Consumer Bankruptcy Law Update

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CONCURRENT SESSION

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Recent Developments in Consumer Bankruptcies (Chapter 7)

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Ninth Circuit Holds Debtor's Life Insurance Policies Are Estate Assets

In *Gladstone v. U.S. Bancorp*, 2016 WL 142469 (9th Cir. Jan. 8, 2016), the Ninth Circuit held that a chapter 7 debtor's life insurance policies are "an interest of the debtor" in property and property of the bankruptcy estate. The chapter 7 trustee brought an avoidance action seeking the recovery of the market value of life insurance settlement after the debtor's sold his unmatured term-life insurance policies to certain banks but failed to disclose those sales in his bankruptcy papers. The court held that the debtor's interests in the life settlements are not explicitly excluded from estate property in §541(b) and therefore cannot be excluded under the plain language of the statute.

Absolute Priority Rule Applies In Individual Chapter 11

In *Zachary v. Cal. Bank & Trust*, 2016 WL 360519 (9th Cir. Jan. 28, 2016), the Ninth Circuit held that the absolute priority rule applies to individual Chapter 11 reorganizations. In doing so, the court rejected the argument that BAPCPA, which allows debtor's to retain property included in §1115 expanded abrogated the absolute priority rule in individual chapter 11 cases. Specifically, the court that "[i]f the BAPCPA amendments were intended to abrogate the absolute priority rule for Chapter 11 individual debtors, Congress could have achieved that goal in a far more straightforward manner." Consequently, the court held that BAPCPA only allows debtors to protect property acquired after the filing date and does not protect all of the debtor's property from the absolute priority rule.

Seventh Circuit Clarifies Inquiry Notice Standard

In *In re Equipment Acquisition Resources, Inc.*, 803 F.3d 835 (7th Cir. 2015), the Seventh Circuit addressed whether a casino knew or should have known of the voidability of transfers a debtor made to it in connection with the casino's gambling operations. Here, the casino was a subsequent transferee of an initial fraudulent transfer from the debtor-company to its principals. The Seventh Circuit held that the correct test is whether the casino knew or should have known of the voidability of the initial transfer and not, as the trustee argued, whether the test was whether the casino knew of the voidability of any of the transfers in the chain. The Seventh Circuit held that the casino did not.

Seventh Circuit Clarifies Inquiry Notice Standard, Again

The Seventh Circuit's decision in *In re Sentinel Group. Inc.*, 809 F.3d 958 (7th Cir. 2016) tackles issues of good faith under §548(c), equitable subordination and the differences between the doctrines. The story of Sentinel is complex and will not be recounted here. It is sufficient to say that as Sentinel began experiencing financial trouble it took many missteps including the raiding of customer accounts and using those funds as collateral for its lending institution. The court found that the lending institution could not rely on a §548(c) defense of good faith and for value because the bank was on inquiry notice that all was not right at Sentinel. The court held that "inquiry notice is not knowledge of fraud or other wrongdoing but merely knowledge that would lead a reasonable, law-abiding person to inquire further—would make him in other words suspicious enough to conduct a diligent search for possible dirt." The court found that the bank possessed that inquiry notice as it had suspicion that all the collateral being pledged was unlikely to be Sentinel's alone.

The court, however, did not agree that the bank's claim should be equitably subordinated. While the court believed that the bank certainly was on inquiry notice of the debtor's insolvency to demonstrate a lack of good faith, the court did not believe that the evidence showed that the defendant had knowledge of the debtor's underlying fraud or displayed deliberate indifference to that fraud to support the equitable subordination of the bank's claim. In short, the Seventh Circuit held that the bank's claim only could be equitably subordinated if "the bank believed there was a high probability of fraud and acted deliberately to avoid confirming its suspicion." The court elaborated that "[t]o suspect potential wrongdoing yet not bother to seek confirmation of one's suspicions is negligent…it is not *purposeful* avoidance of the truth." Consequently, the court held that the bank's claim should not be equitably subordinated.

Court Rules On The Chicken-Egg Problem Of §502(d)

In *In re Emerald Casino, Inc.*, 2015 WL 1843271 (N.D. Ill. Apr. 21, 2015), the court was faced with the following problem: Earlier, the court had entered a very large judgment against a group of defendants. The defendants argued that very large judgment was not as large as thought because they had large claims against the estate that they believe will setoff the judgment and setoff is allowed under §553. The trustee, however, argued that because the defendants had not paid their judgment, their claim was disallowed and therefore unable to be used as setoff. The question then was may a defendant use setoff to help pay a judgment or does an unpaid judgment foreclose setoff? The court agreed with the trustee and held that the right to setoff "presumes a valid claim" but that §502(d) precludes a claim against the estate until the defendant pays the judgment. In effect, the court held that while the defendants may someday get their claim against the estate (and receive a distribution from the judgment they pay) they cannot use setoff to shrink their judgment amount.

Trustee's Statutory Fee Protected

In *In re Wilson*, 796 F.3d 818 (7th Cir. 2015), the Court was faced with whether to allow a trustee his statutory compensation under §326(a), where the trustee collected a large sum of money for distribution to creditors but where the vast majority of those funds went to secured creditors. The Seventh Circuit rejected the creditor's argument that a trustee may collect under §326(a) only to the extent he distributes to unsecured creditors. The court found nothing in the Bankruptcy Code to suggest that such a limitation was appropriate and found that such a rule would in fact not take into account the necessary, valuable, and often times complicated work trustee's must perform in connection with issues surrounding secured claims.

Severance Payments Constitute Reasonably Equivalent Value

Weinman v. Walker (In re Adam Aircraft), 805 F.3d 888 (10th Cir. 2015), involved a fraudulent transfer action brought by the trustee against a former officer of the debtor. Prior to bankruptcy, the debtor decided to replace the defendant as an officer, and for business reasons, had the defendant "voluntarily resign" instead of termination. The debtor and the defendant entered into a contract outlining the terms of resignation.

The trustee sought to avoid the debtor's obligation to continue to pay severance to the defendant and sought to recover payments already made. On appeal, the Tenth Circuit held that the defendant was not an insider when the payments were made. The court relied on the fact that the defendant had already broken with the debtor prior to the negotiation of the agreement. The court also held that the debtor received reasonable equivalent value from the defendant—namely, that the debtor made the payment in return for the defendant's agreement not to compete and an agreement to waive any claims against the debtor.

Upcoming Supreme Court Case

The Supreme Court has granted cert in *Husky International Electronics, Inc. v. Daniel Lee Ritz, Jr.*, to decide whether the discharge exception in §523(a)(2)(A) for "actual fraud" applies only where the debtor has made a false representation to creditors or whether general fraud without a special misrepresentation to a creditor is enough. The First Circuit and the Seventh Circuit hold that the discharge exception applies where the debtor intentionally obtained money through a scheme designed to cheat creditors. The Fifth Circuit, however, has held that that the discharge exception requires the debtor to actually make a false representation to a creditor.

Trustee Allowed Claim in Converted Case Despite No Disbursements

In re Robb, 534 B.R. 354 (8th Cir. BAP 2015). Trustee discovered a defect in the deed of trust on Debtor's home. Debtor responded by successfully moving to convert her case to Chapter 13. The trustee filed a proof of claim as an unsecured priority claim. Debtor objected on the basis that the trustee had not disbursed any moneys prior to conversion. Following a hearing, the bankruptcy court overruled the objection holding that §326(a) was not the only method of compensation for trustee, and that allowing the claim would encourage trustees to be diligent in looking for assets and also discourage debtors from concealing assets. The bankruptcy appellate panel affirmed. The appeals court noted that debtor had filed a "pot plan" requiring her to pay the chapter 13 trustee $590 per month for the duration of the plan. Thus, payment of the trustee's claim would diminish the distribution to other creditors but not have any effect on debtor's obligations under the plan. Therefore, because debtor was not an aggrieved party under the bankruptcy court's order, the appellate court found she had no standing to object and dismissed her appeal for lack of jurisdiction.

Debtor's Foreclosure Settlement Fund Payment not Property of the Estate

In re Neidorf, 534 B.R. 369 (9th Cir. BAP 2015). Debtor scheduled her real property residence in her chapter 7 case. There was no equity in the property, stay relief was granted, and the property was foreclosed. Almost 6 years after the case was filed, debtor reported to the trustee that she had received payment in the amount of $31,250 from a foreclosure settlement fund instituted as a result of a national settlement between banking regulators and certain financial institutions, including the holder of her home mortgage. Trustee then filed a motion to compel turnover, which the debtor opposed. The court denied the motion finding that the settlement payment was not property of the estate under §541(a)(7). Trustee appealed, but the bankruptcy appellate panel affirmed, finding that the settlement payment was neither created with or by property of the estate and that debtor had become entitled to the payment only as a result of qualifying events occurring after her bankruptcy filing. Indeed, the foreclosure which gave rise to the settlement payment, occurred almost three years after the petition date. Although the estate had an interest in the debtor's home, that was not sufficient because the estate was unable to demonstrate any interest in the foreclosure settlement payment itself which arose from acts occurring post-petition and were deemed to be held solely by the debtor/borrower.

Judicial Estoppel Precludes Fair Debt Collection Practices Act Lawsuit

Ward v. AMS Servicing, LLC, 606 Fed. Appx. 506 (11^{th} Cir. 2015). Debtor had entered into a loan modification agreement on her home mortgage that required monthly payments of $1,182.89. She stopped making monthly payments and filed a chapter 13 case. The lender filed a stay relief motion. The parties entered into a consent order stipulating the amount of the post-petition arrearage to be cured at the rate of $1,319.50 per month, after which payments would resume at the normal monthly amount. Less than five months later, debtor filed suit in the district court alleging that the lender had violated FDCPA by falsely representing the amount of her monthly mortgage payments. The magistrate judge recommended granting the lender's motion to dismiss on the basis of judicial estoppel. The district court adopted the report and recommendation and dismissed the lawsuit. Debtor appealed, arguing that the doctrine of judicial estoppel would not apply because her prior statement in bankruptcy court was not "under oath" and there was no evidence that she had "succeeded" in the bankruptcy proceeding. The circuit court disagreed and affirmed the lower court ruling. Specifically, the court noted the holding in *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001) that the purpose of judicial estoppel was "to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment," and further that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." The circuit court reviewed its own circuit case law concerning requirements that the prior inconsistent statements be made under oath by a party that had succeeded in persuading a court to accept the earlier position. However, the court noted that courts would have flexibility in determining the applicability of the doctrine of judicial estoppel based on the facts of a particular case. Here, the circuit court observed that both sides had presented a detailed consent order for the bankruptcy court's approval, in which debtor had stipulated that her monthly payment was $1,329.50 and convinced the bankruptcy court to accept this position to avoid the risk of foreclosure. Thus, the court found that there was no merit to the debtor's position that she did not succeed in her prior litigation. Moreover, it rejected the argument that the prior statement had to be under oath. The court explained that judicial estoppel was meant to prevent litigants from deliberately changing positions after the fact to gain an unfair advantage, which would happen here if the lawsuit was allowed to proceed after debtor had entered into an express agreement as to the monthly payment amount on the arrearages in order to prevent a foreclosure on her home. Accordingly, judicial estoppel was applied and the lawsuit dismissed.

Equitable Tolling of Expired Statute of Limitations Denied

In re Butler Logging, Inc., 538 B.R. 174 (Bankr. S.D.Ga. 2015) (Barrett, C.J.). While Debtor was in chapter 11, the two year statute of limitations to bring avoidance actions under §546(a)(1)(A) expired on April 1, 2013. The case was not converted to chapter 7 until March 5, 2014, long after the deadline expired. The chapter 7 trustee brought an action to avoid as preferential numerous transfers to Hall Oil Company. The trustee later amended the complaint to assert fraudulent transfers under Georgia's version of the Uniform Fraudulent Transfer Act. Hall moved to dismiss the complaint on the basis of the expiration of the statute of limitations. The trustee opposed the motion by asserting that the limitations period should have been equitably tolled by virtue of debtor's failure to list any of the transfers to Hall in the Statement of Financial Affairs, delay in filing its operating reports, formation of a new entity post-petition with its assets, and remaining in chapter 11 long after its operations ended until after the statute of limitations had expired. The court found that these did not satisfy the extraordinary circumstances required for equitable tolling and granted the motion to dismiss. The court noted that the first operating reports had reflected the pre-petition payments to Hall and that the UST and creditors were active in the case and could have taken steps to pursue in a timely manner the transfers to Hall. Further, the UST and creditors were on notice that operating reports were not being timely filed but took no action. Accordingly, the limitations period was not equitably tolled and the lawsuit was dismissed.

Cross Motions for Summary Judgment Denied on whether Debtor's Profit Sharing Plan was "qualified" under the IRC

In re Rogers, 538 B.R. 158 (Bankr. N.D.Ga. 2015) (Sacca, J.). A judgment creditor and the chapter 7 trustee both moved to disallow an exemption debtor claimed in his profit sharing plan consisting of cash, personal property and loans with a value of about $300,000. The court first had to determine whether the plan was property of the bankruptcy estate, and if it was, whether it was exempt under Georgia law or the Bankruptcy Code. The crux of both issues was whether the plan was "qualified" under IRC §401. If it were not qualified, then it would be property of the estate that could not be exempted. Debtor had been a home builder and was an officer, the sole owner, and sole employee of his business, as well as the only trustee of the Plan. He had the Plan purchase the property, had the Plan remodel it, then he moved into it, paid no rent, did not sign a lease, and sold it on behalf of the Plan for a profit two to three years later. He began using the Plan's checking account to pay his living expenses. Debtor claimed those were actually distributions permitted by the Plan. There was no evidence provided to the court as to how the money was treated for tax purposes or by the Plan itself. The Plan had also purchased a boat and trailer which debtor used at least ten times before selling it. He claimed it was an appropriate investment for the Plan. The Plan also loaned $130,000 to another business owned by a relative of the debtor. The parties contended that the Plan made at least one loan to the debtor. The court noted that the burden of proof in establishing that something was not property of the bankruptcy estate under §541(c)(2) rested on the debtor. The parties stipulated that the Plan was not covered by ERISA because it only provided benefits to the debtor, who was the sole owner of the business, in reliance on *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004) and *Slamen v. Paul Revere Life Ins. Co*., 166 F.3d 1102, 1104 (11th Cir. 1999). However, under Georgia law, a spend thrift provision in a pension or retirement arrangement under §401 of the Tax Code would enable the plan to be exempted pursuant to O.C.G.A. §53-12-80(g); however, whether or not the Plan would be property of the bankruptcy estate would hinge on whether it was qualified under IRC §401 and thus exempt from taxation.

The trustee and creditor argued that the Plan was not qualified because it violated the distribution requirements and anti-alienation provisions, the exclusive benefit rule, and had various prohibited transactions under IRC §§401 and 4975. The court noted that there were a number of potentially prohibited transactions to the debtor who was a disqualified individual, but the evidence was insufficient for summary judgment. The court also noted that the Exclusive Benefit Rule would be violated if the Plan was used as a tax advantageous personal checking account for the debtor, or if profits were siphoned off to the debtor, or there were inappropriate loans from the Plan to benefit the debtor, or if the Plan was managed for the immediate benefit of the debtor as the sole trustee/participant as opposed to being for the retirement benefit of that individual. However, there was no evidence of whether the funds were treated as distributions, loans, or neither, under either the Plan or for tax purposes. Nor was the evidence sufficient to determine whether the boat was purchased as an investment or a way for the debtor to utilize the boat for his personal enjoyment. While there were many potentially prohibited transactions, there was insufficient evidence for summary judgment to determine the extent of all of the prohibited transactions that occurred and whether or not the debtor abused the form of the profit sharing plan such that it was no longer qualified.

Alternatively, the debtor argued that he could fully exempt the Plan because he had an opinion letter from the IRS, but the court noted that the opinion letter was not the equivalent of a favorable determination letter and only addressed the acceptability of the form of the Plan. Therefore, no presumption had arisen that the funds would be exempt. Again, the court determined that there was insufficient evidence for a summary judgment ruling. The court determined that questions of fact remained as to the following: (a) how the use of the Plan's funds for debtor's living expenses were treated by both the Plan and for tax purposes; (b) any loans the Plan made to the debtor and the details thereof; (c) whether any such loans were permitted by the Plan and the requirements of the Plan were followed; (d) details of the loans made to other companies and whether those loans were in default, the details of such default, and any efforts to collect; (e) any benefits the debtor received by making such loan(s); (f) the ownership of the other companies receiving the loans; (g) details of these investments; and (h) debtor's attempts at marketing and selling the boat after its purchase.

Trustee largely Denied Relief against Debtor's Former President

Weinman v. Walker (In re Adam Aircraft Industries, Inc.), 805 F.3d 888 (10th Cir. 2015). Walker had been the president of Adam Aircraft Industries and a member of its board. He was essentially ousted from both positions. He resigned in early February 2007. He negotiated a severance and separation agreement and release. One year later, Adam Aircraft filed for Chapter 7 relief, and the trustee sued Walker to recover all of the payments that the debtor made to him after his termination pursuant to §§ 547(b)(4) and 548(a)(1)(B). The trustee identified payments to Walker in that one-year period of (a) $105,704 in March 2007 representing a refund of Walker's deposit to purchase a plane; (b) $100,002 in July 2007 representing the repurchase of Walker's stock in the debtor; and (c) $250,000 in severance salary payments of which $62,500 had been received in the 90-days pre-petition. The bankruptcy court granted judgment to the trustee only for the $62,500 received during the 90-day preference period, denying all of the trustee's remaining claims. On appeal, the Tenth Circuit Bankruptcy Appellant Panel affirmed. *Weinman v. Walker (In re Adam Aircraft Industries, Inc.)*, 510 B.R. 342 (10th Cir. BAP 2014). The BAP agreed with the bankruptcy court's determination that Walker was not a statutory insider and found no clear error in his determination that Walker also ceased to be a non-statutory insider after his ouster from the company at which time he had made a "clean break" from the company and was never again "close" to management. The Appellate Court also found no clear error in the bankruptcy court's rejection of the trustee's arguments that the severance agreement had not been negotiated at arm's length because Walker had received better severance benefits than other executives of the debtor, had intimate knowledge of the debtor's financial status and operations, and had the power to "wreak havoc" on the company's relationship with his customers. The BAP concluded that both sides were likely motivated by their own interests in reaching the agreement and that Walker had received less than he had initially demanded. Finally, the trustee had failed to prove the debtor's insolvency on a balance sheet analysis beyond the 90-day presumption period by confusing "cash flow with insolvency." The court also found under the circumstances the bankruptcy court's order was reasonable that Walker repay the $62,500 to the trustee within 30 days in order to maintain his claim against the estate under § 502(d).

On appeal to the Circuit Court, the lower courts were affirmed on the basis that the Bankruptcy Court's ruling was not clearly erroneous that the defendant was not an insider after his resignation on February 1, 2007. Indeed, a new president began on February 2, 2007, and the evidence supported the defendant's "clean break" upon his resignation the prior day. The court also found that reasonably equivalent value had been given for the transfers in connection with the resignation. The defendant was compensated only for money he otherwise would have earned, and in return for this compensation, the company got the benefit of avoiding a possible lawsuit and the opportunity to obtain $80 million in outside financing.

Fees Reasonably Incurred in Prosecuting a Damages Action for Willful Stay Violation are also Recoverable as Damages

America's Servicing Co. v. Schwartz-Tallard (I*n re Irene Michelle Schwartz-Tallard*), 803 F.3d 1095 (9th Cir. 2015). ASC wrongfully foreclosed on debtor's home post-petition, purchasing the home at the foreclosure sale through a credit bid. The bankruptcy court found that ASC had willfully violated the automatic stay and ordered it to re-convey title to the debtor, pay debtor $40,000 in economic and emotional stress damages, $20,000 in punitive damages and $20,000 in attorney fees. ASC complied with the re-conveyance order but appealed the damages award. The district court upheld the award. Thereafter, the debtor returned to the bankruptcy court seeking an additional $10,000 in attorney's fees in opposing the appeal. The bankruptcy court ruled against the debtor, but the BAP reversed, holding that there was no bar to an award of attorney's fees for a debtor who successfully defends a §362(k) award on appeal. A divided 3-judge panel of the 9th Circuit affirmed. The 9th Circuit re-heard the matter *en banc* and also affirmed in a divided decision. §362(k)(1) provides in pertinent part that, "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages." The Circuit Court determined that congress did not intend to authorize recovery of attorney's fees incurred in litigation for one purpose (ending the stay violation) but not for another (recovering damages). It held that it was evident that congress had sought to encourage injured debtors to vindicate one of the most important rights afforded by the Code – the statutory right to the automatic stay's protection. The concurring judge felt the language of §362(k) was unambiguous and that the rest of the discussion was unnecessary. The dissenting judge asserted that "statutes regarding attorney's fees should be read with a presumption in favor of the American Rule, except when a statutory purpose to the contrary is evident."

Trustee Awarded Surcharge against the Collateral of Secured Creditors

In re Tollenaar Holsteins, 538 B.R. 830 (Bankr. E.D.Cal. 2015)(Jaime, J.). The three jointly administered chapter 11 debtors operated dairies in California and Oklahoma. The two main secured creditors were (a) a bank owed $4.4 million secured by the dairy herds, feed, milk, and milk proceeds, machinery and other personal property; and (b) an insurance company (Hartford) owed about $8.4 million secured by first deeds of trust on the dairy facilities and equipment and the dairy products and proceeds. When the bank refused to consent to the debtor's use of its cash collateral, a trustee was appointed and either liquidated or recovered the collateral. Thereafter, the trustee moved to surcharge the collateral under § 506(c) for the trustees expenses of $269,354.82 incurred in administering the estates. After "having milked the proverbial cow dry," the secured creditors opposed the motion on the basis that they had not consented to any surcharge and the trustee did not satisfy the conditions of § 506(c). However, the bankruptcy court granted the motion based on both the objective and subjective tests.

The objective test required the trustee to satisfy the elements of § 506(c) that the expenses of the trustee related to the preservation or disposition of the collateral were reasonable, necessary, and provided a concrete and quantifiable benefit to the secured creditor. Recovery here would be limited to the amount of any benefit and had to be proven with specificity. The court determined that the collateral could be surcharged to the extent of $107,412 under the objective test in (a) keeping the California dairy "wet" so that valuable permits were not lost until the trustee's motion to liquidate was granted and Hartford's receiver took over; and (b) in operating the Oklahoma dairy after the last cow was removed and until the receiver took control, keeping the property free from vandalism, complying with state environmental regulations, and preventing the licensed dairy from reverting to pastureland. These expenses were determined to have been incurred and the services rendered solely for the benefit of the secured creditors and their respective collateral. The bank was surcharged $71,448.71 and Hartford $35,963.29.

With respect to the remaining $161,942.82, the court applied the subjective (or consent) test that allowed the trustee to show that the secured creditors had in fact consented to or caused the expenses to be surcharged, noting that the 506(c) elements need not be proven if implied or express consent were established. The court found that this was "inherently an equitable standard." The court determined that the secured creditors had known the estates were administratively insolvent and had insufficient assets to even fully pay the secured claims but encouraged the trustee to take actions from which they benefitted significantly. They had moved for the appointment of the trustee while restricting the trustee's use of cash collateral except to the extent it was for purposes beneficial to them and worked closely with the trustee to accomplish their goals. The court found that they "orchestrated the preservation, liquidation, and/or recovery of their collateral through the trustee and the trustee's professionals.… [a]nd in so doing, they consented to the resulting administrative expenses."

This left the final issue of the allocation of the surcharge between the two secured creditors. The court rejected the bank's proposal that it be prorated based on the size of the respective claims (so the bank would incur just 35% of the surcharge), instead adopting the trustee's benefit-based formula based on a ratio of documented trustee and attorney time spent on each creditor's respective operations. This saddled the bank with almost two-thirds of the surcharge as its collateral consisted of live animals and more labor intensive work than with respect to passive collateral.

Debtor lacks standing to object to Proofs of Claim

In re Mohr 538 B.R. 882 (Bankr. S.D.Ga. 2015) (Barrett, C.J.). RREF filed 14 proofs of claim in debtor's chapter 7 bankruptcy case totaling $1,247,317.90, arising from debtor's personal guaranty of 14 loans to Brooks Mohr Builders, LLC ("BMB") to finance the purchase and construction of residential dwellings. Through another corporation, debtor held a 50% membership interest in BMB, which was not in bankruptcy. Debtor objected to each claim arguing that RREF failed to qualify to do business in Georgia in accordance with O.C.G.A. § 1411-711(a). RREF asserted that debtor lacked standing to object. The court agreed and overruled the objections. The court noted that almost all courts hold that debtors generally lack the pecuniary interest to establish standing except where the trustee refused to or neglected to perform his or her duty under §704(a)(5) regarding objecting to improper claims, or when there was reason to believe there was likely to be a surplus. A final exception was where the debt at issue was one that would not be subject to discharge. Here, there was no indication that the trustee had failed and refused to perform his duties, that a non-dischargeable debt was at issue, or that there was a reasonable possibility of the surplus. The court relied on *In re Matthews*, 2014 WL 1277874 (Bankr. N.D.Ga. March 11, 2014) for the proposition that the debtor "carries the burden of proof of establishing that a 'surplus is a reasonable possibility' to allow the court to identify a pecuniary interest." Other cited cases stood for the same proposition. The debtor did not carry his burden of proof, plus a review of the debtor's schedules and claims register showed that it was unlikely that a surplus would be generated. Accordingly, the debtor's objections were overruled.

Funds deposited into Debtor's own account cannot be a fraudulent transfer

Ivey v. First-Citizens Bank & Trust Co. 539 B.R. 77 (M.D.N.C. 2015) (Stocks, J.). Debtor was engaged in a Ponzi scheme disguised as a factoring business. As part of the Ponzi scheme, debtor utilized a personal bank account in his own name at one of the defendant's branch banks to deposit funds. During the two years preceding the involuntary chapter 7 filing, the defendant bank received eleven (11) deposits, six (6) checks and five (5) credits, via wire or telephone transfer, all of which allegedly related to the Ponzi scheme activity. The trustee asserted that these deposits were transfers as defined in §101(54)(D)(ii). Because the transfers were part of an actual fraud, the trustee believed that he could recover from the bank those transfers into the debtor's bank account. The bankruptcy court had rejected this position, 2014 WL 6910837 (Bankr. M.D.N.C. 2014) (Stocks, J.), on the basis that such transfers did not result in any diminishment of the estate nor place the funds involved in the transfers beyond the reach of creditors. Instead, the funds were deposited into an ordinary checking account of the debtor and were readily available to the debtor. The district court affirmed. The district court agreed with the trustee that the deposits did constitute transfers under §101, and due to the Ponzi presumption, were deemed to have the requisite fraudulent intent under §548. However, the district court agreed with the bankruptcy court that to succeed, the trustee would have to show that the transfer was "of an interest of the Debtor in property." The district court did not believe that it could satisfy this test because the transfers did not diminish the estate. The court rejected the trustee's assertion on appeal that diminishment of the estate is not an element of an actual fraudulent transfer. The trustee relied on *Tavenner v. Smoot*, 257 F.3d 401(4th Cir. 2001) where the 4th Circuit had agreed with the majority position that transfers of exempt property were nevertheless amenable to avoidance actions. That court had stated that "if a debtor enters into a transaction with the express purpose of defrauding his creditors, his behavior should not be excused simply because, despite the debtor's best efforts, the transaction failed to harm any creditor." *Id.* at 407. The district court distinguished that case because property would not be exempt unless claimed as exempt which was not automatic. Thus, although the Ponzi presumption allowed the court to infer actual intent to fraud, the court held it did not negate the relevance of actual or potential diminution of the estate to the §548 analysis. [*Author's comment*: The trustee has appealed this decision to the 4th Circuit.]

Circuit Courts split over meaning of §523(a)(2)(A): Supreme Court to Resolve

Husky International Electronics, Inc. v. Ritz (In re Daniel Lee Ritz) 787 F.3d 312 (5th Cir. 2015); *Sauer, Inc. v. Lawson (In re Lawson)* 791 F.3d 214 (1st Cir. 2015). The U.S. Supreme Court granted *certiorari* on November 6, 2015, to resolve a split in the circuits on the following question: "'Whether the actual fraud' bar to discharge under §523(a)(2)(A) … applies only when the debtor has made a false representation or whether the bar also applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was actually intended to cheat a creditor." The Petition in *Ritz* asserted that this "decision creates a roadmap for dishonest debtors to cheat creditors through deliberate fraudulent-transfer schemes, and then to escape liability through discharge in bankruptcy." Ritz was the principal of a manufacturing company which bought components from Husky International Electronics which failed to make complete payment. Ritz then caused his company to transfer substantial funds from its accounts to various entities that he controlled. When Husky sued Ritz to hold him personally liable for the unpaid debt, Ritz filed a chapter 7 petition. Husky brought a non-dischargeability action. The bankruptcy court found the debtor not to be credible witness but held that the "actual fraud" exception did not apply because it was not shown that Ritz had made a false representation to Husky. The district court affirmed. The circuit court likewise affirmed, holding that "actual fraud" could not be established absent a false representation to Husky. The circuit court disagreed with an earlier decision by the 7th Circuit in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). In that case, a creditor had sold machinery to the debtor's brother. When the brother defaulted, owing about $100,000, the creditors sued the brother who then sold the machinery to the debtor (his sister) for just $10. She was aware that she was colluding with her brother to thwart his creditors and later sold the machinery for $160,000. In a split decision, Judge Posner concluded for the majority that a fraudulent misrepresentation was not the only form "that fraud can take or the only form that makes a debt nondischargeable."

In contrast, the 1st Circuit in *Lawson* agreed with *McClellan*, also concluding that knowing receipt of an actual fraudulent conveyance could cause a debt to fall under the sections "actual fraud" provision. In *Lawson*, James Lawson was found liable to a creditor by a state court. Thereupon, his daughter formed a shell company to which Lawson transferred $100,000 allegedly to hinder the creditor's collection of the judgment debt. The daughter then transferred $80,000 from her company to herself. When Lawson filed chapter 13, the 1st Circuit, on direct appeal, reversed the bankruptcy court, which had held in the creditors' non-dischargeability action that the section required that the actual fraud be obtained through fraudulent misrepresentations. [Author's comment: It seems absurd that a debtor could fraudulently transfer property to avoid a creditor's judgment collection and that debt be held dischargeable. Either way, a trustee would bring an action to avoid and recover the transfer of the property or its value and, if the transfer occurred within one year of the petition date, an objection to discharge under §727(a)(2).]

