AMERICAN BANKRUPTCY INSTITUTE

2018 Annual Spring Meeting

CONCURRENT SESSION

Consumer Bankruptcy Legal Update

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Chapter 13 Trustee; Austin, Texas

Hon. William H. Brown (ret.)
Carbondale, Colo.

Hon. David W. Houston, III (ret.)
Mitchell, McNutt & Sams; Aberdeen, Miss.

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2018

Consumer Bankruptcy Legal Update

ABI SPRING MEETING 2018

Panelists:

The Honorable William H. Brown
United States Bankruptcy Judge, Retired

The Honorable David W. Houston III
United States Bankruptcy Judge, Retired

Professor Bruce A. Markell
Professor of Bankruptcy Law and Practice
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Deborah B. Langehennig
Chapter 13 Trustee, Austin

Is affirmative conduct required for a stay violation?

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WD Equipment, LLC v. Cowen (In re Cowen), 849 F.3d 943 (10th Cir. 2017).

11 U.S.C. § 362(a)(3)

provides that the automatic stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

Other cases finding no stay violation:

Pereira v. 397 Realty LLC (In re Heavey), 16-3227 (2d Cir. Jan. 28, 2018), unpublished summary opinion.

Davis v. Tyson Prepared Foods, Inc. (In re Garcia), 2017 WL 2951439 (Bankr. D. Kan. 2017).

In re Waldrop, 2017 WL 1183937 (Bankr. W.D. Okla. 2017).

In re Avila, 566 B.R. 558 (Bankr. N.D. Ill. 2017).

In re Denby-Peterson, 576 B.R. 66 (Bankr. D. N.J. 2017). Page 7 of materials.

Contrary Circuit and other authority:

Weber v. SEFCU (In re Weber), 719 F.3d 72 (2d Cir. 2013).

Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699 (7th Cir. 2009).

California Employment Dev. Dept. v. Taxel (In re Del Mission, Ltd.), 98 F.3d 1147 (9th Cir. 1996).

Knaus v. Concordia Lumber Co., Inc. (In re Knaus), 889 F.2d 773 (8th Cir. 1989).

TranSouth Fin. Corp. v. Sharon (In re Sharon), 234 B.R. 676 (B.A.P. 6th Cir. 1999).

What is the current status of judicial estoppel when the debtor fails to schedule a cause of action?

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Slater v. United States Steel Corp., 871 F.3d 1174 (11th Cir. Sept. 18, 2017).

Chapter 7 trustee's attempts to sell property when primary or only benefit is to generate commission and trustee fees.

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Jubber v. Bird, et al. (In re Bird and Christensen), 577 B.R. 365 (B.A.P. 10th Cir. Nov. 30, 2017). *See also In re Moore*, 577 B.R. 836, 837 (Bankr. E.D. Mass. 2017).

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Is a creditor entitled to administrative expense claim for assistance provided to a trustee in an avoidance action?

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In re Maqsoudi, 566 B.R. 40 (Bankr. C.D. Cal. 2107).

Enforcing the debtor's statement of intention to surrender, and the effects of that in a post-discharge foreclosure action.

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Failla v. Citibank, N.A. (In re Failla), 838 F.3d 1170 (11th Cir. 2016).

Curing defaults in Chapter 13 when the plan term runs beyond 60 months.

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Compare *In re Klaas,* 858 F.3d 820 (3d Cir. 2017), with *In re Humes,* 579 B.R. 557 (Bankr. D. Colo. 2018).

Issue: Are postpetition contributions to a retirement account deductible from the disposable income calculation?

11 U.S.C. § 541 Property of the estate

(b) Property of the estate does not include—

*** * * ***

(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

Gorman v. Cantu, 2017 WL 6422351 (4th Cir. Dec. 18, 2017). Page 51 of the materials.

Burden v. Seafort (In re Seafort), 669 F.3d 662 (6th Cir. 2012).

In re Vanlandingham, 516 B.R. 628 (Bankr. D. Kan. 2014).

RESFL Five LLC v. Ulysses, 2017 WL 4348897 (S.D. Fla. Sept. 9, 2017).

In re Davis, 2017 WL 4898166 (Bankr. C.D. Ill. Oct. 30, 2017).

