § 1322(b)(9), which provides that a plan "may" provide for vesting. The court reasoned that the distinction was important where a creditor objects to vesting. And the court also pointed to § 1129(b)(2)(A), which actually allows for the accomplishment of forced vesting by compelling a court in certain circumstances to confirm a plan "deemed 'fair and reasonable'." Specifically, § 1129(b)(2)(A)(iii) mandates confirmation of a chapter 11 plan that allows for the realization of the objecting secured creditors "of the indubitable equivalent of [their] claims." No such analogous provision is contained in chapter 13.

After reaching its conclusion, the court was quick to point out that in other scenarios involving other property, such as property that is not the primary residence of the debtor, the code may allow for forced vesting in a chapter 13 plan. The court also did not foreclose the possibility that the bankruptcy court could allow for forced vesting by utilizing its equitable powers. Finally, the court emphasized that its holding was a narrow one, only involving §§ 1322(b)(8), (b)(9), and 1325(a)(5)(C).

III. Form B-122 Issues

CURRENT MONTHLY INCOME EXCLUDES CERTAIN MEDICAID WAIVER BENEFITS

***In re Hite*, 557 B.R. 451, 2016 WL 4626124 (Bankr. W.D. Va., Sept. 6, 2016) (case no. 5:15-bk-51191).**

The Court identified the issue as limited to "whether debtors who are themselves caring for a qualified beneficiary in their home need to include all funds they receive through the Medicaid waiver program to make payments to their unsecured creditors."

In this case, below median family income debtors received Medicaid waiver benefits in the form of Public Partnership funds administered through a state agency in Virginia in order to care for their severely disabled adult son in their home. The Trustee objected to confirmation, asserting that the Public Partnership funds were not included in the debtors' disposable income. The debtors, in turn, argued that the funds were benefits received under the Social Security Act and therefore not included in their Current Monthly Income.

The Court cited the Ninth Circuit B.A.P. opinion, *In re Adinolfi*, 543 B.R. 612 (B.A.P. 9th Cir. 2016) for its analysis of other programs administered and funded under the Social Security Act. Specifically, the Court agreed with the *Adinolfi* opinion's reasoning that relying solely on which entity cuts the benefits check is misplaced. Such "follow the money" argument would force "the Court to add words to § 101(10A)(B), changing the language to 'benefits received <u>from the federal government</u> under the Social Security Act.'"

The Court determined that "Medicaid waiver benefits" that the Chapter 13 debtors were receiving on behalf of and to care for their severely disabled adult son at home were "benefits received under the Social Security Act" and thus excluded from the calculation of the debtors' "current monthly income" under Code § 101(10A). In addition, the benefits were also "foster care payments" excluded from the debtors' "disposable income" under Code § 1325(b)(2).

ABOVE MEDIAN DEBTOR CAN USE NATIONAL/LOCAL STANDARDS EVEN WHERE ACTUAL EXPENSES ARE LESS

***Lynch v. Jackson,* 845 F.3d 147 (4th Cir. N.C. 2017)**

Debtors filed for relief under chapter 7 in the U.S. Bankruptcy Court for the Eastern District of North Carolina. Soon after, the Bankruptcy Administrator moved to dismiss the case for abuse because Debtors used the National and Local Standard amounts for certain categories of expenses rather than the actual amount of their expenses, which were less than the standardized amounts, on the Means Test Calculation form - Official Form 22A-2. The Bankruptcy Administrator argued that a chapter 7 debtor was "limited to deducting their actual expenses or the applicable National or Local Standard, whichever [was] lesser." Debtors argued that the § 707(b)(2) required Debtors to use the full National and Local Standard expense amounts.

The Court denied the motion to dismiss, holding that Debtors complied with the statute, and the Bankruptcy Administrator appealed. Ultimately, the Fourth Circuit granted the appeal to determine whether § 707(b)(2) permits a debtor to take the full National and Local Standard amounts for expenses in a case where the debtor incurs actual expenses that are less than the standard amounts.

Section 707(b)(2)(A)(ii)(I) provides "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards." Relying on the plain language of § 707(b)(2), the Fourth Circuit found that the statute unambiguously established that a debtor is entitled to take the full National and Local Standard amounts. Accordingly, the Fourth Circuit affirmed the bankruptcy court's decision.