Conversion Motion denied based on Petition Date debts

In re Dellon Binnon (In re Ash), 539 B.R. 807 (Bankr. E.D.Tenn. 2015) (Whittenburg, J.). Debtor's chapter 11 schedules had listed $1,281,000 of secured debts and indicated that the "unsecured portions" totaled $438,943. A debt of $700,000 was owed to People's Bank of East Tennessee secured by real property. The schedules indicated that that debt was secured for $450,000 and unsecured for $250,000. People's Bank obtained stay relief and foreclosed under an earlier agreed order that provided in the event of foreclosure, it would not seek a deficiency against the debtor. After People's Bank foreclosed, it moved to dismiss or convert the case to chapter 7. Debtor responded with a motion to convert to chapter 13 to which People's Bank objected on the basis that debtor was not eligible to be a debtor under chapter 13 pursuant to the debt limits contained in §109(e). The court denied the debtor's motion, finding that schedules filed in good faith reflecting the state of a debtor's financial affairs on the petition date controlled whether a debtor would be eligible for chapter 13 relief. The court noted that debtor was not eligible under §1112(f), which provided that "a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." The debt limits under §109(e) were unsecured of less than $383,175 and secured of less than $1,149,525. Debtor argued that the forgiveness of the unsecured portion of the foreclosed obligation brought it within the eligibility limits for unsecured debts and that the application of the foreclosure proceeds to the secured debt brought that amount under the limit as well. However, the court noted that §109(e) provided that eligibility was to be determined "on the date of the filing of the petition." Moreover, under §348(a) the conversion date did not effect a change in the petition date. Therefore, debtor's motion was denied. [*Author's comment*: A post-petition foreclosure is a common scenario in bankruptcy, and trustees should be mindful of the petition date debts when considering a debtor's eligibility to seek conversion from chapter 7 to chapter 13 in order to escape the trustee's administration of the estate.]

Post-petition attorney fees disallowed for unsecured claimant

In re Tribune Media Co., et al. 2015 WL 7307305 (Bankr. D.Del. 2015) (Carey, J.). Wilmington Trust Co. served as indentured trustee for unsecured subordinated notes on which the debtors were obligated. Debtor's confirmed plan and several sections of the indenture referred to WTC's right to seek attorney fees. It filed a proof of claim which included $30 million in post-petition attorney fees. Debtors objected.

WTC relied on *Travelers Cas. & Sur. Co. of America v. Pacific Gas and Elec. Co.,* 549 U.S. 443 (2007), to assert that such fees may be included in an unsecured claim if recovery of the fees is permitted by an enforceable pre-petition contract. The bankruptcy court appointed a mediator who recommended disallowance of the fees. The court agreed with the mediator's observation that it was a reasonable conclusion that Congress would not have expressly provided for recovery of post-petition fees by over-secured creditors if such fees were generally recoverable by all creditors. The court agreed with the four-part test enunciated in *Global Industrial Technologies Services Co. v. Tanglewood Inv. Inc. (In re Global Industrial Technologies, Inc.),* 327 B.R. 230 (Bankr. W.D.Pa. 2005) as follows: (1) because §506(b) expressly provided for post-petition attorney fees for over-secured creditors and not unsecured creditors, *expression unius est exclusion alterius* applied; (2) the Supreme Court decided in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc. Ltd.,* 484 U.S. 365 (1988) that §506(b) permitted only over-secured creditors to recover post-petition interest, and because §506(b) provides for post-petition fees and interest, only over-secured creditors may recover such fees; (3) §502(b) requires that the court determine the amount of a claim as of the date the petition was filed, and §506(b) adds post-petition interest and fees, but only to over-secured creditors; and (4) it would be inequitable to allow certain unsecured creditors to recover post-petition fees at the expense of similarly situated claimants. Finally, the court determined that the Supreme Court did not consider the argument in *Travelers* that §506(b) disallowed unsecured claims for contractual attorney fees because the issue was not raised in the lower courts.

Rule 4003(b)(2) applicable to extend objection to exemption deadline for fraudulently claimed exemption

In re Stijakovich-Santilli, 542 B.R. 245 (9th Cir. BAP Dec.15, 2015). Debtor filed her chapter 7 petition on October 25, 2013, listing three single family homes, including the subject property on Beckenhan Drive in Granite Bay, California. She initially claimed a $75,000 homestead exemption on the subject property but later amended it to $175,000 based on a disability. In her schedules and 341 testimony, she confirmed that her only income was social security and a contribution from a "roommate." She received a discharge on February 5, 2014, but the case remained open while the trustee administered non-exempt assets. Debtor filed a motion to compel abandonment of the three properties, including the subject property on the basis that there was no non-exempt equity. The court granted the motion over the trustee's objection as to the third property only. Thereafter, on August 18, 2014, trustee objected to the claim of exemption in the subject property and sought relief from the final order of abandonment, arguing that debtor had fraudulently asserted the claim of exemption in the subject property because she did not reside there on the petition date or at any time during 2013. Trustee relied on tax returns which showed the subject property was a rental property for the entire year, without any personal days. Debtor responded that although she received rental income therefrom, she also resided there during all of 2013. She produced a letter from her CPA saying it was her primary residence solely on the basis of her declaration that she occupied it as her primary residence. She also produced mail addressed to her at the subject property. The bankruptcy court believed that debtor did reside at the subject property but misreported it on her tax returns. The court overruled the objection.

Thereafter, trustee conducted further investigations and determined absolutely that debtor had not resided at the subject property, including affidavits from the tenants who stated that she did not at any point reside there during their tenancy from June 16, 2012 through June 29, 2014. Debtor finally abandoned her argument that she lived at the subject property with "roommates" and admitted that she lived elsewhere. She countered that she did, however, keep some of her personal belongings at the subject property and that her former attorney had advised her that would be sufficient to claim it as her primary residence. Trustee pointed out that the debtor repeatedly mischaracterized the tenants as "roommates/tenants," when they were in fact clearly tenants with formal leases. Trustee further argued that debtor "from the very first filing, set out to deceive the court, the trustee and her creditors by stating that she lived at the subject property". The court again overruled the objection finding that trustee was on sufficient inquiry notice to have discovered the fraud and that debtor's later admissions had no bearing on whether she claimed the exemption fraudulently. Trustee appealed to the bankruptcy appellant panel which vacated the bankruptcy court order and remanded for further proceedings.

The BAP first noted that the usual elements of common law fraud are: (1) misrepresentation of a material fact; (2) knowledge of the falsity of the material fact; (3) intent of defendant to defraud plaintiff; (4) justifiable reliance of plaintiff on that material fact; and (5) damages. The BAP determined that whether a debtor "fraudulently asserted" an exemption claim within the meaning of Rule 4003(b)(2), required that the bankruptcy court apply the usual definition of fraud, except for the damages requirement (which would have no bearing on the question of exemptions). The relevant representation was observed by the BAP to be a debtor's signed declaration attesting to the accuracy of the information in the statements and schedules and expressly certifying under penalty of perjury that all statements contained therein were true. These representations were affirmed at the 341 meeting. The trustee also would have to show that debtor knew, at the time she claimed the exemption, that the facts did not support that claim and that she intended to deceive the trustee and creditors who read the schedules. The BAP concluded that <u>the bankruptcy court had erred by imposing a duty to investigate upon the trustee</u>, noting that the "perpetrator of an alleged fraud cannot avoid liability by showing that the victim could have uncovered the fraud had the victim investigated more carefully." The BAP also stated that "mere negligence in failing to discover an intentional misrepresentation is no defense to fraud." The "victim need not show that he could not have discovered the fraud; rather, he must only show that he justifiably relied on the perpetrator's false representations."

Here, the debtor had asserted a claim of exemption based on false predicates and later continued to mislead the trustee and the court with further false statements. "It would be inappropriate for the debtor to benefit from the fact that the trustee believed her false statements. Therefore, we hold that the bankruptcy court erred when it ruled that the Trustee failed to timely investigate the debtor's claim of exemption." Indeed, based on *Hyman v. Plotkin (In re Hyman),* 967 F.2d 1316 (9th Cir. 1992), it was clear that had the trustee initially objected, he could have suffered the bankruptcy judge's ire because there was no basis to do so from the sworn schedules and testimony. As stated in that case, "any ambiguity in the schedules should be construed against the debtor." The court also held that "a trustee is entitled to rely on, and need not investigate, the information the debtor chooses to include in the schedules." Nothing in the schedules had suggested that debtor's representations therein were untrue. Moreover, she unequivocally stated at the 341 meeting that she resided at the subject property. Thus, the trustee had no basis to object and was not duty bound to have further investigated. Finally, the BAP disagreed with the bankruptcy court's determination that a debtor's later statements and admissions could not be used to establish that she fraudulently asserted the claim of exemption in her initial filings. "It is hard to imagine a case in which the debtor's schedules, standing alone, prove that the debtor fraudulently asserted an exemption. To prove (for example) the debtor's knowledge of the schedule's falsity and intent to deceive, the objector will almost certainly have to offer extrinsic evidence. In an appropriate case, this extrinsic evidence may include the debtor's subsequent statements and conduct." Thus, the case was remanded to the bankruptcy court to apply the proper standard for the phrase "fraudulently asserted" and to consider whether the evidence showed that debtor had fraudulently asserted the claim of exemption.

Trustee's Objection to Exemptions Sustained as to the Pension and Life Insurance Benefits of Debtor's Deceased Spouse

In re Byrne, 541 B.R. 254(D.N.J. Nov. 13, 2015) (Kaplan, J.). Debtor's spouse died within 180 days of her petition date. She had her case reopened to list and claim exempt life insurance proceeds of approximately $105,000 and a pension of approximately $3,100. Trustee objected to the exemption because debtor was not a listed beneficiary of either the life insurance policy or pension plan, there being no stated beneficiary. Trustee's position was that the funds flowed into the decedent's estate and were controlled by the terms of either his Will or the intestate laws of New Jersey. The bankruptcy court agreed, finding that the funds flowed directly to the decedent's probate estate and were subject to New Jersey probate law. The exemption statutes relied upon by the debtor, the court observed, required that the debtor have a "right to receive" payment in connection with the pension plan or life insurance policy. Because debtor was not a listed beneficiary, there was no right to receive payment under either the pension plan or life insurance contract. Accordingly, the objection was sustained.

Assignee of ABC has no authority to file a bankruptcy petition

In re Nica Holdings, Inc., 2015 WL 9241140 (11th Cir. 2015). Nicanor ran a fish farm in Nicaragua and owned land associated with that operation. Its stock was owned by Nica Holdings, Inc. ("Nica"), Peter Ulrich and BioTech Holdings. Facing financial problems, Nica executed an Assignment for the Benefit of Creditors pursuant to Florida law. Welt was appointed the assignee for the ABC. Ulrich and BioTech sought to purchase Nica's stock in order to gain control over Nicanor. Although the facts were in dispute, it was clear that as a result of continuing uncertainty over Nicanor's future ownership, investors stopped investing and the fish farm closed. That rendered worthless Nicanor's stock which was Nica's primary asset in the ABC. Ulrich blamed Welt and sued him in state court. Welt then filed a malpractice action against his counsel. These two lawsuits were Nica's only remaining assets of value. Meanwhile, Welt purported to file a chapter 7 petition on Nica's behalf. Ulrich unsuccessfully challenged Welt's authority to do so. Ulrich's suit against Welt was removed to the bankruptcy court, whereupon the chapter 7 trustee took over the adversary proceeding and settled with Welt with bankruptcy court approval over the objection of Ulrich. The trustee's settlement of the malpractice claim was also approved. The district court affirmed and Ulrich appealed further. The 11th U.S. Circuit Court of Appeals reversed and remanded with instructions to the district court to remand to the bankruptcy court for dismissal of the bankruptcy case on the basis that Welt, as the ABC assignee, had no authority to initiate a chapter 7 bankruptcy proceeding. The 11th Circuit rejected the argument of Welt and the chapter 7 trustee that the appeal was equitably moot based on the settlement of the actions at the lower court. The circuit court found that relief was still possible. The circuit court also observed that ABCs and bankruptcies were alternative proceedings so that an entity could deliberately choose to pursue one or the other. Here, Nica chose to undergo an ABC with Welt as its assignee, thereby intending the application of a specific statutory mechanism that conferred powers consistent with that scheme. Welt's powers as assignee from the ABC were derived from the ABC agreement, which itself tracked almost exactly the language of the Florida statute. The bankruptcy court had found that the residual power granted to the assignee by the power-of-attorney paragraphs in the ABC agreement were broad enough to ecompass the authority to file a bankruptcy petition. The circuit court again disagreed finding that those paragraphs gave Welt broad powers to act on behalf of Nica but only in furtherance of the ABC. "Pulling Nica out of the ABC and casting it into bankruptcy did not' execute the assignment' or 'carry out its [its] purpose.' Just the opposite – it terminated the assignment. We cannot say that Florida's ABC statute carries within it the seeds of its own destruction."

Bankrupty Court's Reduction of Trustee's Commission Reversed

In re Ruiz, 541 B.R. 892 (Bankr. 9th Cir. 2015) (Dec. 11, 2015). The chapter 7 trustee had sold debtor's truck at auction for $21,000, disbursing $15,046 to the truck's lienholder and $2,758 to the auctioneer. The balance in the estate was just $3,195, of which the trustee proposed to distributed $2,300 (out of a maximum commission of $2,850) to trustee fees, along with $52 in expenses. The remaining $842 was to be distributed to general unsecured creditors. Although no objections were filed, the bankruptcy court scheduled the matter for hearing. The court ordered the trustee to produce time records, but the trustee acknowledged that he did not keep detailed case-by-case time records, although he had included a narrative of his services. The court found no fault with the trustee's performance but found there were "extraordinary circumstances" present to justify reducing his compensation. The bankruptcy appellate panel reversed. The bankruptcy court had recognized that under circuit precedent, a trustee's commission was to be calculated under §326 as presumptively reasonable except in " extraordinary circumstances", citing *In re Salgado-Nava,* 473 B.R. 911 (Bankr. 9th Cir. 2012), however, the bankruptcy court relied on *In re Scoggins,* 517 B.R. 206 (Bankr. E.D. Cal. 2014) which established a *per se* finding of "extraordinary circumstances" where the request for compensation exceeded the amount proposed to be distributed to unsecured creditors. That holding by the court had been incorporated into a local rule requiring time records in such instances. The bankruptcy court also noted that under the U.S. Trustee's Handbook for Chapter 7 Trustees, assets should not be administered primarily for a trustee's benefit. Accordingly, the bankruptcy court reduced the trustee's commission from the maximum of $2,850, of which $2,300 was sought, to just $1,597, being exactly half of the net sale proceeds.

The BAP, however, again reiterated the holding in *Salgado-Nava* that courts should treat a trustee's compensation as a commission based on §326, and that such requests should be presumed reasonable where the amount requested does not exceed the §326 maximum. In *Salgado-Nava,* the court held that absent "extraordinary circumstances," bankruptcy courts should approve chapter 7 trustee fees without any significant additional review. Here, the BAP determined that the bankruptcy court erred by applying a *per se* rule that required a finding of extraordinary circumstances in every case in which the trustee had requested compensation in excess of the proposed distribution to unsecured creditors, even if that distribution was 100 percent. The BAP concluded that this *per se* rule was an incorrect legal standard and applying it constituted an abuse of discretion. Accordingly, the BAP vacated the lower court's order and remanded to the bankruptcy court for further proceedings.

An excellent concurring opinion noted that the practices of the Eastern District of California under *Scoggins* and local bankruptcy rule 2016-2 adopted in its aftermath were inconsistent with the holding in *Salgado-Nava* by requiring time records in every case that falls within any of the predetermined categories set out in *Scoggins* and the local rule, thereby eliminating the presumption of reasonableness. Thus, the concurrence notes that the local rule is "fundamentally inconsistent with the holding and reasoning of *Salgado-Nava* and teeters on unstable ground in light of that opinion." (Jury, J.) [*Author's Comment:* Hopefully, this opinion will make *Scoggins* an outlier. That decision was quite extreme and in conflict with all of the other appellate decisions on this issue. The admonition of the concurrence is right on point.]

Court-Approved Sale Vacated 21 Years Later for Fraud on the Court

In re Roussos, 541 B.R. 721(Bank. C.D. Cal. Nov. 25, 2015) (Robles, J.). As alleged by the trustee in his complaint, brothers Harry and Theodocios Roussos had partnered with August Michaelidis in the early 1980's to purchase two apartment buildings. Michaelidis was to receive a one-third ownership interest in one building and a 10% ownership interest in another. After he died in 1992, his widow learned that the

Roussos brothers had failed to abide by their contractual obligations to include her husband on title to the properties. She successfully sued to quiet title and obtained an award of $1 million plus her interests. The Roussos brothers then retained an attorney who facilitated a conspiracy to fraudulently transfer the properties to corporations that they secretly controlled. The brothers then filed for chapter 11 relief, and in their jointly administered cases obtained court approval in 1994 to sell the properties free and clear to the two companies they secretly controlled. The purchasing corporations were noted to be good-faith purchasers under §363(m) based on the false declarations of the brothers that the sale was an arms-length transaction and that neither of them had any interest in the purchasing corporations. They further represented the properties to be over encumbered, which they were not. After the brothers converted their cases to chapter 7, they received discharges in 1996. In 2005, the widow of Michaelidis conducted a judgment debtor examination during which one brother falsely testified that neither he nor his brother had an interest in the purchasing corporations. In 2014, the other brother similarly falsely testified at a judgment debtor examination. Finally, in 2015, the widow learned that the brothers were engaged in an arbitration action against each other with respect to the management of the two properties.

The U.S. Trustee had the chapter 7 cases reopened. After an investigation, the trustee filed a complaint against the brothers and the two companies seeking, *inter alia*, to vacate the sale order for fraud and to obtain turnover of the properties. The court observed that under Rule 60(d)(3), there was no limit to the court's power to set aside a judgment for fraud on the court. The court rejected the contention that the complaint was not timely brought, finding there was no statute of limitations, and even if there had been, the U.S.T. had only just discovered the fraud in 2015. As the complaint alleged facts sufficient to state a claim of fraud on the court, the court denied the motion to dismiss of the brothers. Further, the court found that the sale order had been procured by fraud on the court and was, therefore, void *ab initio*, so that the estate was never divested of its interest in the properties. Consequently, those cases holding that turnover could not be invoked subsequent to a §363 sale did not apply as those cases did not involve a void sale order procured through fraud on the court.

Policy resulting in Constructive Trust Defenses to Trustee's Fraudulent Transfer Complaint Rejected

In re McFarland, 619 Fed. Appx. 962 (11^{th} Cir. Oct. 16, 2015). Thomas and Sherry McFarland were married in 1968 when Thomas was 26 and Sherry was 19. Shortly thereafter, they purchased the subject property for $15,000, financed with a $5,000 loan from Sherry's father taken from a fund for her college education, and a $10,000 bank loan. The loans were repaid from a joint bank account in which they both deposited their earnings. Only Thomas's name ever appeared on the documentation of the purchase, including the warranty deed, security deed, and promissory note, until 2009 when Thomas executed a "Deed of Gift" to Sherry of an undivided one-half interest in the property. This transfer was triggered by a personal injury lawsuit arising from a car accident that was filed against Thomas in 2008. The transfer occurred after mediation was unsuccessful. Ultimately, a $1 million damages judgment was obtained against Thomas. He thereafter filed for chapter 7. The trustee sued to avoid the transfer as both actively and constructively fraudulent. The McFarlands contended that Sherry's one-half interest in the property could not be included within the bankruptcy estate because she already had that equitable ownership interest in the property which was merely corrected through the deed of transfer. However, the bankruptcy court determined that the transfer deed was, in fact, a transfer of Thomas's own interest in the property and not simply a recognition of Sherry's existing equitable interest. The court rejected the argument that an implied purchase money resulting trust existed. Next, the bankruptcy court determined that the transfer was both actually fraudulent (based on multiple "badges of fraud") and constructively fraudulent, as no value was given in exchange for the transfer. On appeal, the district court affirmed. Likewise, the circuit court affirmed.

The circuit court observed that under Georgia law, trusts could be either express or implied and that an implied trust could occur when the legal title was in one person but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another. These implied trusts could be resulting or constructive, with resulting trusts primarily being the product of the parties' intent, whereas constructive trusts were an equitable remedy when there was fraudulent conduct. The court determined that in order to establish a purchase money resulting trust, the party claiming the benefit of the trust must show either (1) that the party contributed purchase money at or before the time of purchase or (2) in agreement at the time of purchase for the party claiming the benefit to contribute purchase money so as to create s resulting trust. Here there was no agreement for Sherry to contribute one-half of the purchase price and any intent to jointly own the property did not equate to an intent to create a purchase money resulting trust. Moreover, the court noted that where the payor of consideration and the transferee of the property were husband and wife, "a gift shall be presumed, but such presumption shall be rebuttal by clear and convincing evidence." O.C.G.A. §53-12-131(c). Here, Sherry did not contribute to the purchase price; rather, the money was loaned by Sherry's father with the expectation that the money would be repaid. Additionally, Thomas was the only party obligated on the note. Moreover, there was no indication that the bank that loaned two-thirds of the purchase price considered the property to be jointly owned and no evidence that the bank would have financed the property if it was jointly owned. All of the sale documents reflected that title was to be vested in Thomas alone, and so it remained for over 40 years. As to a constructive trust, that claim was not raised before the bankruptcy or district courts. Although the circuit court declined to consider the argument for the first time on appeal, it nevertheless reviewed it sufficiently to reject it. It found that the bankruptcy court did not abuse its discretion in concluding that equitable considerations did not support the establishment of a constructive trust. Accordingly, the lower courts were affirmed. [*Author's comment:* Although constructive trust claims are reviewed under state law, this case presents a good review of what is generally required in order to establish this defense to a fraudulent transfer action. Alas, it explains that defendants had the burden of proving by clear and convincing evidence that it was not a gift where there is a statutory presumption that a transfer between a husband and wife is a "gift".]

Trustee allowed to surcharge Pre-abandonment Expenses

In re Domistyle, Inc., 2015 WL 9487732 (5th Cir. 2015). The trustee spent the better part of a year marketing the subject real property in an attempt to sell it for an amount sufficient to permit a distribution on creditor claims. He eventually realized that there was no equity in the property, despite the fact that it had recently been appraised for approximately $6 million compared to the $4 million claim of the secured creditor. After deciding that the property was worth less than the encumbrances, trustee advised the first lien creditor that he intended to cease paying certain property-related expenses, including insurance, security and utility service. The creditor objected because "such action would virtually destroy any value remaining in the … [p]roperty." The trustee then filed a motion to abandon as well as to surcharge the property for certain pre-abandonment expenses such as security, repairs to the roof and electrical system, mowing, landscaping, utilities and insurance premiums. The creditor objected to the proposed surcharge based on the expenses incurred being for the benefit of the estate and not "primarily for the benefit of the creditor." The bankruptcy court disagreed and allowed the surcharge. The 5th Circuit Court of Appeals granted a direct appeal of the bankruptcy court decision and affirmed.

The Circuit Court first noted that the requirement that expenditures be "primarily for the benefit of the creditor" could not be traced to any language in the statute, but rather was in the nature of a "judicial gloss" on the statute to limit overreaching by trustees. The statute itself is brief and states: "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim…" Thus, §506 (c) does not set forth any requirement that the expenses be "primarily for the benefit of the creditor." The Circuit Court reviewed the expenses to be surcharged and found that they actually were "primarily for the benefit" of the creditor. The Circuit Court declined to follow *In re Trim-X, Inc.* 695 F.2d 296 (7th Cir. 1982) finding that the application by that court of the "primarily for the benefit of the creditor" requirement stretched the statute "beyond its text and contradict[ed] its equitable purpose." The Circuit Court next reviewed whether the trustee had properly quantified the extent to which the creditor actually benefitted from the subject expenses. The court observed that it was "obvious" that the creditor obtained some benefit from those expenses or it would have "been left trying to sell a vacant building damaged by vandalism, filled with overgrown weeds, and saddled with a leaking roof." Further, the creditor had recognized as much when it objected to the Trustee's proposal to stop paying those expenses stating that "such action would virtually destroy any value remaining in the [p]roperty." The trustee had also presented expert testimony from an experienced real estate broker that the value preserved was at least equal to the amounts that the trustee expended. The creditor had cross-examined the broker but did not offer a competing expert or any contradictory valuation. Thus, the Circuit Court concluded that the bankruptcy court had not clearly erred in finding a benefit to the creditor that was, at a minimum, equal to the amount of the expenses paid. [*Author's comment:* This is a very important decision in recognizing that the statute's focus is on the benefit to the creditor not the intent of the expenditures.]

Automatic Dismissal of Converted Case Set Aside

In re Tabert, 540 B.R. 790 (Bankr. D.Colo. Oct. 29, 2015) (Brown, J.). The chapter 7 trustee expressed an interest in selling debtor's home due to the existence of non-exempt equity. Debtor responded by immediately converting the case to chapter 13. Under Rule 3015(b), the debtor was then required to file a chapter 13 plan within 14 days of the conversion date. He failed to do so, and the court entered an order dismissing the case the very next day. The chapter 7 trustee then moved to vacate the dismissal and reconvert the case to chapter 7, asserting that debtor was trying to take advantage of an additional $15,000 in homestead exemption by refiling his case after the effective date of the exemption increase. Debtor objected to the chapter 7 trustee's motion on the basis that he had no standing to assert it because the chapter 13 trustee had supplanted his interest. To remove this issue from the case, the chapter 13 trustee filed her own motion to reinstate. These motions argued that debtor had obtained a dismissal of his case without any opportunity for a party-in-interest to object to its dismissal in violation of the Code and Rules that require notice to all parties, and an opportunity for a hearing if any party objected. The debtor countered that the District's local rules permitted the automatic dismissal of a "deficient" case. The court agreed with the trustees and vacated the dismissal and reinstated the case.

The court observed that a UST standing motion in the district had allowed for automatic dismissals as did certain local rules. However, the court noted that §1307(c) governed the dismissal in this case and provided that "on request of a party-in-interest or the United States Trustee and after notice and a hearing, the court may convert … or dismiss … whichever is in the best interest of creditors and the estate for cause." The failure to file a plan was certainly cause, but the issue was due process. Rule 1017(f)(1) provides that a proceeding to dismiss a case under §1307(c) is governed by Rule 9014, which inturn provided that "relief shall be requested by motion and reasonable notice and opportunity for a hearing shall be afforded the party against whom, relief is sought." Rule 9014(b) further required that "the motion shall be served in the manner provided for service of a summons and complaint by Rule 7004." Thus, the Standing Motion did not satisfy the notice requirements of Rule 1017(f)(1). Indeed, the Standing Motion was not served on anyone. The court also noted that Rule 9013 had to be complied with and required separate notice to be served on interested parties with a deadline to object and request for a hearing. The court concluded that the "failure of the Court to provide parties with sufficient procedural due process is grounds for relief under Fed. R. Civ. P. 60(b)(4)." The court ruled that its order of reinstatement would provide a deadline for parties in interest to respond and to address whether dismissal or conversion of the case to chapter 7 was in the best interest of creditors and of the estate. [*Author's comment:* This is an extremely important case in chapter 7 as well because Rules 1017(b), (e) and (f) are equally applicable to dismissals of chapter 7 cases. In some districts, courts are automatically dismissing chapter 7 cases with no notice or hearing upon the failure to make an installment payment of the filing fee or to file all appropriate documents. The chapter 7 trustee has no notice that the debtor has failed to pay an installment until after the case is dismissed for that reason. The author knows of many cases dismissed out from under trustees (and creditors) that were substantial asset cases (although the assets or fraudulent transfers had been concealed). This gives chapter 7 trustees, as well as chapter 13 trustees, some authority for the neglect of our due process rights.]

Trustee performed Legal Work for which he was Entitled to Additional Compensation

In re Amen, 540 B.R. 759 (D.Mont. Oct. 27, 2015). The bankruptcy court had approved without objection the trustee's application to hire his own law firm and the Goetz law firm to represent the bankruptcy estate on a contingency fee basis on the money received into the bankruptcy estate as a result of their services. The trustee's firm was to receive 10% and the Goetz law firm 30%. The trustee ultimately resolved several competing claims on two parcels of land, which included litigating an adversary proceeding against Bar Nothing. After selling a parcel of land owned by the bankruptcy estate, the trustee filed an application for attorney fees. Bar Nothing objected. After the hearing, the bankruptcy court approved the majority of the requested fees and awarded a total of $141,600, with the trustee's law firm receiving $35,400 of that amount and the balance paid to the Goetz law firm. Bar Nothing argued that the trustee did not make the necessary showing to the appointed as counsel for the bankruptcy estate and that the services he performed were typical trustee duties not entitled to separate compensation. The bankruptcy court had disagreed and on appeal, the district court affirmed.

The district court noted that the bankruptcy court was authorized to allow the trustee to employ an attorney, including his own law firm, to carry out the duties of the trustee under §§327(a) and (d). The district court also noted that in the district of Montana, chapter 7 trustees routinely applied to appoint themselves as legal counsel and were allowed to do so, particularly when there were no objections. The court observed that a trustee must hire an attorney (a) when there is an adversary proceeding or a contested motion that requires the trustee to appear and prosecute or defend, (b) when an attorney is needed for a court appearance, or (c) when other services are needed that require a law license. Further, the situation was not limited to conducting litigation. The "practice of law" includes the preparation of legal instruments and contracts by which legal rights are secured, whether the matter is pending in court or not." [Citing *Ferrete & Slater v. United States Trustee (In re Garcia)* 335 B.R. 717, 728 (9th Cir. BAP 2005)] Here, the district court noted that the trustee had negotiated a complex agreement and drafted settlement documents and real estate contracts to resolve claims, thus allowing the bankruptcy estate to liquidate a parcel of property that previously had grave marketability problems. When the trustee moved to approve the settlement agreement, Bar Nothing objected, necessitating a hearing in which the trustee defeated the objection. The trustee had also been forced to initiate an adversary proceeding against Bar Nothing to remove its claim encumbrance upon the proceeds of the property's sale. This AP went all the way to trial whereupon the court ruled in favor of the trustee and removed Bar Nothing's secured claim. Further, drafting complex settlement and real estate documents necessitated the employment of an attorney. Litigating an adversary proceeding was deemed to certainly be legal work beyond a trustee's normal duties. The court also noted the irony of Bar Nothing's argument that the trustee was not required to perform legal work when its own positions necessitated such legal work. The district court also rejected the argument that the trustee had waived its right to attorney fees. The trustee had only waived his right to collect fees against Bar Nothing in relation to the adversary proceeding, but not against the bankruptcy estate. Accordingly, the fee award was affirmed. [*Author's comment:* Although the trustee easily prevailed here, under the Supreme Court's recent *Baker Botts LLP v. Asaro LLC,* 135 S.Ct. 2158 (2015) decision*,* the trustee and his counsel would not be able to recover their additional fees for defending the fee award from the bankruptcy court.]