In re Garza, 575 B.R. 736 (Bankr. S.D. Tex. 2017).

May a Chapter 13 plan be confirmed that separately classifies and provides treatment for student loan debt?

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In re Engen, 561 B.R. 523 (Bankr. D. Kan. 2016); *In re Kindle,* 2017 WL 5035080 (Bankr. D. S.C. Nov. 1, 2017).

May a plan be confirmed that forces vesting of property in the creditor/lienholder?

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In re Brown, 563 B.R. 451 (D. Mass. 2017).

Are administrative expenses allowed to a creditor or creditor's attorney for substantial contribution in Chapter 7 and 13 cases?

Section 503(b) of the Code provides for administrative expense, including:

> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> ******
>
> (D) a creditor, indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title.

Sharkey v. Stevenson and Bullock, PLC (In re Sharkey), 2017 WL 5476486 (E.D. Mich. Nov. 15, 2017). Page 75 of materials.

Mediofactoring v. McDermott (In re Connolly North America, LLC), 802 F.3d 810 (6th Cir. 2015).

In re Fontainebleau Las Vegas Holdings, LLC, 574 B.R. 895 (Bankr. S.D. Fla. 2017).

CONSUMER LAW UPDATE

Cases reported from October 1, 2016 through February 28, 2018

Prepared for American Bankruptcy Institute

36th Annual Spring Meeting

April, 2018

Consumer Bankruptcy Legal Update Panel

Materials prepared by William Houston Brown,
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Appeals

Failure to timely appeal. Chapter 13 debtor in case closed several years earlier did not appeal the bankruptcy court's denial of motion for sanctions against mortgage creditors, and former debtor's petition for mandamus to compel bankruptcy court to consider sanction award was not substitute for timely appeal. Since there was no timely appeal, the Bankruptcy Appellate Panel did not have jurisdiction to hear the appeal labeled as a mandamus petition. *Ozennne v. Chase Manhattan Bank,* 841 F.3d 810 (9th Cir. 2016).

District court had discretion to deny stay pending appeal. The district court affirmed denial of the credit card issuer's motion to compel arbitration in the putative class action concerning alleged violation of the discharge injunction. The district court had held that violation of the discharge injunction is such a substantive issue essential to the proper functioning of the Bankruptcy Code that arbitration would not adequately protect. The card issuer moved for a stay of the bankruptcy proceeding pending further appeal, and the district court denied the stay, applying traditional four-factor test to whether a stay should be granted. *Credit One Bank, N.A. v. Anderson,* 560 B.R. 84 (S.D. N.Y. 2016).

Abandonment

Chapter 7 debtors had party-in-interest standing to seek abandonment. The Sixth Circuit held that the Chapter 7 debtors had sufficient interest in their residence to be parties in interest with Article III standing to seek the trustee's abandonment of the property as having inconsequential value to the estate. The bankruptcy court did not err in finding the value of the property, after a mortgage balance, to be of inconsequential value, and the trustee could not force eviction of the debtors by tendering them a check for $7,500 homestead exemption. *Jahn v. Burke,* 863 F.3d 521 (6th Cir. 2017).

Arbitration

Filing of proof of claim did not prevent enforcement of arbitration. In a non-consumer Chapter 7 case, a creditor filed a proof of claim, while the trustee filed a turnover action against the same creditor, raising disputed issues of the debt under state law. The district court concluded that the turnover action was not core, at least until it was determined by arbitration whether there was a debt owing from the creditor to the

estate. The court ordered arbitration to proceed, and if that resulted in a determination favorable to the trustee, the turnover action would then resume. *Gavilon Grain LLC v. Rice,* 2017 WL 3508721 (E.D. Ark. Aug. 16, 2017).

Arbitration clause not enforced for alleged stay violations. The Chapter 7 debtors filed an adversary proceeding against Verizon Wireless for stay violations, and Verizon sought to compel arbitration under its services agreement; however, the wife debtor was not a party to the services agreement and could not be compelled to arbitrate. Moreover, enforcement of the arbitration clause was not compelled in the core proceeding to determine alleged stay violations. The opinion notes that the Sixth Circuit has not addressed the issue of arbitration in the context of a bankruptcy case. *In re Jorge,* 568 B.R. 25 (Bankr. N.D. Ohio 2017). *See also In re Farmer,* 567 B.R. 895 (Bankr. W.D. Wash. 2017) (Chapter 7 debtor's adversary was core proceeding to determine if loan for bar examination expenses was nondischargeable student loan, and court denied defendant's motion to enforce arbitration provision.).