IV. Chapter 7 Issues

CHAPTER 7 VOIDANCE ACTION FOR COLLEGE TUITION PAYMENTS

***In re Palladino*, 556 B.R. 10 (Bankr. D. Mass., August 10, 2016), appeal filed, Case No. 16-48 (1st Cir. B.A.P., filed August 18, 2016).**

In this case, the Court asks and answers the question, when parents pay for the college education of their adult child, do they receive anything of value? The debtor's child was an adult under Massachusetts law and a dependent student for financial aid purposes and on the debtors' income tax returns. In the two years prior to the debtor's bankruptcy filing, they paid $64,696.22 to Sacred Heart University ("SHU") for their daughter's education.

The Chapter 7 Trustee filed a complaint against SHU seeking to set aside as fraudulent transfers the $64,696.22 in payments made by the debtors on theories of actual and constructive fraud under both Bankruptcy Code § 548 and the Massachusetts Uniform Fraudulent Transfer Act (UFTA), Mass. Gen. Laws ch. 109A. To further complicate matters, the debtors were convicted Ponzi scheme felons. As such, the Trustee based his position on two main arguments: (1) the "Ponzi scheme presumption" that all payments by the Palladinos to SHU were made with actual intent to hinder, delay, or defraud creditors, and (2) the payments were constructively fraudulent because the Palladinos received no reasonably equivalent value from SHU in exchange for the payments and the Palladinos were insolvent at the time the payments were made.

The Court dispensed with the Ponzi scheme presumption by noting that only the transfers made in furtherance of that Ponzi scheme might be presumed to have been made with fraudulent intent. Accordingly, the Court focused on the issue of value and framed the remaining issue as whether the debtors' payments to SHU were constructively fraudulent under Bankruptcy Code § 548(a)(1)(B) because the debtors allegedly did not receive reasonably equivalent value from SHU in exchange.

The debtors offered affidavits in support of SHU's motion for summary judgment explaining why they made the tuition payments. The Court was ultimately persuaded that the debtors paid SHU because "they believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency." The Court found such motivation to be concrete and quantifiable enough to qualify as "reasonably equivalent value" and entered summary judgment in favor of SHU.

IMPLICATIONS OF SURRENDER IN CHAPTER 7

***In re Failla*, 838 F.3d 1170 (11th Cir. 2016)**

Chapter 7 debtors continued to contest a mortgage foreclosure post-discharge, even though they filed a Statement of Intention indicating they would surrender their home. The mortgagee filed a motion to compel the Chapter 7 debtors to surrender the mortgaged property, arguing that the debtors continuing opposition to the foreclosure action contradicted their statement of intention to surrender the house. The Bankruptcy Court granted the Motion., and found that if the debtors did not comply with its order, could enter an order vacating their discharge. 529 B.R. 786 (Bankr. S.D. Fla. 2014). The District Court affirmed. 542 B.R. 606 (S.D. Fla. 2015) The Eleventh Circuit affirmed, and explained that since "surrender" means "giving up of a right or claim," debtors who surrender their property could no longer contest a foreclosure action. The Court held

1. Debtors who file a statement of intent to surrender property that collateralizes a secured debt must perform that intent by surrendering the property both to the trustee and to the creditor;
2. To "surrender" real property securing residential mortgage debt, in accordance with their stated intent, Chapter 7 debtors had to drop their opposition in state court to the foreclosure action;
3. The bankruptcy judge had authority to remedy debtors' abuse of bankruptcy process by directing debtors to withdraw their affirmative defenses and dismiss their counterclaim in a state court foreclosure action.

TIME FOR OBJECTION TO EXEMPTIONS IN CONVERTED CASE

***In re Sharkey*, 560 B.R. 470 (Bankr. E.D. Mich. 2016)**

This case addresses the issue of whether the time to object to the Debtor's exemptions in a case which is converted from a Chapter 7 cast to a Chapter 13 case resets upon the conversion of the case).

Bankruptcy Rule 4003(b) provides that "a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under §341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." In this case, the Chapter 13 Trustee filed an objection to debtor's claim of exemptions within 30 days of the §341 meeting conducted in the chapter 13 case, but beyond 30 days after the conduct of the 341 meeting in the original Chapter 7 case.

The Bankruptcy court held that the conversion of the case, which constitutes an Order for Relief under the new chapter (§348) and required a new meeting of creditors to be convened, reset the time period for filing Reliance is placed on a 2006 case from Maryland which had determined there was no controlling law in the 7 to 13 conversion area. There are cases which address the question in the context of conversion from 13 to 7 and hold that the date is reset.