Exemption and Equitable Estoppel

Lua v. Miller 2015 US. Dist. Lexis 155510 Nov. 10, 2015. While most debtor's lawyers breathed a sigh of relief after the U.S. Supreme Court decided *Law v. Seigel* 134 S. Ct. 1188 (2014), the U.S. District Court for the Central District of California may have raised new hope for trustees in the *Lua* case. *Law v. Seigel* held that the bankruptcy court could not disallow an exemption except for two reasons: first, state law did not permit such an exemption or second, 11 U.S.C. 522 provided an explicit ground for denying an exemption. The bankruptcy court lacked the power to disallow a claim solely on equitable grounds. The immediate impact was that debtors who had hidden their assets could claim them as exempt when the Trustee ultimately discovered them. In *Lua*, however, the Bankruptcy Court did turn to state law and found that the doctrine of equitable estoppel under state law could prevent the debtor from asserting an exemption. Under California law, where the debtor concealed a material fact, did so with knowledge of the facts, did so with the intent that the trustee act on it, the trustee was ignorant of the truth and the trustee relied, then equitable estoppels would prevent the debtor from asserting an exemption under state law. The District Court did not explain whether the trustee's reliance should be reasonable, justifiable or actual. In addition to equitable estoppels, the doctrine of judicial estoppels may also prevent a debtor from profiting from his nefarious deeds.

Recent Developments in Consumer Bankruptcy

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RECENT DEVELOPMENTS IN CONSUMER BANKRUPTCY

***Layng v. Assaf (In re Briones-Coroy)*, 513 B.R. 916 (Bankr. D. Colo. 2014)**. Bankruptcy prepetition preparer ("BPP") was sanctioned $480,000 for wrongful conduct in violation of 11 U.S.C. 110 and ordered to repay that aggregate amount to 240 debtors (plus additional sums to the U.S. Trustee). BPP was also enjoined from serving as a bankruptcy petition preparer for ten years. When BPP failed to timely pay, U.S. Trustee moved for contempt. BPP and U.S. Trustee entered into negotiations and filed a joint motion to enter a stipulated order that would require the BPP to pay over 25 years and would allow the BPP to prepare bankruptcy petitions under the supervision of an attorney. The court denied the motion, expressing disgust at the BPP's efforts to avoid his liability when, during the course of the litigation, he had transferred numerous real properties to his wife. Noting the substantial logistical burden that a twenty-five year payment plan would put on the U.S. Trustee and the office of the clerk, the court ordered that the BPP be prohibited from working as a bankruptcy petition prepare, (even under the supervision of an attorney), that the BPP be prohibited from transferring any more real estate to his wife (without approval of the court), and that the U.S. Trustee later submit a report to the court detailing the efforts made by the U.S. Trustee to execute the court's judgment on behalf of the debtor-victims.

***Rugiero v. Nationstar Mortgage, LLC*, 580 Fed.Appx. 376 (6th Cir. 2014)**. Debtor defaulted on mortgage and property was sold at foreclosure sale. Debtor then filed a Chapter 13 petition and sued the mortgage company. The mortgage company filed a motion for summary judgment, which the court granted after the debtor failed to respond. The Circuit Court affirmed, finding that the debtor had no standing to bring the suit because he did not disclose the claim in his bankruptcy filings.

***Del Toro Loan Servicing, Inc., v. Takowsky (In re Takowsky)*, 2014 WL 5861379 (B.A.P. 9th Cir. 2014)**. Chapter 13 debtors obtained post-petition loan secured by second priority deed of trust against debtor's real property. Debtor went into default, later making a payment that creditor acknowledged "brought the account current." Creditor nevertheless proceeded with a trustee's sale, stating that debtor had failed to provide proof of being current on senior obligations. Debtor initiated an adversary proceeding for wrongful foreclosure. After trial, the bankruptcy court found for the debtor, awarding her damages for loss of equity in the property, but declining to award damages for emotional distress and relocation. On appeal, the creditor challenged the bankruptcy court's jurisdiction to enter a final judgment and the determination that it had wrongfully foreclosed on the property. Debtor cross-appealed on the issue of damages for emotional distress and relocation damages. The Panel held that the creditor had expressly consented to the bankruptcy court's entry of final judgment and that the creditor was equitably estopped from requiring proof of payment on senior obligations because it had stated that payment of the amounts owing would cure the default. The Panel ruled that the debtor had not pleaded intentional infliction of emotional distress and therefore could not recover damages for emotional distress, and affirmed the bankruptcy court's decision not to award relocation costs because the evidence at trial was that the debtor would have relocated even if creditor had not wrongfully foreclosed the property.

***Bell v. Thornburg*, 743 F.3d 84 (5th Cir. 2014)**. Former employee of Chapter 13 trustee sued Chapter 13 trustee in state court claiming that she had been terminated because of her race in violation of Louisiana law. Chapter 13 trustee removed the action to federal court based on the federal officer removal statute, 28 U.S.C. § 1442 (a)(1), and the plaintiff appealed the applicability of that statute to Chapter 13 trustees. Noting that Chapter 13 trustees are appointed by the U.S. Trustee for the purpose of assisting the U.S. Trustee with Chapter 13 bankruptcy cases, the Circuit Court held that the federal officer removal statute indeed applied to Chapter 13 trustees.

***Bank of America v. Caulkett*, 135 S.Ct. 1995 (2015)**. Debtors filed Chapter 7 cases. Each owned a house encumbered by a senior and a junior mortgage lien. The amount owed on each senior mortgage was greater than each house's current market value. Debtors sought to void the junior liens pursuant to Section 506. Noting that it had previously held that Section 506 did not entitle debtors to strip down underwater liens, the Court rejected the debtors' argument that such ruling should only apply where the liens were partially underwater and instead held that a Chapter 7 debtor may not void a junior mortgage lien even when the debt owed on the senior lien exceeds the current value of the collateral.

***In re Harris*, 2015 WL 2210339 (Bankr. S.D. Tex. 2015)**. Debtor lied under oath regarding certain transfers of assets. When the trustee sought to have the debtor's discharge denied, the debtor eventually waived his discharge. It then became apparent that debtor's attorney knowingly filed schedules that omitted information regarding debtor's pre-petition divorce. Without first taking the attorney's deposition, the Chapter 7 trustee brought adversary proceeding against her claiming malpractice. Debtor's attorney responded with a Rule 9011 letter. Trustee determined that he was unable to prove causation, but declined to withdraw the adversary proceeding prior to the Safe Harbor date and instead proposed that debtor's attorney disgorge her fees. On the attorney's motion for summary judgment, the court held that Rule 9011 only deals with the filing of papers and that the trustee had a good-faith basis for filing the adversary proceeding. However, the court went on to conclude that the trustee had violated 28 U.S.C. § 1927 (unreasonably or vexatiously multiplying proceedings) by not withdrawing the lawsuit in a timely fashion after concluding that he could not prove causation. Calculating the date when the adversary complaint should have been withdrawn, the court awarded debtor's attorney her reasonable costs and fees as incurred thereafter.

***Wiggains v. Reed (In re Wiggains)*, Case No. 13-33757, Adv. No. 14-03064, 2015 Bankr. LEXIS 1460 (Bankr. N.D. Tex. April 27, 2015)**. The Bankruptcy Court held that the Debtor and his non-debtor spouse effected an actual fraudulent transfer where they entered into and recorded a partition agreement that partitioned their community homestead into equal, separate, sole management property interests just hours before the Debtor filed for bankruptcy. In this case, the Debtor's homestead was sold by the Chapter 7 Trustee during the Debtor's bankruptcy case, netting cash proceeds of $568,668.41 after payment of liens, claims and encumbrances. The Debtor stipulated that his interest in the net proceeds was capped by 11 U.S.C. § 522(p) because the Debtor and his spouse acquired the house less than 1,215 days before the Debtor filed for bankruptcy. The non-debtor spouse commenced an adversary proceeding, seeking a declaratory judgment regarding the amount and extent of the bankruptcy estate's interest and the spouse's interest in the net proceeds separate and apart from the Debtor's capped interest. The Chapter 7 Trustee counterclaimed, asserting that the partition agreement constituted a voidable fraudulent transfer made with "intent to hinder and delay" creditors under 11 U.S.C. § 548(a)(1)(A) and section 24.005 of the Texas Business & Commerce Code (TUFTA).

In addressing the fraudulent transfer claims, the Bankruptcy Court rejected the spouse's argument that the partition agreement merely re-characterized rather than transferred an interest of the Debtor in property. A transfer did occur via the partition agreement, despite the conclusion that no title was transferred under Texas law, because the result of the partition agreement was to deprive creditors of half of the homestead proceeds that otherwise would have been available to pay claims. The Debtor made this transfer with an "intent to hinder and delay," the Bankruptcy Court held, based on testimony that the Debtor and the spouse entered into the partition agreement after their attorney advised them of the homestead cap under section 522(p) and the option to partition. In determining that the Debtor had the requisite intent under section 548(a)(1)(A), the Bankruptcy Court rejected the argument that an intent to "defraud" in addition to "hinder and delay," was necessary for the Chapter 7 Trustee to prevail on her actual fraudulent transfer claim. The Bankruptcy Court declined to determine the TUFTA cause of action in light of its holding. The Bankruptcy Court considered the spouse's interest in the net proceeds under the scenario that the partition agreement had not occurred. As an initial matter, the spouse was not entitled to a separate capped exemption in the homestead proceeds because section 522(m) only allowed this for a spouse that jointly filed. The Bankruptcy Court referenced Fifth Circuit holdings in *In re Kim*, 743 F.3d 647 (5th Cir. 2014), and *In re Thaw*, 769 F.3d 366 (5th Cir. 2014), in denying the spouse compensation for loss of her homestead interest on account of a constitutional taking because the homestead was acquired after the enactment of section 522(p). Citing *In re Kim*, however, the Bankruptcy Court did acknowledge that the homestead had value to the spouse apart from her ownership interest, which could require compensation under section 363(j). No party had briefed the issue of section 363(j), so the Court declined to opine but, in its amended opinion, noted that the matter was set for a hearing on subsequent motion.

***In re Hale*, Case No. 14-4337, 2015 Bankr. LEXIS 827 (Bankr. D. S.C. Mar. 16, 2015)**. The Bankruptcy Court for the District of South Carolina held that descriptions such as "Review of Plan" and "Proof of Claim" in a Rule 3002.1 notice were insufficient to demonstrate that the requested fees were permissible. The Debtors were current on their mortgage when their bankruptcy case was filed and appear to have remained current on their mortgage through confirmation of their Chapter 13 plan. Nevertheless, their lender filed a Rule 3002.1 notice requesting $150 for fees related to "Review of Plan" and $150 of fees related to "Proof of Claim." The Debtors objected. The lender did not respond to the objection and did not appear at the hearing on the objection. The Court observed that Rule 3002.1 notices must provide adequate descriptions of contractual charges, but the descriptions provided in this case did not demonstrate that the requested fees were allowable pursuant to the underlying loan agreement or non-bankruptcy law and were necessary and/or reasonable, and the Court therefore could not find that the requested fees were permissible.

***Smith v. First Am. Title Ins. Co. (In re Stevenson)*, 789 F.3d 197 (D.C. 2015)**. The Court of Appeals for the District of Columbia held that a bank was entitled to equitable subrogation under D.C. law where the bank refinanced a mortgage and thereby extinguished the obligations of two individuals who jointly owned a house but then only obtained the signature from one of those two owners on the refinanced deed of trust. The Debtor and her son jointly owned a house, and they were both obligated on the mortgage for the house. The Debtor then decided to refinance the loan to obtain some cash. The Debtor's son, however, did not wish to refinance the loan because it would result in a higher interest rate. As a result, the son did not sign the refinancing paperwork, including the deed of trust, for the new mortgage. The bank went forward with the refinancing anyway and paid off the existing loan. The Debtor eventually stopped making payments, defaulted on the loan, and filed for bankruptcy, but the bank could not foreclose on the house because the son never signed the deed of trust. The bank filed a suit in the bankruptcy case seeking equitable subrogation, which would give it the same rights that the previous lender had on the loan that the bank had paid off during the refinance. Under D.C. law, to obtain equitable subrogation, the bank needed to show that (1) it paid off the previous loan to protect its "own interest," (2) it had not "acted as a volunteer," (3) it "was not primarily liable" for the previous loan, (4) it paid off the entirety of the previous mortgage, and (5) subrogation would "not work any injustice to the rights of others." The first four requirements were clearly met, and the Court found that the fifth was met as well because the son would only be obligated to the bank for the amount of the previous loan and only at the lower interest rate of the previous loan. Absent subrogation, the son would experience a windfall. There was also an issue in this case because at the time the loan was made, the bank had actual knowledge that it would not receive the rights of the previous lender. Without any direct authority on this issue, the Court decided that D.C. courts would likely find that actual knowledge does not bar equitable subrogation.

***In re Kozich*, 534 B.R. 427 (Bankr. S.D. Fla. 2015).** The Bankruptcy Court for the Southern District of Florida found that a debtor cannot force the recusal of a judge by filing a judicial misconduct complaint against that judge. The debtor, who was ordered in past proceedings not to file any proceeding pro se without prior approval, filed a complaint against the judge who would hear the debtor's other motions. The court stated that public policy dictates that a debtor cannot force a judge to recuse by filing a misconduct complaint.

***BMO Harris Bank. N.A. v. Isaacson*, No. 15-cv-2528, 2015 U.S. Dist. LEXIS 148619 (N.D. Ill. Nov. 2, 2015)**. Debtors making over $250,000 per year and having over one million dollars in retirement funds, filed for Chapter 13. Trustee moved to dismiss because scheduled debts exceeded the statutory limits. The bankruptcy court converted the case to Chapter 11. Debtors failed to propose a confirmable plan. Judgment creditor holding 99% of debtors' debts moved for dismissal under Section 707(a), arguing that debtors' decision to file for Chapter 13 despite being ineligible to do so taken in conjunction with their failure to propose a confirmable plan demonstrated a lack of good faith. Judgment creditor also argued that debtors' repeated non-disclosure of bonuses paid them during the bankruptcy case and other disclosure failures justified dismissing the case. The bankruptcy court denied the motion to dismiss, holding that "bad faith" was not a grounds for dismissal under Section 707(a). On appeal, the district court vacated and remanded, holding that bankruptcy courts can dismiss cases for cause (including bad faith) wherever there is an unjustified refusal to pay debts.

***Smith v. Robbins (In re IFS Financial Corporation)*, 803 F.3d 195 (5th Cir. 2015)**. Chapter 7 trustee hired his own firm to represent the estate. When trustee requested compensation for his firm based on unitemized expenses for trip to New Orleans for oral argument on which trustee took his family and arrived three days early and stayed the night afterwards, the bankruptcy court ordered the trustee to show cause why he should not be removed as trustee under Section 324(a). At hearing, the court considered the fact that trustee had failed to disclose the presence of his children on the trip, as well as previous instances of questionable behavior by the trustee in his dealings with the estate (including engaging in retaliatory litigation), in reaching the conclusion that the trustee should be removed from the case (and by operation of statute all of his other cases) for violating his fiduciary duty by repeatedly putting the interests of his own law firm ahead of the interests of the estate.

On appeal, the trustee argued that his removal was not appropriate because he did not receive proper notice prior to removal and because the court lacked sufficient cause to remove him. The Circuit Court rejected the trustee's contention that the show cause did not put him on notice that his past actions in other matters might be considered and held that simple breach of fiduciary duty can constitute "cause" under Section 324(a). The Court also rejected the trustee's argument that Section 324(b) was unconstitutional, finding that the statute was neither facially unconstitutional nor unconstitutional as applied.

***Krueger v. Torres (In re Krueger)*, No. 14-11355, 2016 WL 232014 (5th Cir. Jan. 19, 2016)**. Prior to the filing of his bankruptcy, the debtor had been involved in a contentious state court lawsuit with his business partner. In response to being enjoined by the state court from taking certain actions, the debtor formed a new entity for the purpose of supplanting the old company. The state court show caused the debtor for violation of injunctions related to transfers of money out of the old company and into the debtor's accounts. On the eve of the show cause hearing, the debtor filed for bankruptcy. The debtor's business partner was granted relief from the automatic stay for the purpose of pursuing the contempt motion against the debtor. The state court held the debtor in criminal contempt and ordered the debtor jailed. Ignoring the fact that the bankruptcy trustee now owned his shares in the old company, the debtor proceeded to vote himself into virtually complete control over the old company and release all claims against himself.

The debtor's business partner moved to dismiss the bankruptcy case for cause pursuant to Section 707(a). After extensive evidence, the bankruptcy court granted the motion to dismiss and imposed a two-year filing ban on the debtor, finding that the debtor had failed to make important disclosures, violated the automatic stay, used a false address on the bankruptcy petition, perjured himself "on a wide range of topics," and threated a witness during the dismissal hearing. On appeal by the debtor, the Fifth Circuit speedily and curtly disposed of the debtor's procedural and due process arguments. The Court held that a debtor's bad faith in the bankruptcy process can serve as the basis for a dismissal for cause even if the bad faith conduct is encompassed by other provisions of the Bankruptcy Code, stating that this debtor's case was "paradigmatic of the need for cause to include bad faith before, within, and throughout the case."

***James v. Guidry (In re Guidry)*, No. CC-14-1531-TaKuKi, 2015 Bankr. LEXIS 4139 (Bankr. 9th Cir. Dec. 09, 2015)**. During dispute with Chapter 7 trustee over exemptions, debtor who had withdrawn his request to convert to Chapter 13 disclosed to court that bankruptcy petition preparer had suggested to debtor the possibility of conversion to Chapter 13. The bankruptcy court show-caused the bankruptcy petition preparer for violation of Section 110(e). While the debtor did not testify at the hearing on the order to show cause, the court relied on his previous statements in finding that the petition preparer had assisted the debtor with the motion to convert. The bankruptcy court found that the petition preparer had violated Section 110(b), (c), and (l), and ordered him to disgorge his fees and fined him pursuant to Section 110(l). The petition preparer appealed based on violation of due process because the show cause order only mentioned Section 110(e) and because the debtor had not testified at the hearing. The Panel reversed, noting that the bankruptcy court erred by using the debtor's non-evidentiary statements to assess the credibility of the petition preparer and that the pro se petition preparer could not have been expected to be prepared for the basis for his alleged conduct if it was not included in the show cause order.

EXEMPTIONS – STATE.. ....

***Elliott v. Weil (In re Elliott)*, 523 B.R. 188 (B.A.P. 9th Cir. 2014)**. The Bankruptcy case was reopened when Chapter 7 trustee discovered that debtor had engaged in a series of sophisticated pre-petition transfers intended to hide his ownership of a home. Debtor responded by amending his schedules to list the home and claiming a homestead interest in the property under California law. The trustee objected to the claimed homestead exemption on the basis of bad faith and the bankruptcy court sustained the objection. The Panel reversed, holding that *Law v Siegel*, 134 S.Ct. 1188 (2014) precluded bankruptcy courts from creating exceptions to exemptions. However, the Panel remanded with a finding that § 522(g)(1) and its limits on claiming exemptions where debtor concealed property definitely applied to limit the debtor's exemption and that there might be an additional statutory exception arising under California law applicable to homestead exemptions in the context of forced sales.

***Gray v. Warfield (In re Gray)*, 523 B.R. 170 (B.A.P. 9th Cir. 2014)**. Chapter 7 debtors did not list prepaid rent on their schedules as an asset. At 341 meeting, trustee discovered existence of prepaid rent and demanded that the portion relevant to the post-petition period be turned over to the trustee. Debtors refused, instead amending their schedules to list the prepaid rent and claiming it as exempt under a specific Arizona statute. The bankruptcy court sustained the trustee's objection to exemption on the grounds that the debtors had acted in bad faith and intentionally concealed the prepaid rent. The Panel reversed, holding that *Law v Siegel*, 134 S.Ct. 1188 (2014) precluded bankruptcy courts from disallowing under federal law amended exemptions on equitable grounds. The Panel remanded for further consideration of whether Arizona law allowed equitable considerations to be used to disallow exemptions.

***In re Van Erem*, No. 14-35191, 2015 Bankr. LEXIS 876 (Bankr. S.D. Tex. Mar. 18, 2015)**. The Bankruptcy Court refused to apply 11 U.S.C. § 522(o) to eliminate the Debtors' exemption claim in the equity in their Texas homestead, finding that the Debtors' purchase of the Texas homestead with non-exempt funds was not made with an intent to hinder, delay or defraud. Leading up to the bankruptcy case, the Debtor husband quit his job with U.S. Bancorp Investments in New Mexico, and the two parties entered into arbitration regarding the Debtor husband's liability for payback of a $600,000 gross bonus and his claims against the bank for fraudulent inducement. Before making this decision to quit, the Debtor husband obtained employment with Chase Bank in Texas and the Debtors sold their New Mexico home, for no net profit, and purchased a Texas homestead for greater value. The Debtor husband lost the arbitration and began negotiating settlement because he did not have the funds to pay back the full bonus amount. After the Debtors filed bankruptcy, the Chapter 7 Trustee moved to limit the Debtors' exemption claim in their Texas homestead because it had been purchased with an intent to hinder, delay or defraud creditors.

The Bankruptcy Court noted that the lifestyle of the Debtors, albeit irresponsible, had been consistent before and during the dispute with U.S. Bancorp Investments and differed from an intent to hinder, delay or defraud. Pre-bankruptcy planning in and of itself, the Bankruptcy Court stated, did not reflect a fraudulent intent. Referencing *Law v. Siegel*, 134 S. Ct. 1188 (2014), the Bankruptcy Court explained that its analysis for purposes of limiting or obviating the Debtors' exemption claim under section 522(o) was not based upon principles of equity or fairness. Instead, the Bankruptcy Court considered the Debtors' intent in purchasing the Texas homestead under eleven badges of fraud. The Bankruptcy Court found that six factors weighed in favor of the Debtors, based on the fact that their purchase of the Texas homestead still left the Debtors with $90,000 in non-exempt assets, the Debtors did not abscond or conceal their move or purchase of the Texas homestead, the difference in value between the two homesteads was not great, and the Texas homestead was not acquired after the threat of a lawsuit but after the Debtor husband obtained a new job in Texas. Five factors weighed in favor of the Chapter 7 Trustee, including concealment of assets as the Debtor husband had not revealed to U.S. Bancorp Investments during settlement discussions a Chase Bank checking, savings, and retirement account opened in the name of the Debtor wife after moving to Texas. The Bankruptcy Court refused to find a fraudulent intent under these circumstances, determining that the factors in favor of the Debtors outweighed those in favor of the Chapter 7 Trustee. As a result, the Debtors were permitted to claim the entirety of their home equity as exempt.

***In re Crump*, 533 B.R. 567 (Bankr. N.D. Tex. 2015).** The Bankruptcy Court for the Northern District of Texas found that while Chapter 7 debtors could use the homestead exemption on their noncontiguous rural property, they could not exempt part of that rural property, nor the rent proceeds, which was rented to an oil company. The noncontiguous property could be exempted because the property was used in conjunction with the inhabited property. Although this property was leased to another for farming, it did not constitute abandonment since the debtors intended to resume control when the lease ended. With respect to the property rented to the oil company, the debtors did not have the intent to resume control when they signed the thirty year lease with the oil company so it could not be exempted.

***Loventhal v. Edelson*, 2016 U.S. Dist. LEXIS 4327 (N.D. Ill. Jan. 13, 2016)**. Husband and wife conveyed their homestead into a living trust. Upon filing bankruptcy, they claimed the homestead as an interest as a tenant by the entirety that was exempt under Illinois law. A creditor objected, arguing that the debtors had severed their tenancy by the entirety when they conveyed the homestead into the living trust. On appeal, the court rejected the creditor's arguments, finding that the debtor's situation still met the requirements of Illinois' Joint Tenancy Act, primarily because the debtors remained married and had rights of survivorship.

***Lowe v. DeBerry (In re DeBerry)*, No. 14-50406, 2015 WL 6528024 (W.D. Tex. Oct. 28, 2015)**. Chapter 7 debtors claimed their homestead as exempt under Texas law. Post-petition, debtors received permission from the court to sell the homestead. When the debtors did not reinvest the proceeds from the sale in another homestead within the six months contemplated by Texas Property Code § 41.001(c) (the "Texas Proceeds Rule"), the Chapter 7 trustee brought an adversary proceeding seeking a determination that the homestead proceeds had lost their exempt status because they had not been reinvested in another homestead. The court adopted the reasoning *In re D'Avila*, 498 B.R. 150 (Bankr. W.D. Tex. 2013) and held that when a Chapter 7 debtor sells a properly exempted Texas homestead post-petition, the proceeds of that sale are not subject to the Texas Proceeds Rule and therefore do not constitute part of the bankruptcy estate.

***Mosby v. Clark (In re Mosby)*, No. 2:15-cv-09153-JWL, 2015 U.S. Dist. LEXIS 149505 (D. Kan. Oct. 30, 2015)**. Debtor asserted that inherited IRA was exempt under a Kansas statute that exempted monies held in retirement plans that were qualified under certain sections of the federal tax code. In holding that "retirement plan" for purposes of the Kansas statute did not include inherited IRAs, the court relied upon the Supreme Court's construction in *Clark v. Rameker*, 134 S. Ct. 2242 (2014) of the phrase "retirement funds" for the general principle that such statutes are not intended to protect monies inherited from someone else.

***In re Robinson*, 14-3585, 2016 WL 423813 (7th Cir. Feb. 4, 2016)**. Debtor claimed a rare copy of Book of Mormon as exempt under Illinois law permitted exemption for a "bible". The trustee objected, arguing that debtor owned other copies that she actually used and that the rare copy was a valuable collectible that should be used for the benefit of creditors. The Circuit Court held that nothing in the statute modified the term "bible" in a way that would permit debtors to only exempt religious texts that were of little or no value.

***Hamilton v. MacMillan (In re MacMillan)*, 2015 U.S. Dist. LEXIS 166379 (D. Kan. Dec. 11, 2015)**. Debtor had a side-business as a photographer; co-debtor took care of the books and promotions for the side-business. Co-debtor claimed a website and a number of digital images as exempt tools of the trade under state law dealing with "means of production." The trustee objected, arguing that the website and digital images were not means of production but rather stock in trade. The court held the website and digital images to be exemptible tools of the trade on the grounds that they were dual purpose items that could be sold but that were also used as promotional materials. The court also applied the "farmer's wife" rule to reach the conclusion that the co-debtor could claim them as exempt because she was engaged in the business effectively as a co-owner with the debtor.

***In re Hurt*, 542 B.R. 798 (Bankr. E.D. Tenn. 2015)**. Husband inherited real property, sold it, and placed the proceeds half in an account in his name and half in his wife's name. Debtors soon thereafter filed a Chapter 7 bankruptcy and claimed both accounts as exempt under Tennessee's state exemptions. The Chapter 7 trustee objected to the wife's claimed exemption and argued that using the proceeds from the sale of non-exempt real property belonging to the husband to open an account in the wife's name constituted a fraudulent transfer because the husband would not have been able to exempt the entire amount if it had been placed only in his name. The court denied the objection, noting that under *Ellmann v. Baker*, 791 F.3d 677 (6th Cir.2015) and *Law v. Siegel*, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014)) an exemption can only be disallowed if a statutory basis for doing so existed. The court found that Section 522 of the Bankruptcy Code did not provide such a basis, and rejected the argument that Bankruptcy Rule _____ served as a statutory basis. Tennessee having opted out of the federal exemptions, the court also considered whether a basis for denying the exemption existed under state law. Tennessee law provides that an exemption is not permissible where the item has been purchased with or maintained by fraudulently obtained funds. Reviewing the evidentiary record, the court found that the trustee had failed to prove that the debtors had set up the wife's account with the requisite fraudulent intent.

COMMENCEMENT OF CASE-VOLUNTARY-INVOLUNTARY-SUBSTANTIAL ABUSE.................................

***In re Matthews*, 516 B.R. 99 (Bankr. N.D. Tex. 2014)**. Chapter 7 case was filed by niece on behalf of her octogenarian aunt and under a Limited Power of Attorney. The court noted that there is not per se prohibition against powers of attorney authorizing the filing of a bankruptcy, but that increased scrutiny needed to be applied in situations where there was no inherent authentication of the power-of-attorney (such as one would see if the power-of-attorney were a guardian ad litem). Based on the limited information in the record (including the fact that the debtor had no non-exempt assets and lived in a nursing home, and that the niece was living in the house that was claimed as the debtor's schedules as a homestead), the court held that there was insufficient evidence that the debtor had the requisite mental capacity to appoint an attorney-in-fact, that the niece was well suited to act as the debtor's fiduciary, and so on. The court held that it would dismiss the case with prejudice if supplemental information was not filed within five days.

***Witkowski v. Boyajian (In re Witkowski)*, 523 B.R. 300 (B.A.P. 1st Cir. 2014)**. Repeat filer filed pro se Chapter 13 petition and failed to attend 341 meeting. After a hearing, the court was unsatisfied with her excuse for not attending the 341 meeting and found that she had not made her first plan payment, determining that dismissal would be the proper result. The debtor filed a motion to reconsider, which was denied, and then appealed the ruling on the motion to reconsider. The Panel held that Sections 1307 and 1326 authorize dismissal when a debtor fails to make plan payments and that the debtor had failed to meet her burden under Bankruptcy Rule 9023 with regards to establishing grounds for reconsideration.

***In re Baker*, 2015 WL 1515287 (Bankr. S.D. Tex. 2015)**. Chapter 13 debtors filed their fifth case in three years. Only two of those prior filings were disclosed by the debtors, who failed to file payment advices and credit counseling certificates. After issuing an order to show cause and holding a hearing, the court concluded that the debtors had willfully failed to prosecute their prior bankruptcy cases in violation of Section 109(g) and accordingly dismissed the case with prejudice to filing another case within 180 days. In addition, the court found that the bankruptcy attorney had violated Bankruptcy Rules 9011(b)(2) and (b)(3) in that, even though he had represented the debtors in four prior cases, he signed the petition with disclosure of only two of those cases; debtors' counsel was also sanctioned with a prohibition against filing Chapter 13 cases in the district until he had completed 15 hours of CLE in consumer bankruptcy law.