Automatic Stay

Section 362(k)(1) damages include attorney fees for prosecuting and defending damage action on appeal. The Eleventh Circuit concluded that under § 362(k)(1)'s broad provision for recovery of "actual damages, including costs and attorneys' fees," nothing in the statute limited the scope of attorneys' fees solely to ending the stay violation. Agreeing with *In re Schwartz-Tallard,* 803 F.3d 1095 (9th Cir. 2015), *en banc*, the Circuit panel held that fees incurred in prosecuting damages for a stay violation and in defending that fee on appeal were within the scope of § 362(k)(1). That section of the Code "specifically departs from the American rule," authorizing such costs and fees. *Mantiply v. Horne (In re Horne),* 876 F.3d 1076 (11th Cir. 2017).

Automatic stay did not apply to state court suit against trust. Creditors had obtained prepetition judgment against spouses who then filed Chapter 7, and the creditors attempted to collect by garnishment against a trust, of which one debtor was a an alleged beneficiary. In state-court suit against the trustee, the judgment creditor argued that it was entitled to collect from an overdue distribution, but the state court dismissed the suit for lack of standing and assessed attorney fees in favor of the trustee against the judgment

creditors. The judgment creditors then asserted that the automatic stay in the Chapter 7 case prevented the state court from taking further action. The bankruptcy and district courts held that the automatic stay did not apply to the state court suit in which the judgment creditors alleged damages against the trustee and not against the Chapter 7 debtors. The Tenth Circuit held that the judgment creditor lacked Article III standing to appeal but also that the creditors' claims fell outside the "zone of interests protected by the automatic stay." The Circuit opinion discusses that doctrine within the context of §§ 362(a) and 362(k), concluding that the judgment creditor's alleged damages were not asserted against the debtors but against the trustee in the state-court litigation. *In re Peeples,* 880 F.3d 1207 (10th Cir. 2018).

Stay did not prevent government's collection of criminal restitution. Agreeing with the outcome in the Second and Sixth Circuits, the Ninth Circuit affirmed its Bankruptcy Appellate Panel, at 531 B.R. 811, holding that the plain language of the Mandatory Victims Restitution Act permitted "the government to collect restitution, despite any federal laws to the contrary," thus eliminating "any potential conflict with the automatic stay." *In re Partida,* 862 F.3d 909 (9th Cir. 2017).

Stay not violated in Chapter 7 by entry of nondischargeable judgment from prior Chapter 11 proceeding. In a prior Chapter 11 case, litigation involved the nondischargeability of a debt based on larceny, and the bankruptcy court issued its opinion, but the debtor filed a subsequent Chapter 7 before entry of the judgment. The debtor alleged that entry of the judgment violated the automatic stay in the Chapter 7, but the Fifth Circuit found an exception and harmless error. In its prior precedent, the Circuit had recognized that filing a proof of claim did not violate the stay, and the Bankruptcy Code contains various procedures for creditors' assertion of claims against the debtor, including filing adversary discharge proceedings. The stay is directed toward preventing actions taken by creditors outside of the bankruptcy court forum. Moreover, even if error in entry of the judgment, it was harmless, because the bankruptcy court would have lifted the stay on request of the plaintiff, and the prior finding of nondischargeability would have applied in the Chapter 7 case. *In Matter of Cowin,* 864 F.3d 344 (5th Cir. 2017).

Collection of state-court discovery sanction was excepted from stay. Affirming its Bankruptcy Appellate Panel decision at 514 B.R. 591, the Ninth Circuit held that §

362(b)(4)'s exception from the stay for "government regulatory" action applied to an effort to collect a discovery sanction that had been awarded by a Nevada court. The collection effort was a civil contempt proceeding exempted from the automatic stay under § 362(b)(4). *In re Dingley,* 852 F.3d 1143 (9th Cir. 2017). *Compare In re McKenna,* 566 B.R. 286 (Bankr. D. R.I. 2017) (Although proceeding in state court to determine if debtor is liable for sanctions would be exempt from stay, § 362(b)(4) does not apply when the sanction award had already been reduced to monetary judgment; collection attempt of that award would be subject to stay.). *See also In re Grigg,* 568 B.R. 498 (Bankr. W.D. Pa. 2017), for finding creditor's motion for sanctions under 28 U.S.C. § 1927 untimely.