V. Claims Issues

AMENDING SECURED CLAIM TO UNSECURED AFTER BAR DATE IN CHAPTER 13

***In re Tania Castro*, Case No. 14-31807 (Bankr. S.D. Fla. 2017) (J. Olson)**

Nissan timely filed a fully secured claim regarding an auto loan. The debtor filed a Chapter 13 plan providing for direct payment of Nissan's loan, and payment of 100% to unsecured creditors. After taking possession of the car post-confirmation and selling the car at auction, Nissan filed an amended unsecured claim of $7,517.33. This claim was filed *after* the claims bar date.

Nissan argued the claim related back to the timely filed claim, or in the alternative that the $7,517.33 should not be subject to a discharge under 11 U.S.C. 1328. The Court relied on a prior decision by Judge Kimball in *In re Jackson*, 482 B.R. 659 (Bankr. S.D. Fla. 2012). In that case, a mortgage creditor timely filed a fully secured claim. After confirmation of Chapter 13 plan which purported to treat its claim as unsecured based on the debtor surrendering the real property securing it, the creditor filed an "amended" proof of claim filed after expiration of the claims bar date. The Chapter 13 Trustee objected to the amended claim, arguing that it was untimely and did not related back to the timely filed secured claim and should be disallowed.

Based on the Eleventh Circuit analysis of amending claims after the bar date, the Court found that the amended claim was not a proper amendment since it was not used to "cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985). As a result, Judge Kimball held in *Jackson* that:

1. The alleged "amendment" was an entirely new claim which the lender improperly sought to file after bar date expired,
2. Confirmation of the debtors' Chapter 13 plan was *res judicata* to each matter addressed in the plan, including surrender of mortgage property in satisfaction of fully secured proof of claim filed by mortgage lender.

In *Castro*, the Court pointed to limited circumstances in which a creditor may amend a timely filed claim, even after the bar date. "[A]mendment to a claim is freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity, or to plead a new theory of recovery on the facts set forth in the original claim." *United States v. Int'l Horizons,* Inc. (In re Int'l Horizons, Inc.), 751 F.2d 1213, 1216 (11th Cir. 1985). "Still, the court must subject post bar date amendments to careful scrutiny to assure that there was no attempt to file a new claim under the guise of an amendment." *Id*., see also *Highlands Ins. Co., Inc. v. Alliance Operating Corp. (In re Alliance Operating Corp*.), 60 F.3d 1174, 1175 (5th Cir. 1995) ("Bar dates . . . are not to be vitiated by amendments. . . . Amendments to proofs of claim that change the nature of the claim . . . set forth a new claim.")"

The Court in *Castro* concluded that "failure to timely file an unsecured proof of claim is fatal to a creditor receiving anything on account of such claim in a chapter 13 case." The amended claim did not cure a defect in the original claim, describe the claim with greater particularity, or present a new theory of recover. Instead, it was an impermissible claim filed after the bar date that could not be allowed.

BANKRUPTCY RULE 3002.1 - SANCTIONS FOR FAILING TO COMPLY

***In re Gravel*, 556 BR 561 (Bankr. D. Vt. 2016)**

Bankruptcy Rule 3002.1 governs claims secured by a security interest in a Chapter 13 debtor's principal residence. In each of three separate cases, the Chapter 13 trustee filed motions asking the court to make a finding of contempt, disallow certain post-petition fees, and impose sanctions on a mortgage servicer based upon its issuance of inaccurate monthly mortgage statements in violation of Rule 3002.1, and violation of court orders. After a consolidated hearing, the Bankruptcy Court issued an extensive opinion imposing sanctions on the mortgage servicer for failure to comply with Rule 3002.1. The Court based these sanctions on Bankruptcy Rule 3002.1 and § 105. The Court held that:

1. Addressing issues of apparent first impression, mortgage servicer failed to comply with Rule 3002.1(c) by repeatedly sending debtors erroneous mortgage statements which included post-petition fees for which the requisite notices had not been filed;
2. Mortgage servicer's misconduct in improperly assessing post-petition fees and failing to file the required notices warranted the disallowance of all post-petition charges and an award of sanctions of $25,000 in each of the three cases;
3. In two of the cases, mortgage servicer violated court orders declaring that debtors were current on all post-petition payments and unequivocally prohibiting it from asserting otherwise;
4. The mortgage servicer's misconduct in violating court orders warranted imposition of additional sanctions in the amount of $200,000 in first case and $100,000 in second case; and
5. The mortgage servicer was directed to pay the $375,000 in sanctions to a nonprofit legal services entity.