***In re Adamski*, 2015 WL 1607326 (Bankr. N.D. Ohio 2015)**. U.S. Trustee moved to dismiss above-median income debtors' Chapter 7 case for abuse under Section 707(b). U.S. Trustee did not argue that debtors' filed petition in bad faith, but rather that the totality of the debtors' circumstances demonstrated that they were not needy and that granting them a discharge would be an abuse of the provisions of Chapter 7. Finding that the debtors' allocation of $830 to utilities, transport expense of $600, claimed deduction for interest in a time share and claimed deduction for student loan expenses indicated that the debtors could and should be paying creditors. The court ordered the debtors to convert to a Chapter 13 or have their case dismissed.

***In re Lien*, 527 B.R. 1 (Bankr. D. Minn. 2015)**. The Bankruptcy Court found that the Debtors converted their case from Chapter 13 to Chapter 7 in bad faith (as that term is used in section 348(f)(2)) and as a result, the Chapter 7 estate included property acquired post-petition by the Debtors. The Debtors confirmed a Chapter 13 plan in May of 2012 that provided for total payments of $33,000. The Chapter 13 Trustee's final report showed total allowed claims of $345,241.97. In August of 2013, the Debtor received a distribution from his deceased mother's estate of $34,191.00. The Debtors did not tell the Chapter 13 Trustee about the receipt of these funds. The Debtor also had an interest in additional property yet to be distributed by his mother's estate, which would likely be worth over $15,000 to the Debtors. In May of 2014, the Chapter 13 Trustee requested additional information from the Debtors after reviewing their 2013 tax return. Rather than discuss the inheritance with the Chapter 13 Trustee, in July 2014, the Debtors filed a verified conversion form, converting their case to Chapter 7. The Chapter 7 Trustee filed a motion seeking a determination that the case was converted in bad faith and that as a result, the inheritance was property of the estate pursuant to section 348(f)(2).

Section 348(f)(2) provides that "[i]f the debtor converts a case under Chapter 13 of this title to a case under another Chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion." The Court discussed the appropriate factors to consider when determining whether a case has been converted in bad faith but was ultimately persuaded that this case was converted in bad faith because, among other things, (1) the Debtors could have continued making payments under their Chapter 13 plan without incurring a financial hardship, as they were still employed and their income actually increased during the Chapter 13 bankruptcy, (2) the Court did not find the Debtors credible when they testified that that they did not know that they had an obligation to report additional disposable income or property to which they became entitled during the pendency of their Chapter 13 case, including, most importantly, the inheritance-related property, (3) the Debtors failed to fully disclose their interest in additional property that they would receive as part of the inheritance, and (4) the Debtors did not provide credible testimony regarding why they chose to convert their case. While none of the individual reasons cited by the Court would be sufficient to find bad faith, the Court evaluated the totality of the circumstances and found that the Debtors were attempting to manipulate the Bankruptcy Code in an effort to obtain a windfall. Accordingly, the conversion was in bad faith, and the property of the Chapter 7 estate consisted of the property of the estate as of the date of conversion.

***In re Hayes*, No. 13-80035, 2015 Bankr. LEXIS 161 (Bankr. S.D. Tex. Jan. 16, 2015)**. The Bankruptcy Court dismissed the Debtor's bankruptcy case under 11 U.S.C. 707(b), finding that granting relief under Chapter 7 would constitute an abuse of its provisions. In this case, the

Debtor converted his bankruptcy case from Chapter 13 to Chapter 7 after filing four amended Chapter 13 plans. The Chapter 13 Trustee objected to all four amended plans on the basis that they did not provide for payment of all secured and priority debts. The Debtor's secured debts consisted primarily of a first and second mortgage on the residence he was awarded through his divorce and an improvement loan secured by the residence for construction of a pool and spa. After the Chapter 13 Trustee's fourth objection, the Debtor filed a notice of conversion to Chapter 7. The U.S. Trustee then moved to dismiss the case under section 707(b). As a threshold matter, the Bankruptcy Court adopted the view of a majority of courts and determined that section 707(b) applies to cases converted from Chapter 13 to Chapter 7. The Bankruptcy Court noted that the plain language of the section was susceptible to either view, but determined that the rationale of those courts applying its terms to converted cases was persuasive.

The Bankruptcy Court determined that the Debtor had not filed his bankruptcy case in bad faith and therefore, under section 707(b)(3)(B), considered whether abuse would occur under a totality of the circumstances test. Under this test, the Bankruptcy Court analyzed eleven factors, including the reasonableness of the Debtor's proposed family budget, the Debtor's ability to repay a substantial portion of his debts under a Chapter 13 plan, and whether the Debtor's expenses could be deducted without depriving him of his basic necessities. Some factors weighed against dismissal, the Bankruptcy Court found, such as the accuracy of the Debtor's schedules as a whole and lack of evidence that the Debtor incurred consumer advances and purchases in excess of his ability to repay, other than construction of the Debtor's home and improvements. The totality of the circumstances, however, weighed in favor of dismissal because the Debtor's proposed family budget provided for payment of more than 55% of the Debtor's take-home pay on his home and utilities. The Debtor's maintenance of a luxury home well above the median-value for the area, and of housing expenses more than triple the IRS local standards, could not be justified where no distribution was being made to creditors. Accordingly, the Bankruptcy Court dismissed the case.

***In re Johnson*, 532 B.R. 53 (Bankr. W.D. Mich. 2015).** The Bankruptcy Court for the Western District of Michigan found that a debtor cannot file for Chapter 13 bankruptcy if the debtor's income is derived from a medical marijuana business. Although growing and selling medical marijuana is legal in Michigan, it is criminalized under federal law. The debtor cannot disobey the federal law and gain from it at the same time. The Debtor's two sources of income, illegal and legal, will inevitably intermingle and the trustee is precluded from using the proceeds of federal criminal activity. If the debtor ceases the medical marijuana business, then the bankruptcy case can continue.

***In re Schwartz*, 2015 U.S. App. LEXIS 14846 (7th Cir. Ill. 2015).** The Court of Appeals found that debtors who spend more than their income on excessive expenditures instead of repaying their creditors should have their case dismissed. The debtors filed for Chapter 7 bankruptcy in order to discharge various large debts they owed. After filing, the debtors chose to spend their income on unnecessary luxury items instead of repaying their creditors. One creditor objected and asked the court to dismiss the bankruptcy case. The court agreed and determined the debtors were avoiding repayment without any justifiable reason. Thus, the case was dismissed for cause under 11 U.S.C. § 707(a).

***In re Wilcox*, 539 B.R. 137 (Bankr. S.D. Tex. 2015)**. United States Trustee moved to dismiss debtor's case for cause under Section 707(a). Debtor's Schedule J reflected that, despite gross monthly income of $23,193.33, debtor's net monthly income was $2.68. The bankruptcy court made findings of fact that illustrated in great detail debtor's lavish pre-bankruptcy spending, the fact that debtor had been receiving advice from bankruptcy counsel for roughly two years prior to the filing of the bankruptcy petition, and the debtor's claim that he had not made any payments to creditors over past two years because he did not want to create a preference. Clearly dissatisfied with the debtor's failure to make any effort to pay creditors and his "extravagant, if not downright outrageous" scheduled expenses, the court held that "cause" under Section 707(a) can include pre-petition conduct and dismissed the case without prejudice to the re-filing of a Chapter 11 petition.

***In re Laurie R. Montalto (In re Montalto),* 537 B.R. 147 (Bankr. E.D.N.Y. 2015).** The Bankruptcy Court for the Eastern District of New York found that a debtor's marital and expense deductions should be disallowed because a presumption of abuse arose under 11 U.S.C. § 707(b)(2). The court needed to decide the issue of where to place the burden to show how the income is used, whether for household expenses or as purely personal expenses of the non-filing spouse. The court decided that the non-filing spouse's income is presumed to be used for household expenses. Thus, once the trustee finds from the evidence a presumption of abuse, the burden shifts to the debtor to prove that the martial adjustments are correct. The burden is on the debtor because by falsely deducting certain expenses, the debtor is not including all the income that could be used to pay back creditors.

***Curtis v. Segraves (In re Segraves)*, 541 B.R. 449 (Bankr. 8th Cir. 2015)**. Chapter 13 debtor filed a certificate certifying that she had received the required credit counseling. Creditor move to dismiss under Section 109(h)(3)(A), arguing that the fact that the certificate was signed by the credit counseling agency and not the debtor constituted bad faith. The Panel rejected the creditor's arguments, holding instead that the plain language of Section 109(h) did not require that debtors sign the required credit counseling certificates.

AUTOMATIC STAY (SEE ALSO TURNOVERS/PROP. OF ESTATE)...

***In re Adams*, 516 B.R. 361 (Bankr. S.D. Miss. 2014)**. Debtors owed an auto-dealer roughly $5,000 secured by their car. Post-petition, repo men from auto-dealer repossessed the debtors' car despite being informed by debtors and their attorney that the bankruptcy stay prohibited them from doing so. Despite repeated efforts to reach the auto-dealer, the only reply received was a text message telling them that the repossession was the debtors' problem. After a series of cross-pleadings that included the attorney for the auto-dealer withdrawing as counsel because his client was not communicating with him, the court entered sanctions against the auto-dealer for willfully violating Section 362(k) and the automatic stay. Noting that oral notice of the filing of bankruptcy is sufficient, the court found that the repo men were agents of the auto-dealer and that their actions could properly be imputed to the auto-dealer. The court then awarded the debtors actual damages of $819.80 for loss of use of the vehicle and $380.87 for vehicle rental fees. The court also awarded the debtors for reasonable attorney's fees and expenses in the amount of $17,634.00 and punitive damages in an amount sufficient to wipe out the security interest that the auto-dealer held in their car.

***Carter v. First National Bank of Crossett (In re Carter)*, 583 Fed.Appx. 560 (8th Cir. 2014)**. Pre-petition, debtor assigned property of company to himself, but did not give notice of the assignment to the creditor whose interests were secured against that collateral. Debtor then filed a Chapter 13 petition, but did not give the creditor notice of the bankruptcy and still did not notify creditor of the supposed assignment of its collateral. Debtor did not make the creditor aware of the bankruptcy or the supposed assignment of the collateral until creditor had received post-petition relief in state court and judgment entitling it to immediate possession of the collateral. Debtor moved the bankruptcy court to sanction the creditor for willful violation of the automatic stay. On appeal, the Circuit Court affirmed the lower courts' rulings denying the motion and declining to sanction the creditor for a mere technical violation of the automatic stay.

***Crouser v. BAC Home Loans Servicing (In re Crouser)*, 567 Fed.Appx. 902 (11th Cir. 2014)**. Post-petition and after confirming a plan, Chapter 13 debtor filed adversary proceeding against his mortgage lender. Debtor and defendant settled, and Chapter 13 trustee argued to the bankruptcy court that the settlement proceeds were property of the estate. The Circuit Court affirmed the ruling that Section 1306(a)(1) operated to make settlement proceeds from an automatic stay violation property of the estate.

***America's Servicing Company v. Schwartz-Tallard (In re Schwartz-Tallard)* 2015 WL 5946342 (9th Cir. 2015)**. Creditor was found to have violated the automatic stay and debtor was awarded attorney's fees. The creditor appealed both the fee award and the determination that the stay had been violated, but lost. Debtor then requested and was awarded her costs of defending the appeal. A three-judge panel of the circuit court held that under Section 362(k)(1) the attorney's fees for defending the appeal were "actual damages" because the debtor had been defending herself from a creditor's appeal of a finding of violation of the automatic stay and that the award was therefore permissible.

After rehearing en banc, a divided Ninth Circuit explicitly overruled its prior decision in *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) which had held that Section 362(k) allows debtors to recover only those fees which were incurred to end the stay violation itself and not fees incurred prosecuting the resulting damages action. Relying primarily upon the language of the statute, the court concluded that the *Sternberg* did not accurately reflect Congressional intent and instead multiplied litigation. Under Section 362(k), the Court held, because the debtor was entitled to recover attorney's fees for obtaining the judgment, debtor was also entitled to attorney's fees for defending the judgment on appeal.

***In re Leiba*, 529 B.R. 501 (Bankr. E.D.N.Y. 2015)**. Pre-petition creditor ignored the admonitions on the Notice of the First Meeting of Creditors regarding enforcement of the automatic stay and instead served a state court summons on the debtor at the First Meeting of Creditors. Counsel for the debtor subsequently demanded that the creditor cease prosecuting the state court action, but the creditor refused to comply. The debtor initiated an adversary proceeding seeking damages pursuant to Section 362(k) for willful violation of the automatic stay. The court found the stay violation to be willful because the creditor had had notice of the filing of the bankruptcy case (as evidenced by her appearance at the FMOC). The creditor argued that the sanction should only include attorney's fees actually paid to debtor's counsel, a position which the court rejected stating that the amount actually paid is not relevant for the purposes of calculating damages under Section 362(k).

***Cantu v. Schmidt (In re Cantu)*, 784 F.3d 253 (5th Cir. 2015)**. After Chapter 11 case was converted, bankruptcy court denied debtors their discharge for making omissions, misstatements, and unnecessary controversies in their case. Debtors sued their bankruptcy attorney for malpractice and eventually settled. The bankruptcy trustee and the debtors then disputed whether the claims against the attorney had belonged to the estate or the debtors. Applying the accrual approach, the Circuit Court held that the widespread misconduct alleged against the attorney had resulted in numerous injuries to the bankruptcy estate during the pendency of the Chapter 11 case caused the claim to accrue pre-conversion and therefore belong to the bankruptcy estate.

***Goldstein v. Stahl (In re Goldstein)*, 526 B.R. 13 (B.A.P. 9th Cir. 2015)**. The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the Bankruptcy Court, which held that certain claims in state court litigation that the Debtors filed nearly two years after receiving their Chapter 7 discharge were property of the estate that the Chapter 7 Trustee could compromise or sell. While the Debtors' case had been closed as a no asset case, these claims were not disclosed on the Debtors' schedules. The case centered on when the claims accrued; if they accrued prepetition, they were property of the estate, and if they accrued postpetition, they were not. The Debtors sued their home mortgage lender for fraud, promissory estoppel, and breach of contract for refusing to give the Debtors a loan modification under the Home Affordable Modification Program despite the Debtors having fully performed a HAMP trial period plan.

The Debtors' two arguments that the claims accrued postpetition were (1) the lender only formally denied the loan modification postpetition and (2) case law that would support the claims only came out after the bankruptcy was filed. The Court spent some time working through the standards for when a claim accrues but boiled it down to the basic proposition that for the purpose of determining whether a claim is property of a bankruptcy estate, if a claim could have been brought prepetition, it has accrued prepetition. The Debtors' first argument failed because even though a formal denial of the loan modification came postpetition, the denial of the loan modification was not a necessary component of any of the Debtors' claims, and all of the facts giving rise to the claims occurred prepetition. The Debtors' second argument failed because while supportive case law that came out postpetition may have strengthened the Debtors' claims, it did not create them and therefore had no effect on when they accrued. Accordingly, the Debtors' state court litigation claims were property of the estate and therefore the Chapter 7 Trustee could compromise or sell those claims.

***In re Ford*, 522 B.R. 842 (Bankr. D.S.C. 2015).** The court found that prosecuting a request for stay relief following an uncontested confirmation of the plan was a sanctionable violation of the confirmation order. The creditor was provided for under the plan and so the res judicata effect of confirmation precluded stay relief. The creditor had also not objected to the stay extension and had not objected to confirmation. Finding an abuse of process, the court ordered the creditor to pay the debtor's attorney's fees of $8,500.

***Addison v. United States Department of Agriculture (In re Addison)*, No. 1:15CV00041, 2016 WL 223771 (W.D. Va. Jan. 19, 2016)**. Government withheld debtor's federal income tax refund in order to satisfy a non-tax debt owed to the United States Department of Agriculture (USDA). The debtor brought an adversary proceeding against the USDA for violating the automatic stay and the bankruptcy court granted summary judgment in favor of the debtor. On appeal, the USDA argued that its actions constituted a permissible offset under the Treasury Offset Program, 26 U.S.C. § 6402(d)(1), because the debtor did not have an interest in his actual tax overpayment. The district court rejected the USDA's arguments, holding instead that prior to the actual offset under the Treasury Offset Program the overpaid funds belong to the taxpayer and therefore were property of the estate. Because the funds were property of the estate and the USDA had not actually made the offset prior to the petition date, the court held that the USDA had violated the automatic stay by withholding those funds from the debtor.

***In re Williamson*, 540 B.R. 460 (Bankr. D.N.M. 2015)**. Mortgage company moved to compel chapter 7 debtors to either enter into a reaffirmation agreement or redeem their manufactured home. Debtors argued that they had the right to retain their manufactured home as long as they made the required payments. The bankruptcy court held that neither Section 362(h) nor Section 521(a) entitled the mortgage company to compel the debtors to enter into a reaffirmation agreement or surrender the property. Finding that the debtors had specified their intent to retain the manufactured home but had failed to comply with their duty under Section 521(a) to specify an intent to redeem or reaffirm, the bankruptcy court held that Section 362(h) operated to lift the automatic stay and the manufactured home was therefore no longer property of the estate; however, the mortgage company had to look to nonbankruptcy law for its relief and because the debtors were not in default there was no immediately exercisable relief.

***In re Botello*, 2015 Bankr. LEXIS 3312 (Bankr. N.D. Tex. 2015).** The Bankruptcy Court for the Northern District of Texas found that the debtor could not overcome the presumption of bad faith in filing as he could not show any substantial change in circumstances since his last filing. The debtor wanted the automatic stay to continue in his case, but to do so he needed to prove good faith because he filed a second case within a year of his previous case. To prove good faith, the debtor had to show evidence that his financial and personal affairs had changed so that he could complete the plan. But, he could not overcome the presumption because his situation was the same and the issues from the first case were still present.

***In re Wendell Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015).** The Bankruptcy Court for the Eastern District of Virginia found that post-petition appreciation derived from the debtor's estate is property of the estate and should be included in his chapter 7 case. After the debtor converted from chapter 13 to chapter 7, the trustee wanted to include post-petition appreciation in the estate. The debtor argued that the appreciation should not be included in the chapter 7 estate because the appreciation accrued after the debtor filed for chapter 13, but before he entered into chapter 7. The court decided that the trustee is entitled to the appreciation because 11 U.S.C. § 541(a)(6) states that proceeds, profits, products, rents, and offspring from or of the estate are property of the estate. The court stated that post-petition appreciation is included in that definition.

***Stewart v. The Hampton Co. National Surety, LLC (In re Stewart)*, 13-11658-JDW, 2015 WL 9998259 (Bankr. N.D. Miss. Nov. 17, 2015)**. Debtor was bonding agent for surety company. In lawsuit over debtor's failure to remit premiums he had collected, the parties entered into an agreed judgment requiring installment payments. When debtor failed to abide by agreed judgment, the surety company filed a suggestion for writ of garnishment. When debtor learned of the garnishment, he filed for bankruptcy. When surety company learned of bankruptcy filing, it filed a criminal affidavit against the debtor alleging embezzlement. The debtor initiated an adversary proceeding asking the bankruptcy court to determine that the surety company had violated the automatic stay by filing the criminal affidavit. Based on the language of Section 362(b)(1), the bankruptcy court held that it was not necessary to determine the motive behind the initiation of the criminal proceedings and therefore the filing of the affidavit had not violated the automatic stay.

***City of Philadelphia v. Walker*, No. 15-01685, 2015 U.S. Dist. LEXIS 157629 (E.D. Pa. Nov. 23, 2015)**. Postpetition, city attempted to collect overdue real estate taxes from the debtor. Debtor filed a complaint against the city alleging violation of the automatic stay pursuant to Section 362(a). The court found that the city had willfully violated the automatic stay but that the debtor had shown no actual damages. Debtor filed an application for attorney's fees related to the automatic stay violation, and the bankruptcy court granted that application over the city's objection. On appeal, the district court held that Section 362(k)(1) makes actual injury a condition precedent to any request for actual damages and that the Supreme Court's holding in *Baker Botts L.L.P. v. ASARCO*, LLC [135 S. Ct. 2158 , 192 L. Ed. 2d 208 (2015)] precluded awarding attorney's fees for defending a fee application.

***Hunsaker v. United States (In re Hunsaker)*, 2016 Bankr. LEXIS 134 (Bankr. D. Or. Jan. 13, 2016)**. During course of Chapter 13 case, IRS delivered directly to debtors four notices demanding payment and advising of imminent enforcement action. After each notice, debtors' attorney wrote to the IRS advising them that the debtors were in bankruptcy and asking that the

IRS cease collection activity. Because IRS failed to cease demanding payment, debtors brought adversary proceeding alleging that the IRS had violated the automatic stay and seeking damages for emotional distress under Section 362(k). The court rejected the IRS' argument that Section 106 did not abrogate sovereign immunity as to automatic stay violation claims for emotional distress, and went on to hold that the debtors had made sufficient showing of harm to award them $4,000.

***California Coast University v. Aleckna (In re Aleckna)*, No. 5-12-AP-00247 RNO, 2016 WL 157592 (Bankr. M.D. Pa. Jan. 14, 2016)**. Creditor filed adversary proceeding against Chapter 13 debtor requesting that its claim be determined to be a non-dischargeable educational loan or benefit under Section 523(a)(8). Debtor counterclaimed alleging violation of the automatic stay based on the creditor's refusal to release her graduation transcripts. Debtor testified at trial that the creditor had informed her that it would not release her transcripts because there was a financial hold on her account. The court held that withholding transcripts is an action designed to collect unpaid debts. Noting that the docket reflected that the creditor was on the mailing list for the Notice of Chapter 13 Bankruptcy Case, the court applied the Mailbox Rule and ruled that the creditor's witnesses had failed to rebut presumption that creditor had received notice of the bankruptcy case and therefore could be found to have willfully violated the automatic stay under Section 362(k). The court awarded actual damages in the form of one-day's pay to debtor in compensation for the day of work that she had to miss in order to attend the trial, and attorney's fees; debtor's claims for emotional distress were determined to be unsupported because debtor failed to provide evidence that she had suffered any ailments or required any medical treatment due to the violation; claim for punitive damages was denied at least in part because the court acknowledged that there was not universal agreement in the case law as to whether withholding transcripts constitutes a violation of the automatic stay.

***In re Akwa*, No. 15-26914-PM, 2016 WL 67219 (Bankr. D. Md. Jan. 5, 2016)**. Unemployed repeat Chapter 13 debtor moved the court to extend the automatic stay against all creditors pursuant to Section 362(c)(3) and for a ruling that that section does not apply to property of the estate. In her previous case, she had unsuccessfully tried to modify her home mortgage through an adversary proceeding and then dismissed the case when it became apparent that she could not propose a confirmable plan, and in the present case she failed to secure even part-time employment prior to the hearing on her motion. The court denied the motion, holding that Section 362(c)(3)'s provisions apply to property of the estate and that the debtor had not demonstrated that she filed the case in good faith because she could not demonstrate a substantial change in her financial circumstances from the prior case.

***In re Congregation Birchos Yosef*, 535 B.R. 629 (Bankr. S.D.N.Y. 2015)**. Chapter 11 debtor commenced an adversary proceeding against several persons. Those persons then invoked a Jewish religious court which enjoined the principals of the debtor from pursuing the adversary proceeding and threatened the principals with communal shunning. On motion by the debtor, the bankruptcy court held that the Jewish religious court and the persons who invoked it had violated the automatic stay. Noting that the adversary proceeding involved no issues of religious doctrine and was not an interchurch dispute, the court held that application of the automatic stay in this context did not violate the First Amendment because Section 362(a) is general and neutral in its application and is not directed at religious observance or excessively entangled with religion.

***Thaw v. Moser (In re Thaw)*, 769 F.3d 366 (5th Cir. 2014)**. Post-BAPCPA, doctor has judgment entered against him by former partner. Around the same time that the judgment was entered, doctor and his wife purchased a home for more than $2 million and immediately began making contract-for-deed payments of twice the required amount. In June of 2011, doctor and wife closed on the purchase of the home. In December of 2011, doctor filed for Chapter 7 bankruptcy and claimed homestead as exempt. Doctor subsequently conceded that his exemption was capped by § 522(p), and court ruled that doctor's exemption was reduced to $0 by operation of § 522(o) because doctor acted with intent to hinder, delay, and defraud his creditors. Wife argued that she had a separate, vested homestead property right that was not subject to the limits of §§ 522(o) and (p) and that the Fifth Amendment therefore precluded a § 363 force sale. The Fifth Circuit found that, because the home had been purchased post-BAPCPA and because wife was therefore on constructive notice as to how the Bankruptcy Code would operate in the event of the doctor's bankruptcy, the home could be sold under § 363 and controlled whatever distribution might be owing to the wife.

***In re Meier*, 528 B.R. 162 (Bankr. N.D. Ill. 2015)**. Individual debtor filed Chapter 11 case and later converted to Chapter 7. Upon conversion, debtor claimed $98,004.23 in the DIP checking account as not property of the estate, contending that they constituted exempt post-petition personal services income. Finding that Section 348(f)(1) applies only to conversions of Chapter 13 cases, the court held that post-petition income of a Chapter 11 debtor becomes property of the estate upon conversion.

***In re Parsons*, 530 B.R. 411 (Bankr. W.D. Tex. 2014)**. Chapter 7 trustee objected to debtors' homestead objection on the grounds that the debtors did not have any equity in the home. Stressing the fact that Texas homestead exemptions are unlimited as to value, the court both found that the debtors' had equity in the homestead and that they did not need to have equity in the homestead in order to exempt it from the bankruptcy estate.

***In re Saldana*, 531 B.R. 141 (Bankr. N.D. Tex. 2015)**. The Bankruptcy Court for the Northern District of Texas held that despite equitable concerns and bad faith conduct, a debtor may change the property for which they are claiming a homestead exemption at a very late stage in a bankruptcy case even after their original claim of exemption has been challenged. The Court also held, however, that bad faith conduct, while not punishable by denying an amendment to claimed exemptions, could still be addressed with sanctions under Bankruptcy Code section 105. The Debtor owned a number of parcels of real property that the Court identified as "Parcel 1—the Homesite," "Parcel 2," "Parcel 3," "Parcel 4" (collectively referred to as the "French Properties"), and the "Business Properties—60 Acres." For the first fifteen months of his case, during which the Debtor amended his Schedules several times, he claimed the French Properties as his exempt homestead under Texas law. The Chapter 7 Trustee objected to the Debtor claiming a homestead exemption in the French Properties. After this objection had been fully briefed on the merits, after the hearing on this objection began and the parties made opening statements, and after "significant questioning occurred regarding what the facts and issues were with regard to the French Properties," counsel for the Debtor announced—while the Debtor was still on the witness stand—that he would be changing his exemptions to now assert a homestead interest in a portion of the Business Properties—60 Acres and Parcel 4 of the French Properties. The Court continued the hearing to a later date and ordered that the Debtor file an amended Schedule C reflecting this change.

The Court ultimately considered the propriety of the amended exemptions under Texas law and found that the Debtor could exempt the Business Parcel—60 Acres but not Parcel 4. The Court then turned to whether the Debtor's homestead exemption could be barred based on bad faith, judicial estoppel, or prejudice to creditors based on the Debtor's conduct in changing his claimed exemption. The Court held that the case of *Law v. Siegel*, 134 S. Ct. 1188 (2014) took away a bankruptcy court's discretion to grant or withhold exemptions based on equitable considerations. Therefore, because state law supported the Debtor's exemption of the Business Parcel—60 Acres, the bankruptcy court could not change that result. *Law v. Siegel* did not, however, take away a bankruptcy court's authority to sanction conduct under either Federal Rule of Bankruptcy Procedure 9011 or section 105. The Court did not find that a sanction under Rule 9011 was appropriate in this case, but it did find that there was bad faith, the actions were callous and recalcitrant, and the actions were somewhat arbitrary and capricious. The Debtor's amendment of his homestead exemption took place after claiming his original homestead exemption for fifteen months, after the objections to the Debtor's homestead exemption were on file for more than three months, after the parties participated in a hearing on the exemption for more than an hour, and after an unopposed (though ultimately unsuccessful) sale process went forward two months earlier with respect to Business Properties—60 Acres. This was so unreasonably late that it caused the parties, as well as the Court, to needlessly prepare for a hearing that should have never gone forward. A sanction under section 105 was justified, and the Court chose to hold both the Debtor and his counsel jointly and severally liable for the sanction.

***Taylor v. Caillaud*, 2015 U.S. Dist. LEXIS 160984 (W.D.N.C Dec. 01, 2015)**. Chapter 7 debtor inherited proceeds from sale of father's home, her father having passed away within six months of the filing of her bankruptcy case. Despite being reminded by counsel that she needed to disclose the inheritance in the bankruptcy case, debtor failed to do so. The Chapter 7 trustee learned of the inheritance and demanded that it be turned over; the debtor responded by amending her state-law exemptions to include a portion of the inheritance. On appeal, the district court held that dicta in *Law v. Siegel*, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014) precludes bankruptcy courts from exercising their equitable power to deny an exemption unless state law specifically authorized such an action. Looking to the relevant state law, the court found that bad faith or fraudulent conduct were not grounds for denying the exemption.

***Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli)*, 542 B.R. 245, 249 (B.A.P. 9th Cir. 2015)**. Chapter 7 trustee made untimely objection to debtor's homestead exemption claim, arguing that the deadline for his objection was extended under Rule 4003(b)(2) because the debtor had fraudulently asserted the claim. Bankruptcy court held that Chapter 7 trustee could not extend period to object to debtor's homestead exemption because he could have discovered debtor's misstatements earlier and that evidence of debtor's subsequent false statements (e.g. she had originally said that she lived at the homestead, but when that was shown to be demonstrably false she claimed that she kept her personal belongings there and did not have a primary residence) about her exemption claim did not support a finding that she fraudulently claimed the exemption in the first place. The Panel held that "fraudulently asserted" under Rule 4003(b)(2) should be construed with regard to the common law definition of fraud and Section 523(a)(2). The Panel held that the trustee's failure to investigate was irrelevant to the Rule 4003(b)(2) question and that the bankruptcy court had improperly discounted the debtor's subsequent statements and actions as evidence of her fraudulent intent.

JURISDICTION AND VENUE……………………………………………………………………………………

***Galaz v. Galaz (In re Galaz)*, 765 F.3d 426 (5th Cir. 2014)**. Prepetition divorce decree assigned 25% interest in business to debtor and 25% to ex-husband; remaining 50% was held by business partner of ex-husband. Without informing business partner, ex-husband transferred assets of business to new entity owned by ex-husband. The transferred assets, which had not realized any revenue up to that point, subsequently brought in roughly $1 million. After filing her bankruptcy petition, debtor brought adversary proceeding asserting claims under Sections 542, 544, 548, and state fraudulent transfer law; ex-husband filed third-party complaint against business partner, who in turn counterclaimed against ex-husband. The bankruptcy court ruled in favor of debtor and the business partner and awarded actual and exemplary damages to each. On appeal, the ex-husband argued that the bankruptcy court lacked jurisdiction to enter final judgments. The Fifth Circuit vacated and remanded with instructions to dismiss the judgment in favor of the business partner, holding that the bankruptcy court lacked statutory jurisdiction to adjudicate his counterclaims. With regards to the debtor's claims, the Court held that the bankruptcy court lacked constitutional jurisdiction to enter final judgment in her favor, but that on remand the judgment could be recast as proposed findings of fact and conclusions of law which the district court could then review de novo.

PROCEDURE ....

***Moushigian v. Marderosian*, 764 F.3d 123 (1st Cir. 2014)**. Plaintiff sued debtors in district court on claims of fraud and embezzlement. When debtors filed for bankruptcy, plaintiff filed single motion requesting relief from stay and declaration from court that the continued prosecution in district court would be deemed sufficient to satisfy the deadline for commencement of an adversary proceeding challenging dischargeability under § 523(a). The court entered a four-word order: "Relief from stay granted." Creditor assumed that all the relief he had requested had been granted and took no further action to object to discharge. When the period for objections passed, the debtors were granted their discharge and the bankruptcy court ruled that the creditor had failed to timely object to discharge. On appeal, the creditor unsuccessfully argued that the four-word order was ambiguous and could have been read as though it had stated "All relief granted" and that the bankruptcy court had abused its discretion by not employing § 105(a) to save him from the mistake.

***Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015)**. The Supreme Court held that unlike an order granting confirmation of a Chapter 13 plan or an order dismissing a bankruptcy case, an order denying confirmation of a Chapter 13 plan is not a final order that the debtor can immediately appeal. In this case, a Chapter 13 debtor sought confirmation of a plan in which the Debtor's home mortgage would be bifurcated. The lender would have a secured claim for the current value of the house, for which the lender would receive payment in full through the Debtor's regular mortgage payments extending beyond the term of the plan, and an unsecured claim for the balance of the lender's claim, for which the lender would receive as much as the Debtor's income would allow over the term of the plan. The lender objected, and the Bankruptcy Court denied confirmation but noted that other bankruptcy courts in their circuit had approved similar plans in the past.

On appeal, the Bankruptcy Appellate Panel noted that the order denying confirmation was not a final order, but exercised its discretion to review the order anyway and affirmed the Bankruptcy Court. On further appeal to the First Circuit Court of Appeals, that court dismissed the appeal for lack of jurisdiction because the order was not a final order and the BAP did not certify the appeal under 28 U.S.C. § 158(d)(2). The Circuit Court concluded that an order denying confirmation is not a final order so long as the Debtor remains free to propose another plan.

The Supreme Court discussed the unique nature of bankruptcy proceedings, which contain "an aggregation of individual controversies" that would stand alone outside of bankruptcy and the general rule that an order in bankruptcy can be appealed only if it finally disposes of a discrete dispute within the larger case. The question in this case was whether each proposed plan presents a discrete proceeding that is concluded by an order granting or denying confirmation or if the overall plan process is the proceeding to be considered. The Supreme Court concluded that the relevant proceeding is the overall plan process primarily because the status quo is altered and the rights and obligations of parties are restructured only when a plan is confirmed or a case is dismissed.

***In re Parandeh*, 2015 Bankr. LEXIS 296 (Bankr. E.D. Va. 2015).** Holder of non-dischargeable claim failed to timely assert claim in current bankruptcy case under Fed. R. Bankr. P. 3002(c). The court found the creditor had adequate notice of the bar date because the notice was served on her attorney. Because the creditor did not timely file a proof of claim, she had no standing to object to the amount of the distribution under the debtor's amended Chapter 13 Plan. Further, since the creditor had a non-dischargeable judgment, and the debtor was not eligible for a discharge, the creditor lacked standing to object to the debtor's amended Plan on grounds of feasibility and good faith and also lacked standing to move to dismiss the bankruptcy case under 11 U.S.C.§ 1307(c). Other remedies (stay relief) may be available to the creditor.

***In re Lopez*, 2015 Bankr. LEXIS 3436 (Bankr. D.P.R. 2015).** The Bankruptcy Court for the District of Puerto Rico found that an undisputed lien did not need to be decided by an adversary proceeding and that a recent decision regarding undersecured mortgages did not apply to chapter 13 cases. The creditor and debtors were in dispute over how to set value and determine the secured status of the creditor. The creditor wanted the issue decided by an adversary proceeding. But, the court stated that an adversary proceeding is not necessary when the lien is not in dispute. In addition, the court had to decide whether to extend a recent court decision, *Bank of Am., N.A. v. Caulkett*, 135 S.Ct. 1995 (2015), to chapter 13 cases. In that decision, the court found that, during a chapter 7 case, the debtor could not void a junior mortgage when the senior mortgage exceeded the value of the property. This court did not follow that decision, stating that in certain chapter 13 cases a junior lien can be voided.

***Webster v. Bayview Loan Servicing, LLC*, 618 Fed. Appx. 864 (7th Cir. 2015)**. Debtor who had received bankruptcy discharge continued to receive collection calls and letters from a creditor. Debtor sued the creditor for violating the Telephone Consumer Protection Act (TCP) and the Fair Debt Collection Practices Act (FDCPA). The defendant tendered a settlement offer for the full amount of the debtor's claims and the debtor rejected the offer. The district court dismissed the lawsuit as moot based on debtor's rejection of the offer for full settlement. The Seventh Circuit reversed, holding that a defendant's offer of full compensation does not moot litigation, but left the door open for the district court to impose other consequences (such as waiver of claim or estoppel).

CLAIMS

***In re Clark*, 2014 WL 5100111 (Bankr. S.D. Tex. 2014)**. Former spouse of debtor filed untimely proof of claim asserting priority unsecured claim and requesting that the claim be treated as timely filed. Chapter 7 trustee objected and requested that the claim be disallowed. Applying § 726, the court found that the spouse had not shown excusable neglect and was therefore not entitled to have her claim treated as timely filed, but that § 726(a)(3)'s provisions for tardily filed claims to receive distributions after all timely claims would apply.

***In re Morales*, 520 B.R. 544 (Bankr. W.D. Tex. 2014)**. Debtors owned undivided 1/7th interest in a commercial lot. Creditor filed a proof of claim stating the value of the lot and asserting a lien on the entire lot based on a tax claim deed of trust made by the debtors. Debtors objected, arguing that lien could not encumber the 6/7th undivided interest not owned by debtors (owned by debtors' siblings). The bankruptcy court rejected the argument that the statement in the proof of claim as to the value of the lot was binding on the creditor and held that the creditor's lien was subrogated to the county's tax lien and therefore covered the entire commercial lot.

***In re Sanders*, 521 B.R. 739 (Bankr. S.C. 2015)**. Chapter 13 debtor failed to make pre-petition balloon payment on mortgage. Debtor proposed Chapter 13 plan that would pay the arrearage on the mortgage without interest. The mortgage lender did not object to the plan, but the Chapter 13 trustee did on the grounds that the plan did not conform with the requirements of Section 1322 and 1325. The court denied confirmation, holding that the contract between the debtor and the mortgage holder obligated the debtor to pay interest on the principal, that Section 1322(c)(2) would permit the debtor to modify the mortgage holder's claim, but that debtor's failure to include interest did not provide the mortgage holder with the present value of its allowed claims as of the effective date of the plan as required by Section 1325(a)(1).

***In re Curry*, 526 B.R. 276 (Bankr. C.D. Ill. 2015)**. The Bankruptcy Court held that a consolidated student loan subject to income-based repayment terms could not be treated separately in a Chapter 13 plan as an assumed executory contract. The Debtors argued that the student loan was an executory contract because while the Debtors were required to make payments, the lender was required to forgive any loan balance after twenty-five years because the Debtors elected the income-based repayment option. The Court disagreed. The income-based repayment option is merely an alternative method of repayment, and the offer of multiple repayment options does not change the loan into an executory contract. The Court also noted that the Debtors' only remaining obligation was to make payments, which generally does not make a contract executory, and the lender's only remaining obligations were ministerial and not significant enough to render the loan an executory contract.

***In re Clark*, Case No. 12-31850, 2015 Bankr. LEXIS 1928 (Bankr. S.D. Tex. June 12, 2015)**. The Bankruptcy Court for the Southern District of Texas held that the deadline to file proofs of claim in section 726(a)(1) does not embody a due process element that requires actual notice to affected creditors. The two creditors in this case were each a mother to one of the Debtor's children, and each had a claim for child support arrears. Neither of the creditors were sent notice of the Debtor's bankruptcy case, and neither had actual knowledge of the bankruptcy case in time to file a timely proof of claim. When they found out about the bankruptcy, both went to the Illinois Department of Healthcare and Family Services (the "IFHS"), which assured them they that they did not need lawyers and the IFHS would take care of everything. An employee of the IFHS filed proofs of claim for both creditors, apparently without authority to do so, listing IFHS as the creditor and signing the proof of claim as "agent for Creditor." The Chapter 7 Trustee objected to the late-filed claims, and the Court allowed the claims but held that they would only be entitled to distribution under section 726(a)(3).

After the creditors obtained counsel, they filed a motion to vacate the Court's order. The creditors also filed documents purporting to adopt the proofs of claim filed by the IFHS. The basic argument that the creditors were making was that they should be allowed to 726(a)(1) priority for their claims because they were not served with notice of the bankruptcy and this lack of notice was not remedied by the fact that notice was given to IFHS. The Court first found that IFHS was indeed an agent of the creditors as effectively acknowledged in their adoption of the IFHS proofs of claim. The Court went on to find that the deadlines in section 726(a)(1) are not founded in due process. As a result, it really does not matter whether the creditors were properly served with notice of the bankruptcy case. The Court buttressed this interpretation by noting that section 726(a) does not disallow untimely claims, and it in fact provides for distributions to creditors that received notice of the bankruptcy as well as those that received no notice at all. Therefore, the Court held that the creditors' claims should be allowed as tardily-filed claims entitled to distribution under either section 726(a)(2) or 726(a)(3). In light of the notice issues and the situation with IFHS, the Court ultimately held that the creditors' claims should be entitled to distributions under section 726(a)(2).

***In re Trentadue*, 527 B.R. 328 (Bankr. E.D. Wisc. 2015)**. The Bankruptcy Court for the Eastern District of Wisconsin held that a former spouse's claim for attorneys' fees that were awarded by a family court as a result of the Debtor's misconduct during hearings on child support, custody, and placement was entitled to priority as a domestic support obligation under section 507(a)(1)(A). After getting divorced, the Debtor litigated a number of motions in state court regarding changes in child support, custody, and placement. During the course of this litigation, the Debtor's former spouse filed a motion to find the Debtor in contempt. The family court issued a ruling on all matters pending at the time and, while not holding the Debtor in contempt, ordered the Debtor to contribute $25,000 towards his former spouse's attorneys' fees. The family court generally found that the Debtor had made many of the matters significantly more complicated than they needed to be by, among other things, refusing to communicate and insisting on calling witnesses that did not really support his positions. The Debtor did not pay the $25,000 as ordered, and when the Debtor filed for bankruptcy, the former spouse sought priority for this claim as a domestic support obligation.

The Debtor argued that the claim was not entitled to priority because the intent of the family court was to punish him for misconduct in litigation, not for the purpose of enforcing his duty to support his children or former spouse. Therefore, the claim did not satisfy the requirement in section 101(14A)(B) that it was "in the nature of alimony, maintenance, or support." The Court noted that this was not really a punishment because it was meant to compensate for the harm that the Debtor did to the former spouse because of the Debtor's "overtrial." While not all awards of attorneys' fees in family court are deemed domestic support obligations, the Court found that, in substance, the obligation was one which will benefit the Debtor's children, who were the subject of the litigation giving rise to the award.

***In re Onochie*, 2015 Bankr. LEXIS 2217 (Bankr. S.D. Tex. 2015).** The Bankruptcy Court for the Southern District of Texas found that the creditors were not allowed to receive attorney's fees and costs. Both creditors requested an award of attorney's fees and costs because they prepared documents and proofs of claim to be filed in the bankruptcy case. The court stated that the fees the creditors put forth did not fall under the allowed fees listed in Tex. Tax Code Section 32.06(e-1). Thus, the language in 11 U.S.C. § 506(b), that fees are available if provided for in the agreement or state statute, does not apply.

***In re Galindez*, 514 B.R. 79 (Bankr. D.P.R. 2014).** The mortgage creditor failed to object to the Trustee's Notice of Final Cure to challenge full payment of mortgage arrears claim. The res judicata effect of the confirmed plan was upheld to disallow any further claim to the creditor, as they had notice (and due process) of the confirmed plan and a post-confirmation plan modification. The consequence of the creditor's failure to timely act was that the mortgage note was deemed current.

***Martin v. Quantum3 Group (In re Martin)*, 13-12528-JDW, 2015 WL 9999228 (Bankr. N.D. Miss. Oct. 9, 2015)**. Creditor filed a proof of claim for an allegedly time-barred debt and the debtor initiated an adversary proceeding seeking a determination that the creditor had violated the Fair Debt Collection Practices Act (FDCPA). The bankruptcy court dismissed the complaint, finding that Section 502 permits the filing of proofs of claims on time-barred claims and that the appropriate vehicle for challenging such claims is the claims objection process.

***In re Otworth*, 2015 Bankr. LEXIS 3412 (Bankr. W.D. Mich. 2015).** The Bankruptcy Court for the Western District of Michigan found that they did not need to hear the debtor's claim because the claim had been conclusively argued and rejected in a previous case. The debtor felt that two local taxing authorities taxing his property was a criminal act because the two authorities were unincorporated. Unincorporated villages and townships are prohibited from collecting taxes under Michigan law. When the debtor discovered this, he stopped paying property taxes and the creditor placed a tax escrow on the mortgage. The debtor asked the bankruptcy court to hear this issue but, because the debtor already litigated this issue in a previous proceeding, the debtor is estopped by issue preclusion from raising it again in the present case.

***Scheible v. Quantum3 Grp.*, LLC, 2015 U.S. Dist. LEXIS 150845 (S.D. Ind. Nov 06, 2015)**. Creditor filed proof of claim in debtor's Chapter 13 case. Debtor successfully objected to the claim on the grounds that it was time-barred under applicable state law. Debtor then brought claims under Fair Debt Collections Practices Act (FDCPA) for filing of a proof of claim regarding a time-barred debt. Noting that the debtor had failed to point to any incorrect information in the proof of claim, that debtor had been represented by counsel in the bankruptcy case, that the claim had been successfully objected to, and that a debt collector need not be licensed under state law in order to file a proof of claim, the district court held that the debtor had failed to state a viable claim under the FDCPA.

***In re Phillips*, 2015 Bankr. LEXIS 3315 (Bankr. E.D. Wis. 2015).** The Bankruptcy Court for the Eastern District of Wisconsin found that lack of notice of a bankruptcy filing does not allow an exception for late-filing creditors. The Department of Education did not file a claim in the debtor's case because they lacked notice. The debtor did list the Department as a creditor but by the time the Department found out about the case, the timely filing deadline had passed. The Department wants the court to allow an exception for creditors, who do not have notice of the case, to file after the deadline. But, the court stated that allowing a late-filed claim in would go directly against the Bankruptcy Rules. While the Department is not included in the case, it is still afforded a way to seek collection of its debt either by waiting until the plan is completed or through immediate collection.

***Castellanos v. Midland Funding LLC*, 2016 U.S. Dist. LEXIS 165 (M.D. Fla. Jan. 04, 2016)**. Creditor filed proof of claim in debtor's Chapter 13 bankruptcy case for credit card debt on which the statute of limitations to collect had expired. Debtor sued the creditor for violating the Fair Debt Collection Practices Act (FDCPA). The creditor moved to dismiss under 12(b)(6) for failure to state a claim, arguing that the Bankruptcy Code permits filing of stale proofs of claim. The court agreed, dismissing the case on the grounds that the Bankruptcy Code permits the filing of stale proofs of claims and that doing so cannot therefore be a violation of the FDCPA.

DISCHARGE - OVERALL-EFFECT OF DISCHARGE

***Banco Pop., N.A. v. Kanning*, 15-50342, 2016 WL 373505 (5th Cir. Jan. 29, 2016)**. Husband and wife agreed to assign to bank the beneficiary interest in a life insurance policy on the husband. The forms necessary to make that assignment binding on the life insurance company were never properly completed. When the husband died, the life insurance company paid the wife the proceeds from the policy. The wife later filed for bankruptcy, claiming those proceeds as exempt. Some time after the wife received her discharge, the bank sued her in federal district court in an effort to recover the life insurance proceeds. The Circuit Court rejected the wife's arguments that the bank had violated her discharge injunction, holding that the bank's complaint demonstrated that it claimed a lien interest in the life insurance proceeds, that such a claim constituted an in rem action, and accordingly the discharge injunction did not bar the bank from bringing its claims for monetary relief.

***Skavysh v. Katsman (In re Katsman)*, 771 F.3d 1048 (7th Cir. 2014)**. Debtor in ostensibly no-asset Chapter 7 case deliberately omitted several creditors from her schedules. Unlisted creditor initiated adversary proceeding objecting to discharge under
§ 727(a)(4)(A) (false oath or account). The bankruptcy judge ruled in favor of the debtor, noting that it did not appear that she intended to obtain a pecuniary benefit. The district court reversed and the Circuit Court affirmed the district court. Noting that the debtor had made other omissions and had been represented by counsel, the Circuit Court rebuked the bankruptcy court for "miss[ing] the pattern," further holding that "fraudulent" in the bankruptcy context does not require an intent to obtain pecuniary gain.

***Rainsdon v. Anderson (In re Anderson)*, 526 B.R. 821 (Bankr. D. Idaho 2015)**. Chapter 7 debtors mistimed filing of bankruptcy so that they inadvertently had money in their bank account at the time of filing. Consistent with practice in the district, the day the petition was filed the Court entered an income tax turnover order. Court later entered an order requiring the debtors to turn over the moneys that had been in their bank accounts at the time they filed the bankruptcy petition. Debtors failed to comply with both turnover orders., instead using the income tax return to pay child support. The court held that the debtors had acted in a deliberate and calculated manner such as justified denying them their discharge under Section 727(a)(6)(A).

***Elliott v. Weil (In re Elliott)*, 529 B.R. 747 (B.A.P. 9th Cir. 2015)**. Debtor was granted a discharge in March of 2012. More than one year later, Chapter 7 trustee filed an adversary complaint seeking to revoke the debtor's discharge pursuant to § 727(d)(1) and requesting that the debtor be required to turn over a house to the trustee pursuant to § 542(a). The bankruptcy court found that the debtor knowingly and fraudulently failed to disclose in his schedules his ownership in a house, revoked the debtor's discharge, and ordered the debtor to turn over his house to the trustee. The panel reversed, holding that the bankruptcy court lacked subject matter jurisdiction to revoke the discharge because § 727(e)(1) requires actions seeking to revoke a debtor's discharge to occur within one year of the granting of the discharge. In light of its prior decision in this case regarding the debtor's claimed homestead exemption in the house (*Elliott v. Weil (In re Elliott)*, 2014 WL 6972472 (B.A.P. 9th Cir. 2014), the panel also vacated the ordering requiring the debtor to turn over the house, remanding to the bankruptcy court for determination of whether the estate's interest in the house were sufficiently consequential to justify ordering turnover of the house.

***Buescher v. First United Bank and Trust (in re Buescher)*, 783 F.3d 302 (5th Cir. 2015)**. Husband and wife filed joint Chapter 7 bankruptcy petition. Bank filed an adversary complaint seeking to deny discharge to both debtors under Section 727(a)(2)-(5). Debtors moved to dismiss for failure to timely serve process; wife challenged Bank's standing to object to her discharge on the grounds that only the husband was personally liable to the bank. The Court held that Texas community property law meant that the Bank could have sought repayment in Texas court through an in rem suit against the wife and therefore had standing to object to the wife's discharge even though she was not personally liable to the bank. The Court also held that the debtors could not complain that the bankruptcy court had granted the bank additional time to serve the complaint because the debtors had not updated their address and had purposefully avoided service. Finally, the Court affirmed the ruling that the debtors had failed to keep financial records, noting that the trustee was on record stating that the information provided by the debtors had made it impossible to trace various proceeds from pre-petition sales of property and liquidation of IRAs.

***Wieland v. Gordon (In re Gordon)*, 526 B.R. 376 (B.A.P. 10th Cir. 2015)**. The Bankruptcy Appellate Panel for the Tenth Circuit affirmed the Bankruptcy Court's denial of the Debtor's discharge pursuant to section 727(a)(2) for concealing property with intent to hinder, delay, or defraud creditors and section 727(a)(4) for knowingly and fraudulently making a false oath or account. As a bit of background, the Debtor was a sophisticated businessman and was also, at one time, a securities attorney and a certified public accountant. After making millions of dollars on a "pump and dump" securities scheme, the Debtor was convicted by a jury for wire fraud, securities fraud, money laundering, engaging in a wire-fraud scheme, and obstruction of justice. Following his conviction, the Debtor filed for Chapter 7 bankruptcy.

The Debtor had a long history of trying to keep property, such as his homestead and his vehicles, titled in his wife's name despite the fact that he paid for them and continued to use them as his own. When he filed his schedules and his statement of financial affairs, the Debtor took the position that he had no interest in his residence or in several family vehicles. The Bankruptcy Court found that the Debtor's schedules and statement of financial affairs were rife with misstatements and omissions. After the Bankruptcy Court denied the Debtor's discharge, three issues were raised on appeal. The first issue was whether a plaintiff asserting continuing fraudulent concealment under section 727(a)(2)(A) must prove that creditors were damaged as a result of the Debtor's conduct. The Court noted that the elements of section 727(a)(2)(A) do not require a showing of harm and courts in other jurisdictions have "soundly rejected a detriment element" under section 727(a)(2). The Court, however, ultimately did not decide whether harm is required because there was harm in this case.

The second issue on appeal was whether the evidence presented at trial by the plaintiff was sufficient to support the Bankruptcy Court's denial of discharge under section 727(a)(2)(A) for concealing property with intent to hinder, delay, or defraud creditors. The Court did not struggle with this issue. The Court noted that the Debtor consistently denied ownership of his assets, claimed not to remember details of his transactions, was evasive, and failed to keep adequate records of his business dealings. The evidence clearly supported the finding that the Debtor titled major assets solely in his wife's name because he wanted to keep them out of the reach of his own creditors, and fraud can be inferred when an individual transfers title to an asset but continues to exercise dominion over it. The third issue on appeal was whether the Bankruptcy Court erred by denying a discharge under section 727(a)(4)(A) for knowingly and fraudulently making a false oath or account based on misstatements and omissions in the Debtor's bankruptcy filings. While the Bankruptcy Court focused on the statements made regarding his house, the Court did not get bogged down on that single asset and noted that the evidence was sufficient to deny the Debtor's discharge because the number of false statements made by the Debtor in his bankruptcy papers was "overwhelming" and it is inconceivable that he did not know that he had some retained interests in the marital assets that he gave to his wife.

***Neary v. Harding (In re Harding)*, Case No. 14-3078, 2015 Bankr. LEXIS 145 (Bankr. N.D. Tex. Jan. 14, 2015)**. The Court concluded that sufficient evidence had not been presented to deny the Debtors' discharge under section 727(a)(3) or 727(a)(4)(A). There were some legitimate disagreements in this case about whether certain transfers should have been disclosed on the Debtors' schedules or statement of financial affairs, but the Court determined that to the extent mistakes were made, they were honest mistakes. The Court ultimately declined to deny the Debtors' discharge under section 727(a)(4)(A) for making a false oath because even though the Debtors made some inaccurate statements, the totality of the circumstances indicated that there was no fraudulent intent. The bigger issue was that the Debtors wrote checks to themselves in the amount of $200,000 in the two years before filing bankruptcy, and approximately $125,000 of this appears to have been used for cash expenditures for which contemporaneous ledgers were not maintained. From the testimony, it was clear that it had been both of the Debtors' practice for a number of years to carry a good deal of cash and to pay for their fairly lavish living expenses almost exclusively in cash. Despite the lack of receipts or records for their cash transactions, the Debtors did provide a good deal of financial records to the Trustee and went to great lengths to supplement those records in response to requests from the Trustee. The Debtors also maintained adequate books and records as to all of their real estate transactions and their loan transactions, filed annual joint tax returns, and maintained all bank statements and checking records for at least two years prior to the bankruptcy filing.

With regard to section 727(a)(3), the Court found that denial of the Debtors' discharge was not warranted because under the circumstances, the records and documentation provided by the Debtors allowed creditors to ascertain the Debtors' financial condition and business transactions. In addition, even if the records provided had been insufficient, it was reasonable for the Debtors—who traditionally dealt in cash rather than checks, debit cards, or credit cards for these types of expenditures—not to retain receipts for their groceries, restaurant bills, pharmacy bills, and expenditures made in connection with visiting with their children and grandchildren as none of those expenditures related to any business, nor did they concern any deductible items in connection with the Debtors' personal taxes. Accordingly, the Debtors' decision not to maintain contemporaneous records for these cash transactions was justified under all of the circumstances of this case.

***McDermott v. Schwartz (In re Schwartz)*, 527 B.R. 266 (Bankr. E.D. Mich. 2015)**. The Bankruptcy Court denied the Debtor's discharge under 11 U.S.C. §§ 727(a)(2)(A) and (a)(4)(A) where the Debtor transferred assets and used the hidden proceeds for living expenses within one year of the bankruptcy case and also made misrepresentations in his schedules and during the meeting of creditors. In this case, the U.S. Trustee brought a motion to deny the Debtor's discharge for disposing of property with an intent to hinder, delay, or defraud creditors under section 727(a)(2)(A) and for making knowing false statements materially related to the bankruptcy case with an intent to hinder, delay, or defraud creditors under section 727(a)(4)(A). Within one year of the bankruptcy case and after entry of a large judgment against the Debtor and one of his companies, the Debtor transferred, for no consideration, to a business friend a 98% interest in a limited liability company (the "LLC") that he recently formed, which transacted no business. This business friend allowed the Debtor to deposit the Debtor's funds in the LLC's bank account, including proceeds from the Debtor's recent sale of another company he owned. The Debtor used these funds to pay certain creditors and his family's living expenses. The Bankruptcy Court found, and the Debtor admitted, that these sale proceeds were placed in the bank account of the LLC and not the Debtor in order to hide them from the garnishment efforts of the judgment creditor. Standing alone, the Bankruptcy Court determined, the Debtor's transfer of a 98% worthless interest in the LLC for no value would not likely satisfy the requirements of section 727(a)(2)(A). This transfer of ownership interest in the LLC coupled with the subsequent placement of the Debtor's funds in the LLC's bank account to shield from creditors did, however, amount to disposition of property with an intent to hinder and delay. The Bankruptcy Court found that this intent was sufficient to deny discharge.

As to the claim for denial of discharge under section 727(a)(4)(A), the Bankruptcy Court held that the Debtor knowingly made material misrepresentations under oath and with fraudulent intent when he failed to identify on his schedules and in his statement of financial affairs many pre-petition transfers, including the transfer of 98% interest in the LLC, the sale of one of the Debtor's businesses and transfer of proceeds to the LLC's bank account, the use of the funds from the LLC bank account for living expenses and payment to creditors, and the transfer of a Ford Fusion to the Debtor and his spouse. The omissions were tantamount to misrepresentations because they created erroneous impressions. The Debtor also falsely testified that his spouse had loaned him funds for purchase of the Ford Fusion, among other things, at the 341 meeting and during his Rule 2004 examination. No loans were made. Based on this evidence, the Bankruptcy Court upheld the U.S. Trustee's claim under section 727(a)(4)(A), despite the Debtor's arguments that he had made inadvertent errors and false statements due to stress.

***In re Klein*, 15-52174-CAG, 2016 WL 420411 (Bankr. W.D. Tex. Jan. 29, 2016)**. Chapter 13 debtor received discharge after successfully completing five year plan period. A little more than one year after receiving that discharge, the debtor filed another Chapter 13 case. The Chapter 13 trustee moved the court to determine the debtor to be ineligible for a discharge pursuant to Section 1328(f). The bankruptcy court denied the trustee's motion, holding that the appropriate meaning of Section 1328(f)(2) is to prohibit debtors from receiving a second chapter 13 discharge in a case filed within two years of the filing date of a chapter 13 case in which the debtor received a discharge.

***Galasso v. Imes*, No. A-15-CA-578-SS, 2015 U.S. Dist. LEXIS 144170 (W.D. Tex. Oct. 22, 2015)**. After full bench trial on merits, bankruptcy court held that debtor was not entitled to discharge because he failed to keep or preserve financial records and failed to explain satisfactorily his loss of assets in violation of Section 727(a)(3) and (5). The record showed that the debtor had failed to produce banking information prior to the discovery deadline despite having been informed by the bankruptcy court that it was his obligation as the debtor to produce the requested documents. Debtor argued that bankruptcy court had erred in finding that no agreement existed between debtor and the complaining creditor as to who would be responsible for obtaining the banking information and that bankruptcy court had improperly excluded documents that debtor had not produced prior to discovery deadline. The district court affirmed the bankruptcy court, upholding the exclusion of the documents as a Rule 37 sanction and finding that the evidence supported the bankruptcy court's conclusion that there existed no agreement shifting the burden of obtaining those documents.

***Lakhany v. Khan (In re Sameer Lakhany)*, 538 B.R. 555 (B.A.P. 9th Cir. 2015).** The Ninth Circuit Appellate Panel found that the lower bankruptcy court abused its discretion when it granted a motion for relief from stay so that the creditor's debt would not be discharged. The Appellate Panel found that the ability to grant stay relief expired when the discharge was granted. In addition, the creditor did not have notice of the bankruptcy case and his debt was not listed. This meant that the creditor's debt is nondischargeable. The court only needed to issue an order that the discharge injunction from the bankruptcy case did not enjoin the creditor from establishing the debtor's liability in the state lawsuit.

***Hill v. Bearden (In re Bearden)*, 2015 Bankr. LEXIS 3056 (Bankr. S.D. Tex. 2015).** The Bankruptcy Court for the Southern District of Texas found a debtor was not eligible for discharge when she acted with fraudulent intent by refusing to give up an incentive fee she received. Under the advice of her lawyer, the debtor did not include an incentive fee in her bankruptcy case. The debtor thought that the fee fell under the exception of services rendered post-petition. But she completed the services and was paid before she filed for bankruptcy. Upon learning of the fee, the trustee told the debtor that she needed to turn it over. Instead of compiling, the debtor transferred part of the fee to her son and spent the rest. Thus, the court decided that the debtor was ineligible for discharge.

***HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477 (9th Cir. 2015).** The Ninth Circuit found that while the Bankruptcy Code disallows a discharge in a chapter 13 case if the debtor received a chapter 7 discharge within four years of filing for chapter 13, this does not disallow the ability of the debtor to use lien voidance. The debtors filed for chapter 7 bankruptcy and received a discharge. Then, within four years, they filed for chapter 13 bankruptcy. During these proceedings, a creditor's claim involving a lien was disallowed and the debtors moved to void this lien. After the court rejected the creditor's motion for reconsideration of the disallowance of its claim, the creditor argued that because the debtors could not receive a chapter 13 discharge they were not eligible for lien voidance. The court decided that a discharge is not necessary to void a lien.

***In re Alofsin*, 2015 Bankr. LEXIS 3496 (Bankr. D.R.I. 2015).** The Bankruptcy Court for the District of Rhode Island found that the court has discretion to reopen a chapter 7 case when the debtor omits a creditor, but the debtor must meet certain requirements. The debtor wanted to reopen his case because he did not list one of his creditors. The court had to decide whether to allow the amendment, because this would discharge the unsecured debt owed to the creditor. The debtor bears the burden to show that he should be allowed to reopen the case. The debtor must show that he did not fraudulently or intentionally exclude the creditor, the creditor is not unfairly prejudiced by being excluded, and reasonable diligence was made in listing the creditors in the case. The court concluded that the debtor did not meet any of these requirements. The debtor intentionally omitted the creditor and the creditor would be unfairly prejudiced if added to the case now.

DISCHARGE - PARTICULAR DEBTS ....

***In re Beacham*, 520 B.R. 561 (Bankr. S.D. Tex. 2014)**. Prior to debtor's bankruptcy petition, divorce court awarded debtor's former spouse attorney's fees "which were necessary in this case and necessary for the protection and best interest of the child the subject of this suit." [quoting the divorce decree]. After filing for Chapter 13 protection, debtor objected to former spouse's proof of claim and former spouse argued that the debt was a domestic support obligation and not dischargeable by operation of § 523(a)(5). Rejecting the debtor's argument that the BAPCPA amendments abrogated the Fifth Circuit opinions laying out the standard for whether an obligation is in the nature of support, the court held that attorney's fees awarded as part of a child custody dispute are in the nature of support and therefore not dischargeable under § 523(a)(5).

***In re Kemendo*, 516 B.R. 434 (Bankr. S.D. Tex. 2014)**. Several years prior to debtor's Chapter 13 bankruptcy, IRS prepared substitute returns with cooperation of the debtor. At end of debtor's Chapter 13, IRS disputed whether his § 1328(a) discharge included tax liabilities for the periods in which substitute returns had been prepared and argued that they were late filed returns excepted from discharge under § 1328(a)(2). The bankruptcy court held that the substitute returns were proper returns for dischargeability purposes and that they had been filed more than two years before the commencement of the bankruptcy case and were therefore not subject to § 523(a)(1)(B). Accordingly, the tax liabilities were found to be discharged.

***Pappas v. Texas Higher Education Coordinating Board (In re Pappas)*, 517 B.R. 708 (Bankr. W.D. Tex. 2014)**. Debtor received discharge in 1997. Creditor had filed undisputed proof of claim based upon student loans that the debtor had guaranteed and referred to the non-dischargeability provisions of § 523(a)(8). In 2011, creditor sued debtor in state court in effort to collect on the student loans. Debtor re-opened the bankruptcy case and sought a declaratory judgment that the student loan debt had been discharged. After going through an in-depth analysis of the student loan program and the history of § 523(a)(8), the court found that there was no exception for co-obligors of student loans and that the student loan debts in question were non-dischargeable as to the debtor.

***Richardson v. The Koch Law Firm*, 768 F.3d 732 (7th Cir. 2014)**. Attorney-debtor filed for first bankruptcy on eve of trial over his unpaid student loan debt, but did not inform court or counter-party of the filing. Default judgment was entered. When creditor learned of bankruptcy filing, it refrained from making efforts to collect. At end of bankruptcy case, creditor revived its effort to collect on the student loans, relying on nondischargeability under § 523(a)(8). Attorney-debtor filed a second bankruptcy and creditor again abated its collection efforts until close of the bankruptcy. Attorney-debtor then attempted to have creditor sanctioned for supposed violations of the Fair Debt Collection Practices Act. The district court dismissed for want of jurisdiction based on *Rooker-Feldman* doctrine, finding that attorney-debtor was trying to collaterally attack the state court judgment. After district court's decision but before briefing to the appellate court, attorney-debtor re-opened the bankruptcy case and the bankruptcy court held the state court judgment to be invalid (but not void); the bankruptcy court further concluded that any claim for damages belonged to a trustee because debtor had failed to schedule any claims against the creditor. In addition, the creditor asked the state court to vacate its own judgment, and it did so.

On appeal of the district court's *Rooker-Feldman* based decision, the Circuit Court noted the "appalling judgment" shown by both sides in not bringing to its attention the fact that the state court judgment had since been vacated. The circuit court then blasted the attorney-debtor for his pattern of behavior, stating as follows:

> It is hard to see how someone so deficient in the defense of his own interest could be an effective advocate for the interests of clients. And it turns out that he has not been; Indiana has suspended [him] from practice at least three times . . . [H]e is on notice: misfeasance or nonfeasance in federal litigation will lead to professional discipline.

The judgment of the district court was modified so as to be on the merits and affirmed as such.

***Mahakian v. William Maxwell Investments, LLC (In re Mahakian)*, 529 B.R. 268 (B.A.P. 9th Cir. 2015)**. Chapter 7 debtor omitted a creditor from his schedules. The case was initially noticed as a no asset case, but after the debtor received his discharge the Chapter 7 trustee filed a notice of assets and a claims bar date was set. The omitted creditor did not receive notice of the claims bar date and did not file a proof of claim. The omitted creditor subsequently foreclosed on the real property secured by the debt and file a state court lawsuit against the debtor in order to collect the deficiency. Debtor then amended his schedules to include the heretofore omitted creditor and filed a proof of claim on behalf of the creditor, along with an adversary proceeding seeking a determination that his debt to the creditor had been discharged and a ruling that the proof of claim was timely filed under Section 523(a)(3)(A) on excusable neglect. Applying Section 523(a)(3)(A) by its literal terms, the panel affirmed the ruling that the creditor was neither listed nor scheduled and did not otherwise know of the bankruptcy case and therefore the debt had not been discharged. The court pointedly rejected the debtor's efforts to use the excusable neglect standards with regards to tardy proofs of claim as a means of circumventing the plain language of Section 523(a)(3)(A).

***Nunez v. Key Education Resources (In re Nunez)*, 527 B.R. 410 (Bankr. D. Ore. 2015)**. Chapter 7 debtor dischargeability determination on student loan debts. Applying Section 523(a)(8), the court ruled that for a loan obligation to be non-dischargeable it must have been incurred to a governmental unit or a nonprofit institution. Applying Section 523(a)(8)(B), the court took judicial notice of the School Codes Lists identifying all post-secondary schools eligible for Title IV aid (the institution attended by the debtor not being on those lists) in reaching the conclusion that the loans in question did not qualify as eligible loans. Because the loans were not incurred to a governmental unit or a nonprofit institution, and because the loans were not otherwise eligible, the court held them to be discharged.

***Lamar, Archer & Cofrin, LLP v. Appling (in re Appling)*, 527 B.R. 545 (Bankr. M.D. Ga. 2015)**. Pre-petition, law firm represented debtor in lawsuit. Debtor failed to pay fees, resulting in law firm threatening to withdraw as counsel. Debtor represented to law firm that he would receive a tax refund of $100,000 which he would use to pay its fees. The law firm refrained from withdrawing as counsel and successfully settled the lawsuit. Debtor received a refund for only $60,000 but did not pay any of it to the law firm. When debtor filed Chapter 7, the law firm brought an adversary proceeding seeking to have the debt owed them determined to be nondischargeable under Section 523(a)(2)(A). After trial, the court held that the debtor had falsely represented with intent to deceive when he told the law firm that his tax refund would be $100,000, that debtor had committed false pretenses by not subsequently disclosing to the law firm the actual amount received as a tax refund, and that the law firm had been justified in its reliance on the representations made by the debtor. Because the law firm had agreed to continue to represent the debtor based on the debtor's misrepresentations, the entire debt owed (e.g. the amounts owed to the law firm for work done both before and after the misrepresentations) was nondischargeable.

***Sullivan v. Glenn*, 782 F.3d 378 (7th Cir. 2015)**. Debtors employed loan broker to obtain for them a short-term loan. The loan broker engaged in various deceptions in order to obtain a loan from a personal friend. When both the loan broker and the debtor filed for bankruptcy, the lender obtained a Section 523(a)(2)(A) judgment of nondischargeablity against the loan broker and sought to do the same against the debtors. The court rejected the argument that the debtors should be denied a fresh start based on the fraudulent actions of their agent, finding that the debt would only have been nondischargeable if the debtors had known or should have known of the fraud. The court went on to note that the lender had made the loan not based on the loan broker being the debtors' agent but rather based on his friendship with the loan broker, stating that his other dealings with the loan broker "bordered on the irrational".

***Wagner v. Wagner (in re Wagner)*, 527 B.R. 416 (B.A.P. 10th Cir. 2015)**. Father and son entered into verbal loan agreement. Son defaulted and moved to another state. Father sued son in state court and obtained judgment, then made collection efforts in state were son lived. Son began having his paycheck deposited in his then girlfriend's bank account, only stopping the month before he filed for bankruptcy protection. When the son filed for Chapter 7, he did not disclose his prior use of his girlfriend's bank account. Father brought adversary proceeding seeking to have discharge denied under Section 727(a)(4) for failure to disclose the bank account and the debt owed to him determined to be nondischargeable under Section 523(a)(2)(A) for representations made by the son at the time the loan was made.. The bankruptcy court made its credibility finding in favor of the father and denied the son's discharge while also holding the debt to be nondischargeable. The appellate panel found there to be no issues of law and affirmed the bankruptcy court.

***Dorsey v. U.S. Department of Education*, 528 B.R. 137 (E.D. La. 2015)**. Chapter 7 debtor brought adversary proceeding seeking determination that he was entitled to undue hardship discharge of student loan debts pursuant to § 523(a)(8). The bankruptcy court ordered the debtor to file an application for administrative discharge of his student loan debt under the Federal Family Education Loan Program (FELP) based on his being disabled. When the debtor failed to apply, the court dismissed his adversary proceeding. On appeal, the debtor contended both that he did not qualify for the administrative discharge under the FELP and that applying for the administrative discharge should not be a prerequisite to obtaining an undue hardship discharge. The district court held that dismissal for failure to apply for the FELP discharge was improper, although the failure to apply for the FELP discharge could be considered as part of determining under the *Bruner* test whether the debtor had made a good faith effort to repay his loans.

***Acosta v. ECMC (in re Acosta)*, 536 B.R. 326 (Bankr. M.D. Ala. 2015)**. Chapter 7 debtor brought adversary proceeding seeking determination that she was entitled to undue hardship discharge of student loan debts pursuant to § 523(a)(8). Debtor worked full-time as a public school teacher in a rural area, had two children, and received some child support. The court found that the debtor's status as being in a loan deferral program supported her claim of undue hardship, that debtor would not be required to apply for an income contingent repayment plan before she could be eligible for an undue hardship discharge, and that the debtor's youngest son being eleven-years old was additional indication that the debtor's circumstances were not likely to change in the foreseeable future (e.g. it would be many years before the debtor's children would be grown and out of the house).

***Sauer Southeast v. Lawson (in re Lawson)*, 791 F.3d 214 (1st Cir. 2015)**. Prepetition, Debtor A created a shell entity and transferred assets to it in order to impede collection by a judgment creditor. Debtor B (daughter of Debtor A) then transferred some of those assets to herself. The judgment creditor subsequently got a state court judgment against Debtor B for having taken the assets as fraudulent conveyance. Debtor B filed for bankruptcy and the judgment creditor brought an adversary proceeding seeking to have her debt determined to be nondischargeable pursuant to Section 523(a)(2)(A). The Circuit Court held that "actual fraud" under Section 523(a)(2)(A) was not limited to fraud effected by misrepresentation and that the judgment creditor did not need to be able to show misrepresentation in order to prevail.

***Mallo v. Internal Revenue Service (in re Mallo)*, 774 F.3d 1313 (10th Cir. 2014)**. Debtors failed to timely file pre-petition income tax returns. The IRS assessed taxes and penalties, whereupon the debtors filed late Form 1040s. The court held that late Form 1040s filed after the IRS has assessed the taxpayer's liability are not "returns" for the purposes of Section 523(a) and that associated tax liabilities are therefore excepted from the general orders of discharge.

***American Express Bank v. Mowdy (in re Mowdy)*, 526 B.R. 63 (Bankr. W.D. Okla. 2015)**. Shortly before filing for bankruptcy, debtor and wife charged over $100,000 on credit cards, much of it in Las Vegas at luxury retailers. Debtors' petition and schedules indicated that debtor was unemployed and did not have monthly income during the six months prior to the bankruptcy filing. The court held the credit card debt to be nondischargeable pursuant to Section 523(a)(2)(A) because the debtor had falsely represented at the time of the credit card charges that he intended to repay them.

***In re Ruben*, 774 F.3d 1138 (7th Cir. 2014)**. Pre-petition, debtor and others were sued for having negligently and fraudulently mismanaged a trust. Plaintiff agreed to arbitrate her claims shortly after the debtor filed his Chapter 7 case. Plaintiff filed an adversary complaint seeking a determination of nondischargeability of debt pursuant to Section 523(a)(2)(A) and (4). Plaintiff subsequently settled her negligence claims against all defendants, which left only her fraud claims against the debtor. The arbitration panel ruled that her settlement of the negligence claims had fully compensated her for her damages, but ordered the debtor to pay the Plaintiff's arbitration expenses. Plaintiff amended her adversary complaint to request a nondischargeability finding as to the award of arbitration expenses. Debtor argued that the arbitration fees award was a pre-petition claim related to the negligence settlement and therefore dischargeable. The Circuit Court, noting the obstinate and uncooperative behavior of the debtor in the arbitration and the findings of the arbitration panel which suggested that they believed the debtor had committed fraud, held that the debtor would not be allowed to undertake with impunity post-bankruptcy acts related to pre-petition obligations and found the debt to be nondischargeable.

***Gerard v. Gerard (In re Gerard)*, 780 F.3d 806 (7th Cir. 2015)**. The Seventh Circuit Court of Appeals held that the findings of a state court jury did not establish that the Debtor acted "willfully" within the meaning of 11 U.S.C. § 523(a)(6) because the jury's verdict could have been based on the Debtor's negligence. Prepetition, the Debtor's brother obtained a judgment against him for breach of contract and slander of title. When the Debtor filed for bankruptcy, the Debtor's brother filed an adversary proceeding and sought a determination that the jury findings supporting his judgment preclusively established that the judgment was non-dischargeable pursuant to 11 U.S.C. § 523(a)(6), which provides that "this title does not discharge an individual debtor from and debt for willful or malicious injury by the debtor to another entity or the property of another entity." The Bankruptcy Court held that the judgment based on slander of title and breach of contract satisfied section 523(a)(6), and the District Court affirmed. The Court of Appeals, however, noted that the actual questions that the jury answered in the affirmative left room for the jury to have either found that the Debtor acted intentionally or negligently. As a result, the jury findings were not sufficient to preclusively establish that the judgment was nondischargeable, and the Bankruptcy Court needed to determine whether the Debtor's conduct constituted a willful and malicious injury.

***D'Youville College v. Girdlestone (In re Girdlestone)*, 525 B.R. 208 (Bankr. W.D.N.Y. 2015)**. The Bankruptcy Court held that a debt arising from the non-payment of tuition was not non-dischargeable under section 523(a)(8) of the Bankruptcy Code. The debt at issue in this case did not relate to amounts that were advanced to the Debtor. The Debtor did not execute a note and receive any funds or have any funds paid on her behalf. Rather, the Debtor simply did not pay tuition when it was due, and the college where she was enrolled obtained a judgment against her. The Court noted that section 523(a)(8) generally prohibits the discharge of educational loans that are made, insured, or guaranteed by the government, or that are made under any program funded by the government or any nonprofit institution. The issue, however, was whether this debt fell within the definition of the word "loan," which is not a defined term in the Bankruptcy Code. The Court held that it did not. A loan relationship requires an agreement to extend credit in return for a promise of repayment at a future date.

***Fahey v. Mass. Dep't of Revenue (In re Fahey)*, 779 F.3d 1 (1st Cir. 2015)**. The First Circuit Court of Appeals held that a Massachusetts state income tax return filed after the day by which Massachusetts requires such returns to be filed does not constitute a "return" under Bankruptcy Code section 523(a), and accordingly, unpaid taxes due under the late-filed returns could not be discharged in bankruptcy. The Debtors in this case did not file timely state income tax returns for several years. They eventually filed all of the tax returns late, but did not pay all of the outstanding taxes, penalties, and interest. The Massachusetts Department of Revenue sought a determination that these outstanding obligations were nondischargeable pursuant to section 523(a)(1)(B)(i), which excepts from discharge debts for a tax with respect to which a return was not filed. The Court noted that based on a common notion of what a "return" is, the Debtor's debts would be dischargeable because the returns were eventually filed. The hanging paragraph of section 523(a), however, provides its own definition of "return" and states that "the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."

After walking through its statutory interpretation, the Court concluded that complying with a filing deadline is a "filing requirement" under applicable nonbankruptcy law. Therefore, based on the definition of a "return" in the hanging paragraph of section 523(a) and the statutory filing requirement that Massachusetts state tax returns be filed by a certain deadline, the Court found that a late-filed tax return does not constitute a "return" for the purposes of section 523(a)(1)(B)(i). As a result, the Debtors' unpaid taxes due under late-filed tax returns were nondischargeable.

***Inst. of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624 (B.A.P. 9th Cir. 2015)**. The Ninth Circuit Bankruptcy Appellate Panel held that a private university's claim based on an obligation to repay tuition credits rather than funds actually received by the Debtor was not excepted from discharge pursuant to section 523(a)(8)(A)(ii). The creditor was a for-profit private university that the Debtor attended. The creditor offered the Debtor financial aid to pay a portion of her tuition each year. This financial aid took the form of tuition credits, and the Debtor did not directly receive any actual funds. In exchange, the Debtor signed promissory notes evidencing her obligation to repay this money after she finished her coursework or withdrew from the university. The Debtor ultimately defaulted on these obligations and filed for bankruptcy.

In the Debtor's bankruptcy, the creditor argued that its debt was excepted from discharge under section 523(a)(8)(A)(ii) as "an obligation to repay funds received as an educational benefit, scholarship or stipend." It was undisputed that the claim constituted "an obligation to repay" "educational benefits." The parties disagreed, however, about whether the tuition credits constituted "funds received." The Court noted that the Debtor did not actually receive any funds, as it would from a third party financing source. Sections 523(a)(8)(A)(i) and 523(a)(8)(B) both apply to "loans," which this obligation certainly was, but the word "loan" does not appear in section 523(a)(8)(A)(ii). Because Congress did not refer to "loans" in this subsection, the Court concluded that it was intended to apply to a different type of debt specifically arising from "funds received." Because the Debtor did not receive actual funds, this debt was not the kind that could be excepted from discharge under section 523(a)(8)(A)(ii).

***Corletta v. Texas Higher Education Coordinating Board*, 531 B.R. 647 (W.D. Tex. 2015)**. The District Court for the Western District of Texas held that the Debtor's Chapter 7 discharge in 1997 did not discharge his obligations as a co-signor on a student loan. The Debtor co-signed three promissory notes for a friend in 1993 and 1994 that the friend obtained as part of the College Access Loan Program administered by the Texas Higher Education Coordinating Board. The Debtor filed for Chapter 7 bankruptcy and obtained a discharge in 1997 and scheduled this debt in the bankruptcy with the description "Co-Signed Student Loan." The THECB filed a proof of claim for the debt with a statement in the proof of claim asking the Court to determine that the debt is not dischargeable except as provided for in section 523(a)(8). The loan was declared to be in default in 2005, and the THECB filed a state court lawsuit against the Debtor in 2011 to collect. In response, the Debtor reopened his bankruptcy case for the limited purpose of getting a ruling on whether the debt owed to THECB was discharged. The Debtor made a number of arguments, including that under the law as effective in 1997 at the time of his discharge, loans by state governments, as opposed to the federal government, could not qualify as "educational loans" and that the THECB was not a governmental unit. These arguments were fairly easily dismissed though, and the Court found that the debt was not discharged in 1997.

***Sauer Inc. v. Lawson (In re Lawson)*, 791 F.3d 214 (1st Cir. 2015).** The First Circuit Court of Appeals found that the definition of actual fraud in a dischargeability action includes debt that was gained by "knowingly accepting a fraudulent conveyance" that was conveyed to thwart creditors. The creditor alleged that the debtor received property that belonged to her father to prevent the creditor from collecting on a judgment. The court issued a judgment against the debtor to return the transferred property to the creditor. The debtor then filed for bankruptcy, but the question for the court was whether the debtor committed actual fraud because she did not meet the misrepresentation element. The court determined that the debtor's actions constituted actual fraud and the debt could not be discharged.

***Ng-A-Qui v. College Assist (In re Ng-A-Qui),* 2015 WL 5923363 (B.A.P. 9th Cir. 2015).** Unemployed Chapter 7 debtor with a Bachelor of Science degree and three minor children received welfare and $1,760 per month in support from the fathers of her children. The Panel held that the Ninth Circuit does not require a debtor to maximize her income in order to qualify for undue hardship discharge of student loan debt, but that the debtor's ability to increase her income could be considered as evidence of lack of good faith. The Panel affirmed the bankruptcy court's ruling that the debtor was impermissibly unilaterally limiting her job search and held that that the debtor's situation was unlikely to persist for the entire life of the loan. Denial of discharge was affirmed.

***Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756 (7th Cir. 2015).** The Court of Appeals found that the debtor's student loan could not be discharged under 11 U.S.C.S. § 523(a)(8) because there were not circumstances to indicate that the debtor could not repay the loan. When the court analyzed the facts using the *Brunner* test, the debtor could not meet the two of the three requirements. The debtor did not have additional circumstances that show his long term inability to repay and he did not make a good faith effort at repayment. The court noted that the debtor had managed to make significant repayment on another loan during the relevant time period.

***Res-TX One LLC v. Hawk (In re Hawk)*, 534 B.R. 697 (Bankr. S.D. Tex. 2015).** The Bankruptcy Court for the Southern District of Texas found that a debtor was ineligible for discharge when the debtor transferred funds with the actual intent to defraud a creditor. The debtors, husband and wife, filed for Chapter 7 bankruptcy. A creditor filed an objection to discharge because the debtors transferred property with the intent to defraud the creditor. The debtors transferred exempt property to another account under their control so that it would not be garnished. While one debtor will be denied a discharge due to his violation, this denial cannot be imputed to his wife simply because they are husband and wife. The wife did not have the necessary intent and thus she will receive a discharge.

***Batali v. Mira owners Ass'n (In re Batali)*, No. WW-14-1557-KiFJu, 2015 Bankr. LEXIS 4050 (B.A.P. 9th Cir. Dec. 01, 2015)**. Chapter 13 debtors filed their petition in January of 2011. On September 9, 2011, debtors proposed amended plan that called for the surrender of a condo unit; the amended plan was confirmed on October 28, 2011. Although the debtors ceased living in the condo, the secured lender did not foreclose on the condo until July 25, 2014. The debtors' condominium association was subsequently granted relief from the automatic stay for the purpose of seeking judgment in state court against the debtors with regards to postpetition dues. The debtors moved the court requesting a determination that the postpetition dues would be discharged and that the amended plan eliminated the condominium association's right to assess debtors for postpetition dues. On appeal, the court held that the terms of the amended plan did not discharge the postpetition dues because they made no mention of the postpetition dues and therefore the condominium association had received neither notice nor due process required for a discharge. Applying Section 1328(a) and Washington law, the Court held that the postpetition dues were a property right that ran with the land and could not be extinguished in bankruptcy. Because the transfer of the property happened at the time of the foreclosure sale and not at the time of plan confirmation, the debtors remained liable for and could not discharge the postpetition dues assessed for the period ending on the date of the foreclosure sale.

***Coyle v. Coyle (In re Coyle)*, 538 B.R. 753 (Bankr. C.D. Ill. 2015).** The Bankruptcy Court for the Central District of Illinois found that when a debtor transfers property within one year before filing for bankruptcy, with the intent to defraud creditors, the court has the ability to deny a discharge. In addition, when a trustee receives attorney-client privilege communications the trustee does not preserve the privilege. When the debtor filed for chapter 7 bankruptcy, the plaintiffs objected to the debtor's discharge and the dischargeability of their claim. They stated that the debtor concealed the fact that she converted non-exempt property to exempt property before filing. This was found by a discussion noted on privileged billing records submitted to the trustee. The court found that the debtor intended to hinder or delay the collection efforts of her creditors by transferring property out of her account before it could be garnished. Thus, the debtor is not entitled to a discharge.

***Keefe Law Firm v. Days (In re Days)*, 2015 Bankr. LEXIS 3613 (Bankr. E.D. Mo. 2015).** The Bankruptcy Court for the Eastern District of Missouri found that the debtor did not misrepresent to a creditor her bankruptcy case because she was not required to disclose this information and the creditor never asked. After filing for chapter 13 bankruptcy, the debtor hired the creditor to represent her in a legal claim. After a decline in the debtor's health, she was unable to pay her outstanding balance. When the debtor converted to a chapter 7 case, the creditor moved to have its debt declared nondischargeable because the debtor obtained the debt by fraud and acted willful and malicious by not disclosing the bankruptcy case. The court found the debt dischargeable because the debtor did not have a duty to disclose the bankruptcy case, the creditor did not ask about the debtor's finances, and the debtor believed that she would be able to pay for the creditor's legal services.

***United States v. Tucker (In re Tucker)*, 539 B.R. 861 (Bankr. D. Idaho 2015).** The Bankruptcy Court for the District of Idaho found that a debt is nondischargeable when the debtor commits fraud under 11 U.S.C. § 523(a)(2)(A) by intentionally omitting certain facts that the debtor had a duty to disclose. The debtor failed to notify the Social Security Administration (SSA) that he was employed, because he knew that this would end or lessen the amount of his disability benefits. When the debtor filed for chapter 7 bankruptcy, the SSA asked the court to find that the overpaid disability benefits were nondischargeable under § 523(a)(2)(A). The SSA argued that they relied on the debtor to disclose his employment status and the debtor omitted the fact that he was employed as a way to deceive them and keep receiving payments. The court agreed and found that the debt cannot be discharged.

***Nilsen v. Mass. Dep't of Revenue (In re Nilsen)*, 542 B.R. 640 (Bankr. D. Mass. 2015)**. Debtor brought adversary proceeding seeking determination that taxes, penalties and interest owed for certain years were not excepted from discharge under Section 523(a)(1). Debtor argued that his late filed tax forms constituted "equivalent reports" as that term is used in Section 523(a)(1)(B) and that because they were filed more than two years prior to the petition date they were not excepted from the discharge. The bankruptcy court held that late filed federal and state tax returns do not qualify as "equivalent reports" and were therefore excepted from discharge.

***Shells v. U.S. Dep't of Educ. (In re Shells)*, 530 B.R. 758 (Bankr. E.D. Cal. May 07, 2015)**. Chapter 7 debtor sought to discharge her student loan debt. She had obtained a bachelor's and a master's degree in social work, taking on nearly $100,000 in loans to do so. She maintained employment as a social worker, and requested and received an Income Contingent Repayment plan, although she never made any payments under that plan. Two years after receiving her discharge, she requested and received an Income Based Repayment plan, but only made for payments before defaulting. While making net monthly income of $5,902, debtor claimed monthly expenses included savings for her children, eating out, entertainment, and vacation amounts that exceeded what her monthly Income Based Repayment plan payment would have been. The bankruptcy court granted the United States summary judgment on the grounds that the undisputed facts established that the debtor could not prove undue hardship because she could not any of the three prongs of the *Brunner* test.

***United States v. Martin (In re Martin)*, 542 B.R. 479 (B.A.P. 9th Cir. Dec. 17, 2015)**. Debtors failed to timely file tax returns for 2004-2006, causing IRS to employ deficiency assessment guidelines for the purpose of assessing taxes. After IRS sent notice of intent to levy, debtors finally filed their untimely tax returns, which the IRS accepted, in 2009. Debtors filed Chapter 7 bankruptcy case less than two years later and filed an adversary proceeding seeking a determination that their tax debt was dischargeable. Construing the hanging paragraph at the end of Section 523(a), the bankruptcy court held that for purposes of determining the honesty and reasonableness of the taxpayer's efforts the statute permitted the court to look only at the form and content of the tax filing. The Panel vacated, holding that the proper legal standard for determining whether a tax return constituted return for purposes of dischargeability looked at not merely the form and content of the filing but also the number of missing returns, the length of the delay, the reasons for the delay, and any other circumstances reasonably pertaining to the honesty and reasonableness of the taxpayer's efforts.

***Wischmeyer v. Bobinski (In re Bobinski)*, 2015 U.S. Dist. LEXIS 167861 (N.D. Ind. Dec. 15, 2015)**. Debtor's ex-wife filed adversary proceeding seeking determination that debtor's share of her guardian ad litem fees from custody dispute were not dischargeable pursuant to Section 523(a)(5). The district court noted that there is a split of authority over whether domestic support obligations can include obligations payable to third-parties, but held that under either the broader "support" test or the narrower "payee" test the ex-wife had established that the ad litem fees were for the support of the debtor's children and that she would qualify as a payee because if debtor did not pay the ad litem she could be required to.

***Gonzalez v. Anthony (In re Anthony)*, 538 B.R. 145 (Bankr. M.D. Fla. 2015).** The Bankruptcy Court for the Middle District of Florida found that the plaintiff's defamation claim was dischargeable because the debtor's declaration was not a willful and malicious injury. The plaintiff was worried that a statement made by the debtor and debtor's mother would implicate her in the disappearance of the debtor's daughter. Thus, the court had to decide whether the plaintiff's claim was dischargeable in the debtor's bankruptcy case so that the plaintiff would know whether to initiate a defamation suit. The debtor's statement did not rise to the level of a willful and malicious injury because the statement was not made with the intent to injure, was not directed at the plaintiff, and did not contain a false statement about the plaintiff.