ALLOWANCE OF ATTORNEY FEES RELATED TO SECURED PROOF OF CLAIM

***In re Raygoza*, 556 B.R. 813 (Bankr. S.D. Tx. 2016)**

A Chapter 13 debtor objected to secured creditor's notice of post-petition mortgage fees, expenses, and charges, contending that the notice was untimely as to some of the fees and that attorney fees of $825.00 relating to preparation and filing of a secured creditor's proof of claim should be disallowed. The debtor argued that the portion of the fees attributed to the preparation and filing of the proof of claim were improper, since a creditor should not be entitled to recover post-petition fees for work performed preparing and filing a Proof of Claim alleging these services are merely ministerial, not legal in nature, and did not require the assistance of counsel.

The Bankruptcy Court examined a split in the law on this issue, and found that the secured creditor would be allowed $250.00 as a reasonable fee for preparing and filing the proof of claim based on the totality of circumstances. The Court held that:

1. post-petition fees, expenses, and/or charges are "incurred," for purposes of the bankruptcy rule governing notice relating to claims secured by a security interest in a Chapter 13 debtor's principal residence, on the date the services were rendered, not on the date the services were billed;
2. to the extent that the drafting and filing of a proof of claim requires legal analysis, a secured creditor may recover fees, but to the extent it involves ministerial aspects, such tasks cannot form the basis for recoverable fees.

VI. Other Collected Cases

SURCHARGE AFTER LAW v. SIEGEL

***In re Taylor,* 562 B.R. 16 (Bankr. W.D.N.Y. 2016)**

The Court partially allowed the Chapter 7 Trustee's request to surcharge exempt property for the amount needed to pay his expenses and a commission.

Prior to filing bankruptcy, Debtor was a plaintiff in a personal injury action. Debtor, however, failed to disclose the pending litigation in his schedules and at his 341 meeting of creditors. The Trustee ultimately filed a report of no distribution, Debtor was granted a discharge, and the case was closed.

A year later, the Trustee learned about Debtor's personal injury claim and moved to reopen Debtor's case. After the case was reopened, the Trustee moved to approve a settlement regarding the personal injury action for $31,791.91, of which $18,920.29 would go to the Trustee for distribution to creditors. Debtor amended his schedules to account for the claim and to exempt the full amount of the funds. The Trustee objected to Debtor's claimed exemption. The Trustee argued that Debtor lost his right to claim the exemption when he failed to failed to disclose the cause of action. Alternatively, the Trustee requested that the court surcharge the exemption to recover statutory commissions, attorney's fees, and the case re-opening fee. Debtor argued that his failure to initially disclose the claim was an innocent oversight.

The Court declined to disallow the full amount of Debtor's exemption claim pursuant to Fed. R. Bankr. P. 1009(a), which provides that schedules "may be amended by the debtor as a matter of course at any time before the case is closed. Consequently, the debtor may remedy his bad faith in any initial failure to file comprehensive schedules."

In determining whether to compensate the Trustee for the additional expenses he incurred as a result of Debtor's initial failure to disclose the claim, the Court looked to the Supreme Court case *Law v. Siegel*, 134 S.Ct. 1188 (2014). In *Law v. Siegel,* the Supreme Court stated, "A debtor need not invoke an exemption to which the statute entitles him; but if he does, the court may not refuse to honor the exemption absent a valid statutory basis for doing so." *Siegel*, 134 S.Ct. at 1191. The Court in this case found that § 522(k) acts as a valid statutory basis for a limited surcharge. Section 522(k) provides, "Property that the debtor exempts under this section is not liable for payment of any administrative expense except – (1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered . . . ." Therefore, pursuant to § 522(k), "the trustee may surcharge exempted property for 'the costs and expenses' of that property's recovery."

The Court declined to allow a commission to the Trustee because, unlike a surcharge, it would be general compensation and not per se a cost or expense that the Trustee incurred. The did, however, award the Trustee the entire amount of his allowable costs and expense that would constitute the aliquot share to be paid from exempt proceeds pursuant to § 522(k).

POSTPETITION BONUS NOT PROPERTY OF THE ESTATE

***In re Gonzalez*, 559 B.R. 326 (Bankr. E.D. N.Y., Sept. 30, 2016)**

The Trustee sought both the turnover of the debtor's postpetition bonus and the denial of her discharge for the failure to disclose the same on the schedules filed with the Court. The debtor, a Goldman Sachs & Co. employee, filed her Chapter 7 petition on October 30, 2015, and no potential bonus was referenced in the schedules. On January 26, 2016, the debtor received a $24,400.00 bonus from her employer.