***Bougie v. Livingston (In re Livingston)*, 2016 U.S. Dist. LEXIS 888 (W.D. Va. Jan. 04, 2016)**. Chapter 7 debtor included address for creditor's attorney on schedules instead of creditor's address; as a consequence, that creditor did not receive notice of the bankruptcy prior to the deadline for filing a proof of claim. The creditor subsequently brought an adversary proceeding seeking a determination that the debt was nondischargeable for various reasons, including that the debtor had not properly listed or scheduled the debt in time to allow the creditor to file a proof of claim. The bankruptcy court granted summary judgment on that count, applying a mechanical interpretation of Section 523(a)(3)(A). The district court reversed, holding that although 523(a)(3)(A) could normally be applied mechanically, doing so in a no-asset case like this one merited consideration of three equitable factors: 1) the reason the debtor failed to list the creditor, 2) the amount of disruption which would occur, and 3) any prejudice suffered by the listed creditors and the unlisted creditor in question.

***Conway v. Nat'l Collegiate Tr. (In re Conway)*, 542 B.R. 855 (B.A.P. 8th Cir. 2015)**. Bankruptcy court found some, but not all, of debtor's student loan debt to be nondischargeable. Debtor subsequently asked bankruptcy court to make additional findings and amend its judgment in light of her increased expenses and decreased income. The bankruptcy court denied that request and the debtor appealed, arguing that the bankruptcy court had erred by making its decision based on her income from a recent 12-month period and not a 12-month period ending closer to the date of the court's decision. Stating that "[a] decision on the dischargeability of student loan debt will nearly always be akin to a judicial version of Whack-A-Mole because a debtor's income and expenses are seldom static[,]" the Panel affirmed, focusing on the fact that the bankruptcy court had reviewed the most recent 12-month period for which it had complete income and expense figures.

***Harry Kaufmann Motorcars, Inc. v. Benton (In re Benton)*, 540 B.R. 372 (Bankr. E.D. Wis. 2015)**. Debtor and her boyfriend purchased a BMW in the debtor's name with the down payment being made by a $10,000 check from the boyfriend. The check was written against a nonexistent corporate account, and the debtor and her boyfriend agreed to pay the obligation in installments. When the debtor filed for bankruptcy, the seller filed an adversary proceeding seeking determination that the remaining balance from the fraudulent down-payment was nondischargeable under 523(a)(2). The debtor argued that she had had no knowledge that her boyfriend was passing a fraudulent check and had herself made no representations regarding her boyfriend's finances; the seller argued that at the time of the purchase the debtor had deliberately misrepresented the status of her relationship with her boyfriend and their financial prospects and had silently sat by while her boyfriend made representations that she knew to be false. The court referred to the debtor as "trying to use the classic ostrich defense" and found many holes in her testimony regarding her knowledge of her boyfriend's financial position. The court concluded that the debt was nondischargeable based on the debtor's concealment of material facts.

***Jyh Shyi Wang v. Gao (In re Gao)*, No. 1:15-cv-03838-FB, 2015 U.S. Dist. LEXIS 153904 (E.D.N.Y. Nov 12, 2015)**. Former business associates of debtor obtained state court judgment, with judge holding that debtor had committed actual fraud. When debtor filed bankruptcy, debtors brought adversary proceeding seeking determination of nondischargeability under 523(a)(2) and (4). Applying Texas law, the district court affirmed the application of collateral estoppel against the debtor in holding that the elements of the state court judgment satisfied the bankruptcy elements of both fraud and defalcation and willfulness.

***Kelley v. Ahern*, 541 B.R. 860 (W.D. Wis. 2015)**. After three years of contested litigation, state court entered default judgment against debtor for fraud in the sale of a floating dock system when debtor failed to show at trial. Bankruptcy court held that debt was nondischargeable under Section 523(a)(2)(A). Applying Wisconsin law, the district court affirmed that collateral estoppel applied because the debtor had participated in the litigation and yet inexplicably declined to attend the trial. The court rejected the debtor's contention that the state court record was not sufficiently clear to establish fraudulent intent because of a lack of specific findings of fact on the grounds that the Wisconsin statute governing the claim in the lawsuit necessarily included a finding that false representations had been made.

***Loucas v. Cunningham (In re Cunningham)*, 541 B.R. 792 (E.D. Pa. 2015)**. Debtor had not appeared in the state court proceeding because his employer had told him that an insurance carrier would defend him; no defense was presented and the state court had awarded judgment based on the uncontested evidence presented by the creditors; the court's judgment included a finding that the debtor's conduct was "outrageous." After judgment was entered, debtor filed for Chapter 7. Creditors filed an adversary proceeding against the debtor seeking determination that their state court judgment against him was nondischargeable pursuant to Section 523(a)(6). Creditors failed to respond to discovery requests which had included a request for admission regarding the mental state of the debtor at the time of the incident which had given rise to the state court lawsuit. The bankruptcy court ruled that the creditors' failure to respond constituted an admission that they had no evidence as to the debtor's state of mind and therefore granted summary judgment in the debtor's favor. On appeal, the district court rejected the argument that the Rooker-Feldman doctrine applied, holding that that doctrine does not deprive bankruptcy courts of jurisdiction over disputes that involve rights that arise only in the context of the bankruptcy case (e.g. nondischargeability). The court concluded that collateral estoppel was not applicable because the debtor had not have a full and fair opportunity to actually litigate the state court lawsuit and because the state court's finding that the debtor's conduct was "outrageous" because the record did not show that the state court's findings reached the specific issue of whether the conduct was willful and malicious.

***In re Harris*, 522 B.R. 804 (Bankr. E.D.N.C. 2014)**. Above median income debtors listed a monthly disposable income in a negative amount and proposed a plan that would pay zero percent to general non-priority unsecured creditors. The Chapter 13 trustee objected, asserting that debtors had miscalculated their monthly disposable income. Applying the means test of 707(b)(2) and looking to 1325(b)(3) for guidance, the bankruptcy court ruled that the home and vehicle allowances operated as a cap on the amount that debtors may deduct; if debtors wish to deduct additional amounts, they must show that the requested deduction is reasonably necessary and subject to a special circumstance. The court furthermore held that those deductions could only be permitted where the debtor had actual payments.

***In re Harwood*, 519 B.R. 535 (Bankr. N.D. Cal. 2014)**. Debtor's petition reflected undersecured and unsecured debts totaling over $550,000. Three years after petition was filed, Chapter 13 trustee for the first time moved to dismiss on the basis of debtor's ineligibility for Chapter 13 due to scheduled unsecured debts in excess of Section 109(e)'s limits. The debtor asserted that her attorney had miscalculated the debt, that a sizeable portion had been extinguished post-petition, and that laches precluded the trustee from seeking to dismiss her case. Applying a plain language reading of Section 109(e), The court rejected the debtor's arguments that post-petition events could affect the eligibility determination and found that the debtor's unsecured debt as of the date of the filing was in excess of the eligibility limits. Declining to apply laches against the trustee because the problem was of the debtor's own creation, the court went on to note that it could sua sponte decline to confirm a Chapter 13 plan based on Section 109(e) ineligibility.

***In re Schuldt*, 527 B.R. 278 (Bankr. W.D. Mich. 2015)**. Chapter 13 debtor and Chapter 13 trustee disputed whether the debtor's income must be both earned AND received during the applicable six month period in order to constitute "current monthly income" under Section 101(10A). Focusing on the statutes use of the term "derived", the court noted that extensive analysis of dictionary definitions for the term utilized the term "receive" when explaining the meaning of "derive". Finding a review of the legislative history to be inconclusive on the subject, the court held that the dictionary definitions taken in tandem with the purposes embodied in the BAPCPA amendments (i.e. to ensure that debtor repay creditors the maximum amount that debtor can afford) resulted in the conclusion that income need only be received within the applicable six-month period, regardless of when it was earned.

***Choudhuri v. Deutsche Bank National Trust Company (in re Choudhuri)*, 2014 WL 5861374 (B.A.P. 9th Cir. 2014)**. Pre-petition, debtor sued bank in state court based on mortgage issues. The state court granted summary judgment to the bank. Debtor then filed a Chapter 13 case and proposed a plan; the bank objected to confirmation on the grounds that the proposed plan listed an incorrect amount of arrearages; bank also filed a proof of claim reflecting the amount which it believed was owed. The bankruptcy court found against the debtor and for the bank on all points, denying confirmation of the plan and the debtor's objection to the bank's claim. During the appeal, the bankruptcy court dismissed the debtor's case. The Panel held that it lacked jurisdiction to address the denial of confirmation because the underlying bankruptcy case had been dismissed. Turning to the disputed claim of the bank, the Panel dismantled the debtor's failure to present an adequate record on appeal and affirmed the denial of the debtor's objection to the bank's claim.

Chapter 13 - PLAN

***In re Pautin*, 521 B.R. 754 (Bankr. W.D. Tex. 2014)**. Debtor confirmed a Chapter 13 plan. When debtor failed to provide trustee with post-petition income tax returns, trustee moved to dismiss. Debtor then provided her post-petition income tax returns, whereupon trustee discovered that debtor had received significantly more post-petition income than contemplated in the plan, including several thousand dollars in tax returns that debtor did not turnover to trustee. Debtor also for the first time disclosed that she had been making payments to a pawn shop in order to redeem certain personal items. Trustee moved to modify the plan and increase plan payments. Debtor argued that her increased income was temporary and had ceased, making the trustee's proposed modification infeasible. Discussing the interplay between § 1325(b)(1) and § 1329, the court held that the fact that § 1325(b)(1) is not cross-referenced in § 1329 does not preclude the bankruptcy court from using the disposable income and best interests tests in assessing the good faith of a proposed modification. Concluding that the debtor's failure to fully disclose her income and tax refund, as well as her post-confirmation payments to the pawn shop, displayed an absence of accountability and transparency in her case, the court nevertheless denied the trustee's motion to modify for infeasibility because the debtor no longer had the monies in question and ordered the debtor to turnover to the trustee all future tax refunds, tax returns, and pay advices.

***In re Rodgers*, 2014 WL 4988388 (Bankr. W.D. Mo. 2014)**. Debtor filed Chapter 13 petition and proposed a plan for confirmation. The Chapter 13 trustee objected to plan confirmation, arguing that the debtor had disclosed insufficient information regarding the non-filing spouse's income. Debtor argued that he and spouse had kept their finances largely separate and that he had very limited knowledge of his wife's finances. Noting that there might be circumstances in which the non-filing spouse's income would not affect the contents of a Chapter 13 plan, the court held that without disclosure of the non-filing spouse's income the debtor could only confirm a plan which proposed to pay unsecured creditors in full.

***In re Fielding*, 2015 WL 1676877 (Bankr. N.D. Tex. 2015)**. IRS objected to manner in which Chapter 13 debtors proposed to allocate the proceeds received from the sale of their homestead. The court held that the Supreme Court's decision in United States v. Energy Resources, 495 U.S. 545 (1990), a Chapter 11 case, applied to Chapter 13 cases as well. The court also concluded that Section 1322 and Section 1326 gave it the authority to order the IRS to apply the debtor's tax payments in a designated manner if that designation is necessary to effectuate a successful reorganization. Noting that Chapter 13 is a voluntary form of bankruptcy, that the debtors' sale of their homestead was a voluntary act and that their payment of the IRS was therefore a voluntary payment, the court held that even it did not have the authority to order the IRS to allocate the payment as designated by the debtors, the debtors' payment qualified as the sort of voluntary payment which the IRS was required by the Internal Revenue Code to apply according to the payor's designation.

***In re Harris*, 522 B.R. 804 (E.D.N.C. 2014)**. Above median income Chapter 13 debtor proposed a plan that would have a zero-percent payout to non-priority unsecured creditors and which claimed home and vehicle deductions in excess of the IRS Standard amounts. The Chapter 13 Trustee objected on the grounds that the debtors' failed to comply with the projected disposable income requirement of Section 1325(b). The court held that unless a debtor makes a showing of special circumstances pursuant to Section 707(b)(2)(B), the IRS Standards act as a cap on the deduction allowed.

***Bronitsky v. Bea (In re Bea)*, 533 B.R. 283 (B.A.P. 9th Cir. 2015)**. The Ninth Circuit Bankruptcy Appellate Panel (BAP) affirmed the Bankruptcy Court's confirmation of the Debtor's Chapter 13 plan over the Chapter 13 Trustee's objection that the plan did not satisfy the adequate protection requirements of 11 U.S.C. § 1325(a)(5)(B)(iii)(II). In the bankruptcy case, the Debtor proposed to retain the collateral with liens attached and to commence equal monthly payments to his secured creditors on the seventh month, after payment of his attorneys' fees. The BAP stated that two issues existed in the case: (i) whether a Chapter 13 plan violates the Bankruptcy Code where it delays equal payments to secured creditors and (ii) whether a secured creditor's failure to object to a Chapter 13 plan constitutes acceptance of his treatment under the plan.

The BAP considered the U.S. Supreme Court's holding in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). Of relevance was the Supreme Court's guidance that bankruptcy courts should only confirm a Chapter 13 plan that complies with the "applicable provisions" of the Bankruptcy Code, regardless of whether a creditor or other party has objected. The BAP distinguished *Espinosa* on the basis that it dealt with a self-executing provision of the Bankruptcy Code requiring non-dischargeability of student debt absent undue hardship. In contrast, the requirement that a creditor secured by personal property receive adequate protection under a plan that provides him with equal periodic payments was not self-executing, as determining the adequacy of protection required proof. Further, the BAP cited to its earlier holding in *Paccom Leasing Corp. v. Deico Electronics, Inc. (In re Deico Electronics, Inc.)*, 139 B.R. 945 (B.A.P. 9th Cir. 1992), determining that the Bankruptcy Code nowhere directed the timing for adequate protection payments and instead left the bankruptcy courts with "broad discretion" to fix commencement dates. Because the secured creditors did not object and the adequacy of protection under section 1325(a)(5)(B)(iii)(II) was fact-specific rather than self-executing, the bankruptcy court below did not err in confirming the Chapter 13 plan. The BAP did not address the issue of whether the secured creditors' failure to object constituted acceptance of the plan that, standing alone, would provide a basis to affirm.

***In re Lightfoot*, Case No. 13-32970, 2015 Bankr. LEXIS 1918 (Bankr. S.D. Tex. June 10, 2015)**. The Bankruptcy Court for the Southern District of Texas held that section 1322(b)(10) does not prevent confirmation of a Chapter 13 plan that includes state-mandated interest on domestic support obligations even when the plan does not provide for full payment of all allowed claims. The Court wrote to address an apparent conflict in the Bankruptcy Code regarding whether interest could be paid on domestic support obligations when unsecured creditors are not being paid in full. Section 1322(b)(10) provides that a plan may provide for payment of interest on nondischargeable claims only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of allowed claims. Section 1322(a)(2) requires that the plan provide for full payment of all claims entitled to priority under section 507, which includes domestic support obligations that are owed or recoverable as of the date of the filing of the petition. Section 101(14A) defines domestic support obligations to include interest though, so in a plan that pays creditors less than 100% of their claims, section 1322(b)(10) seems to prohibit the payment of interest on domestic support obligations while section 1322(a)(2) seems to require it. The Court harmonized these provisions by finding that because a domestic support obligation is already defined to include post-petition interest, such interest is considered *part of* the underlying claim and is not considered *interest on* a claim, which would be prohibited by section 1322(b)(10). Therefore, interest on domestic support obligations is not only allowed by the Bankruptcy Code, but is actually required by the Bankruptcy Code.

***In re Lancaster,* No. 14-16672 (Bankr. D. MD. 2015).** The Bankruptcy Court for the District of Maryland found that when a debtor files without their spouse, if any spousal income is excluded to be used exclusively for spouse's debts, the debtor must show that the income is not used for the household's benefit. If the debtor chooses to reduce the household monthly income listed in the Chapter 13 plan, then the debtor must prove that the excluded income is purely personal spousal income. For each case, the court will look to see if the debtor has fulfilled the burden to show the spousal income was truly separate income and is not "regularly contributed to household income." Otherwise, the debtor is unfairly allowed to discharge joint household debts, even though only the debtor is contributing.

***In re Sagendorph*, 2015 LEXIS 2055 (Bankr. D. Mass. 2015).** The Bankruptcy Court for the District of Massachusetts found that a debtor can propose a Chapter 13 plan which satisfies a mortgage claim by transferring title back to the mortgagee. The debtor's plan proposed that their three properties were disposed of by surrender and vesting of title back to the creditor who owned the mortgage. One creditor objected to this plan on the basis that forcing them to accept the property would interrupt their ability to foreclose on the property. The court found that the debtor has the right to include these provisions, but if the creditor objects, then further findings, such as whether the plan is made in bad faith, must be made before the plan can be confirmed.

***Matteson v. Bank of Am. N.A. (In re Matteson)* 535 B.R. 156 (B.A.P. 6th Cir. 2015).** The Bankruptcy Appellate Panel found that a debtor could not reduce the long term debt owed to a secured creditor because the creditor did not file a proof of claim. The debtors filed a Chapter 13 plan which provided for payments on two mortgages. The creditor failed to file proofs of claim, so the debtors filed suit to determine whether the mortgage debt was discharged. The bankruptcy court had found that the debt was not discharged, but was reduced by the amount the creditor would have received had it filed claims. However, the bankruptcy rules require only that unsecured creditors must file a proof of claim. The appeals court stated that the court cannot reduce the claim by what the creditor would have received because there is no legal basis for such a finding and the debtor would unfairly gain a windfall.

***In re Gaetje*, 2015 Bankr. LEXIS 2027 (Bankr. S.D. Tex. 2015).** The Bankruptcy Court for the Southern District of Texas found that a proposed plan could not be confirmed because the interest rate proposed for the debtor's principal residence was changed from adjustable to fixed. 11 U.S.C.S. Section 1322 states that a debtor may modify secured creditor claims, but this is not allowed if the loan is secured solely by the debtor's principal residence. The Court also decided that the debtor is allowed, during the plan period, to pay the loan in full before the maturity date because the loan agreement included language allowing for prepayment.

***Riverbend Condominium Ass'n v. Green (In re Green)*, 793 F.3d 463 (5th Cir. La. 2015).** The Court of Appeals affirmed the District Court and Bankruptcy Court's decisions stating that all unpaid sums by a condominium owner are classified as a statutory lien. Thus, these sums are subject to 11 U.S.C. Section 1322(b)(2) and not protected from being modified in the plan. The state allows the creditor to file a lien against condominium owners for any unpaid dues. When the debtor filed for bankruptcy, he proposed to bifurcate the claim. The creditor objected, stating that the lien was a security interest in the Debtor's principal residence and could not be modified. The court disagreed and found that the lien was not created by consent, so it could not be a security interest. Since the creditor's lien is a statutory lien, and not a consensual security interest, Section 1322(b)(2) can be used to bifurcate the claim.

***In re Wilkerson*, 2015 Bankr. LEXIS 2081 (Bankr. D.D.C. 2015).** The Bankruptcy Court for the District of Columbia found that a debtor's Chapter 13 plan could not be confirmed because the debtor's claimed deductions exceeded her actual expenses. If the full deductions were allowed, the debtor's disposable monthly income would not include all the income she has available to pay the creditors. In this case, the debtor proposed the full amount of the deductions for the housing and transportation standards although she did not expend that amount. The court decided that a debtor can only claim a deduction equal to their expenses.

***Adinolfi v. Meyer (In re Adinolfi)*, 398 Fed. Appx. 616 (B.A.P. 9th Cir. Jan. 19, 2016)**. Bankruptcy court denied confirmation of Chapter 13 debtor's plan, ruling that Adoption Assistance payments received by debtor from county government did not constitute benefits received under the Social Security Act and therefore were required to be included her projections for disposable income. The Panel conducted a thorough analysis of the many programs whose payments are made in accordance with the Social Security Act and reached the conclusion that Adoption Assistance payments qualified because even though they were paid out to the debtor by the county government they were subject to the federal oversight and the federal program requirements and standards of the Social Security Act.

***In re Brownlee*, No. CV 15-01109-HB, 2016 WL 241250 (Bankr. D.S.C. Jan. 20, 2016**). IRS filed a proof of claim against a Chapter 13 debtor asserting a secured portion, a priority unsecured portion, and a general unsecured portion. Debtor proposed to treat the secured portion of the IRS's claim outside of the Chapter 13 plan and the IRS objected. The bankruptcy court joined the majority view and held that the requirements of Section 1325(a) are mandatory in order for confirmation of a Chapter 13 plan. The court went on to hold that the proposed plan failed to satisfy the requirements of Section 1325(a)(5)(B)(ii) because the debtor had not negotiated a payment schedule with the IRS and therefore could not show that the IRS was adequately protected. By the same token, the proposed plan violated Section 1326(a)(6) because all income available to the debtor was committed to monthly expenses and Chapter 13 plan payments, leaving nothing with which to pay the secured portion of the IRS claim.

***In re Romero*, 539 B.R. 557 (Bankr. E.D. Wis. 2015).** The Bankruptcy Court for the Eastern District of Wisconsin found that attorney's fees included in the proposed plan cannot reduce or create unequal payments to the creditor. The debtors structured their plan to first pay a lower monthly amount to the creditor until their attorney's fees were paid off, after which the creditor's monthly amount would increase. The creditor objected to this citing the equal monthly payments rule of Bankruptcy Code § 1325(a)(5)(B)(iii)(I). The court examined this rule and found that the debtor must pay the creditor in equal amounts, unless the creditor consents to unequal payments. Since the creditor did not consent, the court could not confirm the debtor's proposed plan. The debtor may pay attorney's fees concurrently with other claims, but these fees cannot reduce the payments to other creditors.

CONVERSION

***Harris v Viegelahn*, 135 S.Ct. 1829 (2015).** The Supreme Court determined that, at good faith conversion to Chapter 7 after confirmation, undistributed funds held by the Chapter 13 trustee must be refunded to the debtor. A debtor's post-petition earnings do not become property of the Chapter 7 estate. A terminated trustee can only return the debtor's earnings to the debtor. No reason of policy would suggest that creditor should not be put back in the same position as had the debtor never sought to repay his debts under Chapter 13.

***Hotop v. Wells Fargo Bank N.A. (In re Hotop)*, 2015 LEXIS 1964 (Bankr. E.D. La. 2015).** The Bankruptcy Court for the Eastern District of Louisiana found that property abandoned by the Chapter 7 trustee is nonetheless included when the case is converted to Chapter 13. Prior to conversion, the Chapter 7 trustee abandoned a claim the debtors had against the creditor. The debtors argued that since the case was converted, the claim was brought back into the estate. The creditor stated that the court lacked jurisdiction over the claim because it was abandoned and that the cause of action had prescribed. The court disagreed and found that while it did lose jurisdiction when the claim was abandoned, the court now had jurisdiction because 11 U.S.C. Section 1306 provides that property acquired after commencement of the case is included as property of the estate. Since the property is included in the estate, the court has "related to" jurisdiction over the claim.

***In re Beauregard*, 533 B.R. 826 (Bankr. D.N.M. 2015).** The Bankruptcy Court for the District of New Mexico found, in light of the recent *Harris* Supreme Court case, that all funds given to the Chapter 13 Trustee must be returned to the debtors after the case is converted to a Chapter 7 case. Where before, when the case converted, the practice was to pay any money held by the trustee to creditors and administrative expense claimants, now the trustee must return the money. The court decided under 11 U.S.C. Section 348 that when the case converts, the Chapter 13 plan and provisions are not binding and the authority of the trustee is immediately terminated. The funds are returned as part of the trustee's wind up process. This ruling applies whether or not the debtor's plan was confirmed.

***Robb v. Harder (In re Robb)*, 534 B.R. 354 (B.A.P. 8th Cir. 2015).** The Bankruptcy Appellate Panel found the debtor lacked standing to appeal the court's decision because she could not show she was "directly and adversely affected pecuniarily by the order." The debtor filed for Chapter 7, but then converted to Chapter 13 after finding a defect in some of her documents. The Chapter 7 trustee filed a claim for time spent on the case. The debtor objected to the claim stating that the trustee was not entitled to any compensation because funds had not yet been disbursed. The court denied the objection and the debtor appealed. The appeals court found that the claim would not diminish the debtor's property or increase her burden because the claim would only reduce the distribution to the creditors. Thus, the debtor lacked standing on the claim.

***In re Sowell*, 535 B.R. 824 (Bankr. D. Minn. 2015).** The Bankruptcy Court for the Southern District of Minnesota found that when a debtor converts from Chapter 13 to Chapter 7, an attorney's approved fee cannot be paid from funds held by the Chapter 13 trustee. In this case, the debtor's Chapter 13 plan was denied, so she converted the case to Chapter 7. The trustee filed a final report which listed claims paid and the balance of funds on hand. The debtor's attorney asked for his fee application to be approved and to receive the funds held by the trustee as payment. The court looked to *Harris v. Viegelahn*, 135 S.Ct. 1829 (2015) and found that the debtor is entitled, when the case converts to Chapter 7, to the return of any funds held by the trustee that have not been distributed, despite approval of a fee application.

***In re Culp*, BR 14-11592-BLS, 2016 WL 462911 (D. Del. Feb. 5, 2016)**. Chapter 7 debtors moved to convert to chapter 13 in order to prevent chapter 7 trustee from selling a piece of real property at a value that the debtors disputed but which would have paid all allowed unsecured claims in full and left some money for the debtors. The bankruptcy court denied the motion to convert, holding that the debtors had failed to meet the requirements of Section 706(d) by showing that they qualified to be chapter 13 debtors and that the debtors' motion was brought in a bad faith effort to prevent the sale of the real property. The district court affirmed, holding that there is no absolute right to convert from chapter 7 to chapter 13 and that both Section 1307 and Section 105(a) permit a bankruptcy court to deny a motion to convert from chapter 7 to chapter 13 when the motion amounts to an abusive effort to frustrate the bankruptcy process.

***In re Croft*, 539 B.R. 122 (Bankr. W.D. Tex. 2015).** The Bankruptcy Court for the Western District of Texas found that it would not allow the debtors to find relief through chapter 7 bankruptcy when the court found that the debtors abused their case with excessive expenses and nonpayment of taxes. The debtors failed to make payments in their chapter 13 case, so they converted to chapter 7. The trustee objected to the conversion on the grounds of abuse because the debtor's had excessive expenses before and during their bankruptcy and continual failure to pay taxes even with a high income. The court agreed and found that the debtors' converted case still fell under the applicability of the abuse standards in 11 U.S.C. § 707(b). While the chapter 7 case was dismissed, the debtors could convert back to a chapter 13 case.

***In re Hightower,* 2015 Bankr. LEXIS 3354 (Bankr. S.D. Ga. 2015).** The Bankruptcy Court for the Southern District of Georgia found 11 U.S.C. § 1326(a)(2) directed the court to disburse any remaining funds to the debtor because there were not any administrative expenses or adequate protection payments due. After a debtor's chapter 13 case was dismissed, the debtor filed a new case and moved to convert to chapter 7. The debtor, using the recent case law of *Harris v. Viegelahn*, 135 S.Ct. 1829 (2015), argued that after he converted to a chapter 7 case the chapter 13 trustee lost the authority to disburse payments to the creditors, so the trustee needed to return any undisbursed funds to the debtor. But, the court decided that this argument did not apply to the debtor's situation since his chapter 13 case was not yet confirmed nor converted. Thus, the chapter 13 trustee could disburse funds, but there were not any expenses or payments due. The trustee argued that these funds should be distributed because the creditors did not receive any compensation during the automatic stay. But, the court stated that if the creditors wanted to be compensated they should have requested adequate protection payments.

***Brown v. Billingslea (In re Brown)*, No. SC-14-1388-JuKIPa, 2015 Bankr. LEXIS 3625 (B.A.P. 9th Cir. Oct. 26, 2015)**. Chapter 13 debtor failed to disclose monetary inheritance that he, acting as executor, distributed to himself postpetition. Made aware of the monetary inheritance, the Chapter 13 trustee objected to the proposed Chapter 13 plan and moved for dismissal of the case. During the ensuing months, debtor took contradictory positions regarding the nature of the inheritance and refused to preserve the money received therefrom. Debtor eventually moved to dismissed under Section 1307(b), but bankruptcy court instead found cause for conversion under Section 1307(c) in that debtor had spent money that he had previously agreed to turn over to the Chapter 13 trustee, could not fund a Chapter 13 plan because he no longer had the inheritance monies, and had prejudiced his creditors by delay. The debtor appealed, arguing both that he had an absolute right to dismiss his bankruptcy case and that the bankruptcy court had erred in finding cause for conversion. The Panel affirmed on all points, in particular noting that Ninth Circuit precedent [Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764 , 767 (9th Cir. 2008)] had already established that voluntary dismissal under Section 1307(b) is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad faith conduct or to prevent an abuse of process.

POST CONFIRMATION ....

***In re Gilbert*, 526 B.R. 414 (Bankr. N.D. Ga. 2015)**. Chapter 13 debtor confirmed a plan. More than 180 days after filing bankruptcy, and after plan confirmation, debtor inherited an unencumbered house. Exploring the interplay between Section 541(a)(5) and Section 1306(a)(1), the court adopted the majority rule that property which is inherited more than 180 days after a Chapter 13 case is commenced, but before it is closed, dismissed, or converted, is property of the estate subject to distribution for the benefit of creditors.

***In re Vela*, 526 B.R. 230 (Bankr. W.D. Mich. 2015)**. The Bankruptcy Court held that the Debtors could not modify their confirmed Chapter 13 plan over the objection of the Chapter 13 Trustee to pay their home mortgage directly now that they had cured the prepetition arrearage rather than paying their mortgage through the Chapter 13 Trustee as their confirmed plan provided. The Debtors had an arrearage on their home loan and confirmed a plan that included payment of the arrearage and regular payments for the home loan under the "cure and maintain" provision of section 1322(b)(5). The plan provided that the Debtors would make their plan payments to the Chapter 13 Trustee who would then make disbursements for both the home loan arrearage as well as its regular payments. About a year after confirmation, the Debtors were able to take advantage of a program that assisted them with curing the arrearage.

The Debtors then sought a modification of their confirmed plan to (1) pay their regular mortgage payments directly and (2) reduce their payment to the Chapter 13 Trustee by slightly less than the amount of their mortgage payment. The Chapter 13 Trustee objected to the modification on the grounds that (1) the modification is not one of the types of modifications allowed by section 1329(a), (2) section 1325(b)(5) requires the Debtors to abide by the decision at confirmation to make their mortgage payments through the Chapter 13 Trustee, and (3) direct payments raised feasibility concerns. The Court held that the proposed modification was a permissible type of a modification (1) under section 1329(a)(1) because the reduction in payments to the Chapter 13 Trustee results in a slightly lower commission for the Trustee, thus reducing the amounts of payments on claims of a particular class provided for by the plan, (2) under section 1329(a)(2) because the modification would reduce the plan term slightly, and (3) under section 1329(a)(3) because the modification alters the amount of the distribution to the mortgage company to account for the arrearage funds paid to it by a third party. Satisfaction of section 1329(a) is not enough though.

The Debtors also need to satisfy section 1329(b), which they cannot. The Court recognized the general presumption in section 1326(c) that trustees should disburse payments to creditors under confirmed plans. A decision of whether or not to abide by that general rule was made at confirmation, and it was not appropriate to revisit the issue in a post-confirmation modification.

***Schlegel v. Billingslea (In re Schlegel)*, 526 B.R. 333 (B.A.P. 9th Cir. 2015)**. The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the dismissal of a Chapter 13 case because the Debtor made all of the required plan payments but failed to pay unsecured nonpriority creditors the approved percentage dividend during the applicable commitment period. The Debtor's confirmed plan provided for monthly plan payments of $812 for 60 months and a 48% dividend to unsecured nonpriority creditors. The confirmation order acknowledged that that a wholly unsecured junior lien creditor that filed a proof of claim for $155,246.17 would receive treatment as a holder of an unsecured claim, but the plan apparently failed to take this into account in calculating the 48% dividend for unsecured nonpriority creditors.

On the eve of the sixtieth month, the Debtor filed a motion for a hardship discharge because, among other reasons, it would take an additional 96 months to complete his plan given the promised 48% dividend despite having made all of the monthly plan payments so far. The Trustee filed a motion to dismiss for failure to complete plan payments within five years from commencement of the case. The bankruptcy court dismissed the case and denied the motion for a hardship discharge. On appeal, the Court agreed that even though a Chapter 13 debtor has completed his or her monthly plan payments, failure to pay unsecured creditors the promised percentage dividend constitutes a material default with respect to a term of a confirmed plan pursuant to section 1307(c)(6). The Court also noted that the Debtors in this case did not seek permission to continue making payments beyond the 60 months and instead sought a hardship discharge. Accordingly, the Court did not reach the issue of whether section 1322(d) limits a bankruptcy court's ability to allow a debtor to continue making plan payments beyond the applicable commitment period.

***Covert v LVNV Funding, LLC*, 779 F.3d 242 (4th Cir. 2015).** Following confirmation of their proposed plan and commencement of creditor distributions, the debtors sued one of their pre-petition creditors for violation of the Fair Debt Collection Practices Act. The debtors' claims were properly dismissed based on res judicata. Confirmation of the plan adjudicated the merits of these allowed claims and the parties and causes of action were identical.

***In re Anderson*, 11-13541-JDW, 2015 WL 9998241 (Bankr. N.D. Miss. Oct. 19, 2015)**. Chapter 13 debtors moved to modify their confirmed plan in order to surrender an automobile and cease payments to the secured creditor. The creditor objected, arguing that post-confirmation modification to is impermissible under Section 1329(a). The bankruptcy court rejected the Sixth Circuit's reasoning from *In re Nolan*, 232 F.3d 528 (6th Cir. 2000) and held instead that Section 1329(a) taken in conjunction with Section 502(j) permits post-confirmation modification to surrender collateral as long as two standards have been met: 1) cause has been shown, according to the requirements of Rule 60(b) of the Federal Rules of Civil Procedure, and 2) the equities of the case support surrendering the collateral. Because the parties agreed that the automobile needed a new transmission because of ordinary wear and tear and because the court found that the debtors had acted in good faith, the court held that modifying to surrender was appropriate and would be allowed.

***In re Lush*, 10-15774-NPO, 2015 WL 9998135 (Bankr. N.D. Miss. Oct. 1, 2015)**. Chapter 13 debtor inherited money market account and the chapter 13 trustee moved to modify the debtor's plan in order to account for those monies. Debtor and chapter 13 trustee submitted an agreed order in which debtor would remit to the trustee a portion of the account and which removed a student loan creditor from the plan payments. Before order was entered, debtor reneged and indicated that she intended to keep all of the money market account money to cover medical expenses. The bankruptcy court held that the debtor was bound by the agreed order, but that the agreed order could not be approved because it unfairly discriminated against the student loan creditor by removing it from plan payments.

***In re Ramos*, 540 B.R. 580 (Bankr. N.D. Tex. 2015)**. The chapter 13 debtors confirmed a "cure and maintain" plan that allowed them to keep their homestead by curing prepetition default arrearages owed to the mortgage company. The debtors were to make their post-petition mortgage payments directly to the mortgage company. The debtors made to the Chapter 13 trustee all of the plan payments, but failed to make numerous direct post-petition mortgage payments. Neither the debtors nor the mortgage company took any action to address the debtors' failure to make post-petition mortgage payments. When the end of the 60-month plan term came, the Chapter 13 trustee filed his notice of final cure payment, to which the mortgage company filed a response which for the first time made debtor's counsel and the Chapter 13 trustee aware that the debtors had missed numerous post-petition mortgage payments.

Relying on 1329(a), the debtors moved to modify their plan in order to provide for the surrender of their home to the mortgage company. Noting that the debtor's argument had some equitable appeal, particularly in light of the mortgage company's inexplicable failure to take action prior to the end of the plan period, the court nevertheless rejected the debtors' arguments and joined the Sixth Circuit in holding that 1329(a) does not permit post-confirmation modification for the purpose of surrendering collateral. The court went on to discuss how the result might have differed if the secured creditor had moved to lift the stay and there had been time to address any unsecured deficiency claim in the Chapter 13 plan.

***In re Ashley*, 539 B.R. 198 (Bankr. D.N.H. 2015).** The Bankruptcy Court for the District of New Hampshire found that the obligations that a creditor has under a confirmed chapter 13 plan must be complied with. After the debtors paid the creditor's claim in full, the creditor, without a reasonable explanation, did not timely release the debtor's lien and return the title of the debtor's car. The debtors, and their counsel, tried for several months to obtain a release and the refusal of the creditor to issue it complicated the sale of the debtor's car. The court ordered the creditor to pay the debtors' attorney's fees and, in addition, to pay a sanction equal to the amount of the secured claim paid by the debtors through the plan. The court issued the additional sanction to "send a message" to secured creditors and keep this type of noncompliance from happening again.

TRUSTEES; ATTORNEYS (FEES AND CONDUCT)..

***In re Medina*, 2014 WL 5794837 (Bankr. E.D. Ca. 2014)**. Chapter 13 plan called for "no less than a 19.5% dividend" to unsecured creditors. Attorney for Chapter 13 debtors moved the bankruptcy court to compel the Chapter 13 trustee to close the case after 46 months and only 45 plan payments despite the fact that plan required 60 plan payments and neither secured nor unsecured creditors had been paid in full, arguing that trustee was improperly attempting to modify the plan by forcing the debtors to pay more than 19.5% to unsecured creditors. Attorney did not show up at the hearing on his motion, so the court denied it and ordered the attorney to show cause why he should not be sanctioned for violating Rule 9011 by making a frivolous filing in light of the fact that controlling precedent existed from the appeals court. After a hearing on the show cause order at which the attorney was unable to distinguish the facts of his case from the facts of controlling precedent from the appeals court, the court entered sanctions against the attorney for failing to investigate the facts of the case and familiarize himself with applicable law.

***Bisges v. Gargula (In re Clink)*, 770 F.3d 719 (8th Cir. 2014)**. Chapter 7 case was reopened when US Trustee discovered that debtor had not disclosed that she owned horses. Debtor settled with the Trustee, explaining that her counsel had told her not to disclose the horses. The Trustee then moved for disgorgement of counsel's fees and sanctions under §§105(a) and 526(c)(1). Debtor's counsel moved to dismiss, as a spoliation sanction based on Trustee's destruction of the recording of the 341 meeting. The bankruptcy court denied the motion to dismiss and instead sanctioned debtor's counsel under §105(a) for violating §§ 526(a)(2) and 707(b)(4) by telling the debtor to not disclose payments made by debtor to debtor's mother shortly before filing for bankruptcy and for telling debtor to not disclose ownership of the horses. On appeal, the denial of the motion to dismiss was affirmed on the grounds that there was insufficient evidence of bad faith on the part of the Trustee. The monetary sanction against debtor's counsel was upheld.

***In re Savell*, 517 B.R. 680 (Bankr. W.D. La. 2014)**. Practice developed in district of attorneys directly collecting no-look fees for post-petition work from Chapter 13 debtors. In this case, the court rejected that practice as running contrary to § 330(a) and Rule 2016(a) and thereby short-circuiting court oversight of attorney compensation. The court reasoned that direct post-petition payments could not be allowed if the source were post-petition earnings or any other property of the estate. The court ordered disgorgement in the matter before it and further ordered that all post-petition attorneys' fees in Chapter 13 cases be disbursed through the Chapter 13 trustee.

***In re Davis*, 2015 WL 1598048 (Bankr. N.D. Ala. 2015)**. Attorneys failed to disclose that their fee arrangement was to request from each debtor fifteen signed checks, the which the attorneys would then stamp $100 as to the amount payable and put in a self-addressed stamped envelope which would then be given to the debtors with instructions to mail to the attorneys as soon as they called to tell them that they had filed their bankruptcy case. Attorneys argued that they were acting from philanthropic motives in order to help distressed clients who needed immediate relief. The court began by finding that attorney had failed to inform numerous of their clients that they were eligible for in forma pauperis waivers and continued on to conclude that the attorneys had no discernable records for determining how much each debtor had paid. The court suspended the filing privileges of the attorneys, sanctioned them their net fees without giving deduction for filing fees paid where debtor would have been eligible for a fee waiver, and suspended their filing privileges pending completion of participation in the State Bar's Practice Management Assistance Program.

***U.S. Trustee v. Williams (In re Steptoe)*, Case No. 14-3298, 2015 Bankr. LEXIS 855 (Bankr. S.D. Tex. Mar. 18, 2015)**. The Bankruptcy Court for the Southern District of Texas granted summary judgment to the United States Trustee and found that the Debtor's attorney violated sections 329 and 527 of the Bankruptcy Code. The Debtor's attorney agreed to provide the Debtor with both Chapter 7 bankruptcy services and foreclosure and real estate loan services. While the attorney did provide services to the Debtor, there were issues from the beginning. The bankruptcy petition does not disclose the attorney's representation but does list his phone number as the Debtor's. The documents that were filed by the attorney generally had the Debtor's signature on them, but the Debtor never authorized the attorney to sign on her behalf. In addition, the documents did not accurately reflect the information that the Debtor gave to the attorney. Finally the attorney asked the Debtor to claim she had not hired the attorney, but she refused.

The Court found on summary judgment that the attorney (1) violated section 527(a)(1) by failing to provide the Debtor with the written notice required under section 342(b)(1); (2) violated section 527(a)(2) by failing to provide the notice to the Debtor regarding the necessity for accuracy, the requirement of due diligence, and the possibility of an audit; (3) violated section 527(b) by failing to provide the detailed notice concerning fee agreements, eligibility, and other matters required by section 527(b); (4) violated section 527(c) by failing to advise the Debtor on how to value her assets, how calculate amounts required on her schedules, how to complete her list of creditors, and how to determine the value of her exempt property; (5) violated section 329, as implemented by Fed. R. Bankr. P. 2016, by failing to file the required information regarding his fees for representing the Debtor; (6) violated section 528 by utilizing a fee agreement that failed to clearly and conspicuously explain the bankruptcy services that he was to provide; (7) violated section 526(a)(2) by filing documents that contained untrue and misleading statements that, upon the exercise of reasonable care, the attorney would have known to be untrue and misleading; (8) aggravated his conduct by failing to give proper advice to the Debtor regarding the appropriate consumer Chapter for her bankruptcy filing; and (9) aggravated his conduct by instructing his client to lie about the nature of their professional relationship. The attorney was permanently enjoined from engaging in further violations of sections 329, 526, 527 and 528 of the Bankruptcy Code, ordered to pay the United Trustee's attorneys' fees, and ordered to refund the Debtor's fees.

***Bar Nothing Ranch Partnership v. Womack (In re Amen)*, 540 B.R. 759 (D. Mont. 2015)**. Chapter 7 Trustee applied to hire his firm and another firm to collaborate on recovering assets into the bankruptcy estate, with payment to be on a contingency basis; no party objected and the court approved. After litigating and winning an adversary proceeding that brought significant funds into the estate, the trustee and collaborating attorney filed fee applications; the party that lost the adversary proceeding objected to the fee applications. The court denied the objections, noting that litigating an adversary is not "typical trustee duties" and that Section 327 authorizes trustees to be paid for handling adversary proceedings. On appeal, the district court affirmed, and also rejected out of hand arguments that appellant raised for the first time on appeal as being untimely.

***America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095 (9th Cir. 2015).** The Ninth Circuit found that when a creditor violates the automatic stay, the debtor is allowed to sue for attorney's fees and any damages that occurred from the violation. After the debtor's mortgage was foreclosed due to error by the creditor, the debtor sued the creditor for damages and attorney's fees. 11 U.S.C. § 362(a) allows the debtor to sue for attorney's fees incurred when a violation of the automatic stay occurs. *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) stated that a debtor could only sue for attorney's fees that arose from ending the stay violation, but not for any damages after the violation ended. This court ultimately decided that *Sternberg* violated Congress' intention when they wrote § 362(a). The debtor should be able to receive attorney's fees for ending the stay violation, as well as for pursuing damages that occurred from the violation.

***Penrod v. AmeriCredit Fin. Servs. (In re Penrod)*, 802 F.3d 1084 (9th Cir. 2015).** The Ninth Circuit found that the debtor was entitled to attorney's fees under a state statute which allowed the fees to the prevailing party on an action "on the contract," when the contract included a unilateral obligation to pay the fees. The debtor wished to bifurcate her auto loan into a secured and unsecured claim. The creditor, under 11 U.S.C. § 1325(a), argued that the debtor was not allowed to bifurcate and the court agreed. But, while the court allowed the creditor the balance as a secured claim, the negative equity was listed as unsecured. California Code allowed attorney's fees if the fees were incurred on an action "on the contract." The court decided that the action was on a contract because the creditor wished to enforce a provision of its contract with the debtor. Since the debtor prevailed on the contract dispute claim, she was entitled to attorney's fees.

***Fear v. United States Tr. (In re Ruiz)*, 541 B.R. 892 (B.A.P. 9th Cir. 2015)**. Chapter 7 trustee applied for compensation and expenses in an amount that exceeded the amount available for distribution on allowed unsecured claims but was less than the statutory commission. The bankruptcy court held that the lopsided compensation constituted an extraordinary circumstance warranting the court's review of the reasonableness of the Section 326(a) commission rates and awarded only a portion of the requested fees. The Panel vacated and remanded, holding that trustee compensation exceeding distributions to unsecured creditors was not per se an extraordinary circumstance warranting the bankruptcy court's review of the reasonableness of the statutory commission.

JUDICIAL ESTOPPEL ....

***Matichak v. M.A. Mortenson Co. (in re Metrou)*, 781 F.3d 357 (7th Cir. 2015)**. Debtor disclosed on schedules a workers' compensation claim valued at $7,500. After receiving his discharge, debtor sued to firms that he maintained had contributed to his injuries. The defendant moved for summary judgment based on debtor's failure to disclose those claims in his bankruptcy, and the debtor responded by notifying the trustee who then reopened the bankruptcy case and moved to replace the debtor as plaintiff in the tort suit. Applying judicial estoppel, the district court ruled that the trustee's recovery could not exceed the value of the debts that had not been paid in the bankruptcy. On appeal, the circuit court held that trustee would not be limited in recovery because to do so would be to reduce the stakes to a level which would make it economically unreasonable for the trustee to pursue the claim. Moreover, the circuit court remanded with instructions to the district court to not apply judicial estoppel mechanically but rather to explore whether the debtor had acted with intent to cut out his creditors or simply an innocent mistake.

***Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265 (5th Cir. 2015)**. Chapter 13 debtor confirmed a 100% plan. Roughly three years into the five-year plan, the debtor filed a whistleblower lawsuit alleging that his employer had defrauded the United States government on contracts. Debtor did not amend his bankruptcy schedules or otherwise disclose his interest in the lawsuit. Shortly before trial, the defendant discovered that debtor had failed to disclose the lawsuit in his bankruptcy case and move to dismiss based on judicial estoppel. Focusing on whether the debtor had any motive to conceal the lawsuit, the circuit court held that the facts that the debtor was not required to pay interest on his debts, was given the full five years to repay the principal on his debts, and had $4,504.91 in unsecured claims discharged constituted sufficient motive to justify judicially estopping the debtor from prosecuting the whistleblower lawsuit.

***Bartel v. A-C Prod. Liab. Tr.,* 2015 U.S. Dist. LEXIS 144079 (E.D. Pa. Oct. 21, 2015)**. In 1997, asbestos action was dismissed administratively, with the possibility of being pursued at a later, unspecified date. Husband brought claims in the asbestos action in 1999 (the action remained administratively dismissed), was diagnosed with cancer in 2001, and died in 2002. Wife, who was the beneficiary of husband's estate, filed chapter 7 bankruptcy in 2003, but did not disclose any claims related to the asbestos action. In 2011, the asbestos action was reinstated, and the defendants argued that either judicial estoppel barred the wife from pursuing her claim because she had failed to disclose it in her bankruptcy or that the wife lacked standing because the claims belonged to the bankruptcy estate. Based on the unusual procedural posture of the asbestos litigation at the time that the wife filed for bankruptcy, the district court concluded that under the Third Circuit's formula for judicial estoppel the debtor had not changed her position in bad faith because she could not realistically have been expected to have understood when she filed the bankruptcy that the asbestos case might one day be reopened. Nevertheless, the court held that because the wife did not disclose the claim in the bankruptcy, it remained an asset of the bankruptcy estate.

The court ruled that it would give the bankruptcy trustee a certain amount of time to determine whether he/she intended to proceed with the claim, and if the trustee declined to do so the wife would be given an opportunity to move the bankruptcy court to compel abandonment of the claim so that she could pursue it herself.

***Jones v. Bob Evans Farms, Inc.*, 2016 U.S. App. LEXIS 1202 (8th Cir. Jan. 26, 2016)**. Debtor must disclose any events affecting disposable income, including lawsuits. Before the plan period was complete, the debtor quit his job and filed an employment discrimination charge against his former employer. Debtor did not report the lawsuit to the trustee, but rather completed the plan period and received his discharge. Post-discharge, the employer moved for summary judgment based on debtor having failed to disclose his claims in the bankruptcy case; debtor responded by moving to reopen bankruptcy case and amending his schedules to include the claims. The circuit court affirmed the district court's application of judicial estoppel to bar the debtor's claims, rejecting the debtor's argument that the failure to disclose was inadvertent.

In re Palacios**, No. 14-70076, 2016 WL 361569 (Bankr. S.D. Tex. Jan. 27, 2016)**. The debtors had failed to disclose in their schedules a class action products liability lawsuit in which they were claimants. A little over a year after the petition was filed, the chapter 7 trustee notified the court of the asset. Several months later, the trustee applied to the court to approve the class action settlement that had already occurred, and simultaneously requested permission to retain and pay the attorney who had handled the class action lawsuit. Under the class action settlement, the debtors would receive a net of $49,654.72 out of a total recovery of $87,968.00; the remaining amounts were attributed to covering various attorneys' fees and costs related to the lawsuit. The trustee's request to pay the attorney reflected the attorneys' fee and cost arrangements that had been incorporated as a part of the class action settlement.

The court conditionally approved the proposed settlement, but refrained from ruling on the request to retain and pay the attorney so that the trustee could first comply with Sections 327(e) and 328(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014, the statutes and rule governing the retention of special counsel for the bankruptcy estate. The attorney from the class action lawsuit prepared and filed the fee application, but failed to include certain details, verifications, and disclosures required by the statutes. The bankruptcy court denied the application based on its failure to properly comply with the statute. As a result, the court ruled that the bankruptcy estate would receive the entire $87,968.00 settlement (less the debtors' exempted portion).

ARBITRATION ....

Moses v. CashCall, Inc.**, 781 F.3d 63 (4th Cir. 2015)**. The Fourth Circuit Court of Appeals affirmed the bankruptcy court's denial of a motion to compel arbitration of a debtor's claim for declaratory relief but remanded with instructions to grant the motion to compel arbitration of the debtor's claim for damages under the North Carolina Debt Collection Act. This case came before three judges for the Fourth Circuit and yielded three different opinions on the outcome of the two issues on appeal. The holding of the Court represents the agreement of two of the judges on the first issue and two different judges on the second issue. As a result, while the outcome was clear, the reasoning behind the outcome was not.

In this case, the Debtor borrowed $1,000 from Western Sky Financial, LLC and signed a loan agreement in which she promised to repay Western Sky $1,500 and 149% interest, which amounted to total payments of $4,893. Because of the interest rate, the loan was illegal under North Carolina law, but the agreements specified that Indian tribal law would apply and that any dispute under the agreement would be resolved by arbitration conducted by a representative of the Cheyenne River Sioux Tribe. The Debtor filed for bankruptcy, and CashCall, Inc. (the loan servicer) filed a proof of claim. The Debtor objected to the claim on the grounds that the loan was illegal and void and filed a complaint seeking (1) a declaration that the loan was void and (2) damages for CashCall's attempt to collect on a debt that was void. CashCall filed a motion to withdraw its proof of claim, which the bankruptcy court denied, and filed a motion to stay the proceeding and compel arbitration, which the bankruptcy court also denied. CashCall sought leave to appeal both of these interlocutory orders, but was only granted leave to appeal denial of the motion to compel arbitration.

Because the declaratory judgment claim was constitutionally core, but the claim for damages was not, the Court analyzed the two claims separately. The Court concluded that resolution of the Debtor's claim for a declaratory judgment that the loan was illegal under North Carolina law could directly impact the claims against her estate and that sending this claim to tribal arbitration would substantially interfere with the Debtor's efforts to reorganize. Thus, compelling arbitration of the Debtor's constitutionally core claim would inherently conflict with the purposes of the Bankruptcy Code, and the bankruptcy court appropriately exercised its discretion in denying CashCall's motion to compel arbitration of that claim. The Court also held that while the core/non-core distinction is not "mechanically dispositive" in deciding whether a bankruptcy court may refuse to send a claim to arbitration, a bankruptcy court's discretion to deny arbitration of non-core matters is narrow. As stated in Judge Gregory's majority opinion, "the refusal to send a non-core claim to arbitration requires more than a finding that arbitration would potentially conflict with the purposes of the Bankruptcy Code. Rather, the conflict must be inherent and 'sufficient to override by implication the presumption in favor of arbitration.'" The Court did not feel that was the case with regard to the non-core claim and remanded with instructions to grant the motion to compel arbitration of the debtor's claim for damages under the North Carolina Debt Collection Act.

***Harrelson v. Spray and DSSC Inc. (In re Marie Sue Harrelson)*, 537 B.R. 16 (Bankr. M.D. Ala. 2015).** The Bankruptcy Court for the Middle District of Alabama found that a claim needs to be heard by the bankruptcy court when it involves a core proceeding, is necessary to protect the debtor's creditors, and it would otherwise violate the purpose of the bankruptcy code. The debtor entered into an agreement with the defendants to settle her debts through their debt relief agency. The court had to decide whether to compel the debtor's claims to arbitration in compliance with the arbitration agreement. If the proceedings at issue are core then the court has discretion whether to enforce the arbitration agreement. The court found that the turnover claim is actually a breach of contract claim and thus a non-core proceeding; that the fraudulent conveyance claim, although a core proceeding, needs to be decided with the turnover claim in arbitration; and the violation of debt relief agency restrictions cannot be arbitrated because these restrictions were meant to be heard by the bankruptcy court.

***Larson v. Swift Rock Fin., Inc. (In re Craig)*, 2015 U.S. Dist. LEXIS 165750 (D. Colo. Dec. 09, 2015)**. Pre-petition, debtor had paid debt resolution services companies certain amounts. The Chapter 7 trustee sought to recover those amounts under Section 548(a)(1)(B) and under Colorado law governing fees that debt resolution services can charge. One of the companies moved to compel arbitration based on provisions in its contract with the debtor. The bankruptcy court denied the request, holding that the trustee's Section 548 claim was not derivative of the debtors' rights and that the arbitration provisions had no application to such a claim, and that requiring arbitration on the state law claim would impair the effort to conduct an expeditious and equitable distribution of the debtors assets and subject the no-asset estate to significant arbitration costs. The district court affirmed, noting that requiring arbitration under these circumstances would likely deprive the estate of the possibility of any recovery because the amounts in question were small.

CREDITOR ABUSE ....

***Schinabeck v. Wells Fargo Bank (In re Schinabeck)*, 2014 WL 5325781 (Bankr. E.D. Tex. 2014)**. Debtor and spouse received discharge from liability on real property that had been surrendered to Wells Fargo but upon which Wells Fargo had not foreclosed. Post-discharge, debtor began receiving written communications from Wells Fargo relating to the real property. The attorney for the debtor demanded that Wells Fargo cease, and a settlement and release agreement was entered. Nevertheless, Wells Fargo continued to send debtor statements regarding the real property. Debtor filed an adversary complaint requesting a finding of violation of the § 524 discharge injunction; statements from Wells Fargo continued to arrive during the pendency of the adversary proceeding. Wells Fargo argued that it was required by federal statute to send the statements because it had not yet accomplished foreclosing on the property and therefore had *in rem* rights that entitled it to communicate with the debtor who was still the holder of title to the property. The bankruptcy court found that Wells Fargo had unreasonably extended its *in rem* rights by unilaterally refusing to foreclose on its interest in the property and that Wells Fargo had knowingly and repeatedly violated the discharge injunction by sending statements to the debtor.

***Snowden v. Check Into Cash of Washington, Inc. (In re Snowden)*, 769 F.3d 651 (9th Cir. 2014)**. Debtor took out payday loan for $575. Before payment was due, she put a stop payment on the check and informed the payday lender that she was preparing to file for bankruptcy. The payday lender told her to inform them when she filed, and in the meantime began calling her numerous times at her place of work in order to ask why she had not paid. After the debtor filed a Chapter 7 petition, she discovered that the payday lender had used an electronic funds transfer to debit her account $816. After unsuccessful attempts by the debtor to get the payday lender to rectify the situation, debtor filed a motion for sanctions for willful violation of the automatic stay. Payday lender made a low-ball, non-admission of liability settlement offer of $1,445 (a total which ostensibly included three hours of attorneys' fees) but which debtor felt did not compensate her for the emotional distress that the payday lender had caused. After trial, the bankruptcy court awarded emotional distress damages of $12,000 and punitive damages of $12,000, as well as actual damages and attorneys' fees. A short series of appeals, cross-appeals, and remand from the district court followed. Upon reaching the Circuit Court, the emotional distress and punitive damages were affirmed under § 362(k). Addressing the issue of attorneys' fees, the Circuit Court ruled that the payday lender's lowball offer did not constitute an offer to end the violation of the automatic stay because the payday lender had specified that it was not admitting a violation of the automatic stay; debtor was therefore entitled to damages for the portion of attorneys' fees incurred in her efforts to get the payday lender to stop violating the automatic stay. By operation of the American Rule, debtor was not entitled to the portion of attorneys' fees related to proving damages. The Circuit Court remanded to the bankruptcy court for calculation of the attorneys' fees and required the parties to bear their own costs on appeal.

***In re Tucker*, 526 B.R. 616 (Bankr. W.D. Va. 2015)**. The Bankruptcy Court held that the creditor violated the discharge injunction by sending a mortgage statement to a debtor who had already received a discharge of that obligation, but that an award of damages was not appropriate. In this case, the Debtor received a Chapter 7 discharge but received a mortgage statement about a year later indicating that the loan had been accelerated and that the full amount was due immediately. The Debtor filed a motion for sanctions against the creditor. In response, the creditor acknowledged that the mortgage statement was sent to the Debtor, but explained that it was sent in error and the error in the creditor's system had been corrected. The creditor also acknowledged that the Debtor was no longer personally liable for the loan.

The Court found that the creditor violated the discharge injunction because the mortgage statement sent to the Debtor did not contain any disclaimer language stating that it was not an attempt to collect from the Debtor personally. The Court also noted that making a good faith mistake is not a valid defense to a violation of the discharge injunction. Because the lender committed an intentional act with knowledge of the injunction, the Court found that the violation was willful. The last issue, however, was whether damages were appropriate. The Court found that they were not because (1) emotional distress is not an appropriate consideration for damages for civil contempt, (2) the Debtor acted pro se and had no attorneys' fees, (3) the Debtor was fully aware of the lender's position that it was not attempting to collect from the Debtor personally but rather trying to enforce its in rem rights against the property, and (4) punitive damages were not appropriate.

APPELLATE PROCEDURE ....

***In re Gonzalez*, 795 F.3d 288 (1st Cir. P.R. 2015).** The Court of Appeals dismissed the debtor's appeal, which did not set forth the issues of the case. In this case, the debtors filed a complaint against the trustee in Arecibo Superior Court, who then removed the case the bankruptcy court. The debtors filed a motion for jury trial and to remand the case, but those requests were denied. When the debtors appealed, the district court stated that it did not have jurisdiction because the bankruptcy court had not issued a final judgment. The debtors once again appealed, but in their brief they did not address the jurisdictional issues. The Court of Appeals stated that the debtor's "incomprehensible" brief that did not clarify the necessary issues and numerous "frivolous" suits could lead to sanctions if continued.

POST PETITION TRANSFERS ....

***Sender v. Golden (In re Golden)*, 528 B.R. 803 (Bankr. D. Colo. 2015)**. Debtor disclosed a homestead in his schedules and confirmed a Chapter 13 plan which provided that all property of the Chapter 13 estate revested in the debtor at confirmation. Post-confirmation, debtor sold the homestead and transferred his share of the proceeds to his estranged wife. Debtor subsequently converted his case to Chapter 7, and the Chapter 7 trustee filed an adversary proceeding against the estranged wife under Section 549(a) seeking to avoid the transfer of proceeds from the sale of the homestead. Applying Section 1327(b), the court explored the meaning of the terms "vest" and "revest" in reaching the conclusion that the homestead had left the estate upon confirmation of the Chapter 13 plan, that the homestead was not property of the estate at the time that it was sold and the transfer was made, and that Section 348(f) therefore did not operate to bring back into the estate the proceeds from the sale of the homestead.