The Trustee conceded that the bonus was paid at the employer's sole discretion, but he asserted that the debtor nevertheless had as of the petition date a "contingent right" to receive the bonus which was "sufficiently rooted" in the pre-petition period to make the bonus property of the estate subject to turnover. The debtor countered that she had no right to compel her employer to pay the bonus and thus no enforceable interest or property rights existed with the respect to the bonus that could be transferred to the estate on the date she filed her petition.

The Court ruled in favor of the debtor, finding that under New York law, an employee has no actionable right to collect a discretionary bonus before it is paid. "Because the pre-petition Debtor had no right to demand payment of the Bonus at the time of the bankruptcy filing, there existed no legal or equitable rights to transfer to the estate and the Bonus, subsequently paid, did not become property of the estate subject to turnover to the Trustee."

ADDRESSING LIENS AGAINST VEHICLE TITLES

***In re Covington (Covington vs. Santander)*, 2016 WL 7176600 (S.D. Ga. 2016)**

The debtor filed an adversary seeking an order requiring an auto lender to release and remit to the debtor the certificate of title to a 2007 Ford Taurus (the "Vehicle"), unencumbered by any liens. The lender filed a motion for summary judgment contending its lien survived the bankruptcy discharge and the debtor was not entitled to the relief sought. The debtor failed to respond to Santander's summary judgment motion.

The Court ruled that while the debtor discharged her personal liability on Santander's claim, Santander's *in rem* rights against the Vehicle passed through and survived the bankruptcy. See *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) (liens "pass through bankruptcy unaffected"); *In re Bateman*, 331 F.3d 821, 830 (11th Cir. 2003)(in rem rights pass through the bankruptcy); *In re Thomas*, 883 F.2d 991, 997 (11th Cir. 1989)(holding that a secured creditor's lien survived a Chapter 13 discharge when it had not been provided for in the plan and the secured creditor had not filed a proof of claim). The Bankruptcy Court denied the debtor's request for the turnover of the certificate of title unencumbered by Santander's lien, and granted Santander's Motion for Summary Judgment.

WILLFUL & MALICIOUS INJURY UNDER 523(a)(6)

***In re Monson*, 661 Fed.Appx. 675 (11th Cir. 2016)**

The Eleventh Circuit affirmed a finding that a debt was not discharged under § 523(a)(6). A creditor brought adversary proceeding based on a Chapter 7 debtor's unauthorized removal of computer equipment that was subject to creditor's security interest. The bankruptcy court found that to qualify under 523(a)(6), a debtor "must commit some type of intentional tort directed against the claimant or his property" for a debt to be nondischargeable. Further, the injury must be both "willful, meaning that the injury itself was intended, and malicious, meaning that the debtor was conscious of his wrongdoing." The bankruptcy court determined that the evidence showed that the debtor knew that he damaged the creditor's right to recover its loan when he removed the company assets from the office and used them in a new business created with a new business partner. Thus, the injury was intended and the debtor was conscious of his wrongdoing.

On cross appeals, the district court affirmed. The debtor argued his actions were a mere breach of contract. The district court found that the bankruptcy court erred in finding that tortious conduct is a necessary prerequisite for a finding of nondischargeability under § 523(a)(6), it stated such conduct is "certainly one avenue available to a bankruptcy court in establishing nondischargeability." The district court held that the debtor's actions (i.e. absconding with its collateral) injured the creditor because those actions deprived it of access to the collateral, and that such injury was substantially likely to occur.

Following it prior case of *In re Kane*, 755 F.3d 1285 (11th Cir. 2014)(§ 523(a)(6) does not require an independent and additional showing of an "intentional, tortious act"), the Eleventh Circuit affirmed and found that the debtor committed a willful injury because his actions were an "intentional act the purpose of which [was] to cause injury or which [was] substantially certain to cause injury." In this case, the debtor's actions of absconding with the creditor's equipment and using it to open a new internet center were not reckless or unfortunate but non-malicious acts which the Court previously held do not rise to the standard of a willful and malicious injury under § 523(a)(6). The Court found this injury was "malicious" because the injury was wrongful, without just cause, and excessive ("the very nature of [the debtor's] actions implies a malefic intent").