Lienholder too late in seeking to vacate stay relief order. During the Chapter 13 case, PNC Bank moved for relief from the automatic stay to foreclose, and notice was electronically served on counsel who had appeared for Wells Fargo, but no response was filed. An order granting stay relief to PNC also cancelled Wells Fargo's junior deed of trust. Two years later, after PNC's foreclosure sale in which a third party purchased the property, Wells Fargo moved to set aside the stay relief order. The Fourth Circuit held that the motion to set aside was not filed within a reasonable time, and the notice to Wells Fargo's attorney was sufficient for due process purposes, notwithstanding PNC's error in seeking to invalidate Wells Fargo's lien in conjunction with its stay relief. *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC,* 859 F.3d 295 (4th Cir. 2017).

Automatic stay prohibits only affirmative acts. The Tenth Circuit held that § 362(a)(3)'s prohibition against obtaining possession or exercising control over property of the estate applies only to affirmative acts. When the secured creditor retained collateral that had been repossessed pre-bankruptcy, that passive retention did not violate the stay. The automatic stay must be read in conjunction with § 542's turnover remedy, but turnover is not self-executing to trigger a stay violation by passive retention. The Circuit panel adopted "the minority rule: only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3)." *In re Cowen,* 849 F.3d 943 (10th Cir. 2017). *See also In re Avila,* 566 B.R. 558 (Bankr. N.D. Ill. 2017) (City did not violate stay by post-petition retention of vehicle, because retention was necessary to maintain or continue perfection of its statutory lien under § 546(b), and the city was protected by § 362(b)(3).).

Creditor's postpetition credit reporting did not violate stay or confirmation order. In a matter of first impression, the Ninth Circuit Bankruptcy Appellate Panel considered the issue of whether a creditor's postpetition reporting to a credit reporting agency of overdue or delinquent payments was a per se violation of § 362(a)(6)'s stay of collection activity. The Chapter 13 debtors had obtained confirmation of a plan to pay prepetition arrears and ongoing mortgage obligations, and the debtors obtained 3-bureau credit reports showing the mortgage servicer as reporting postpetition late or past due payments on the mortgage account. The BAP held "that postpetition credit reporting of overdue or delinquent payments, without more, does not violate the automatic stay as a matter of law," and it is noted that the debtors were not contending that the reported information was inaccurate. The BAP observed a "dearth of case law on the precise issue before us. Most courts have addressed this issue in the context of the discharge injunction," and the opinion found those decisions to be relevant because "the standard for violations of the automatic stay and the discharge injunction are similar, with the latter decisions "stand[ing] for the proposition that negative credit reporting, without more, does not violate the discharge injunction. The debtor must show that the credit reporting was done with the purpose of coercing the debtor to pay the reported debt." The BAP further found that the "few cases addressing the issue of negative credit reporting in the context of § 362. . .hold that postpetition negative reporting alone is not an act to collect a debt in violation of the stay; such reporting must have been done with the intent to harass or coerce the debtor to pay the reported debt." Moreover, the bankruptcy court did not err in its determination that the postpetition credit reporting did not violate the confirmation order under § 1327(a). *In re Keller,* 568 B.R. 118 (B.A.P. 9th Cir. 2017).

Repossessing creditor's passive retention of vehicle did not violate stay. A vehicle had been repossessed pre-bankruptcy, and the Chapter 13 debtor moved for turnover and for stay violation damages related to retention of the vehicle. The court concluded that in Chapter 13 it is the debtor, rather than the trustee, who has standing under § 542(a) to seek turnover of property that the debtor could use, sell or lease. Although this debtor did not have legal title to the vehicle, she had an equitable interest at the time of bankruptcy filing, sufficient to bring the vehicle into the bankruptcy estate, with a right to redeem the repossessed vehicle. The court then reviewed the conflicting circuit and other

authority on whether § 542(a) requires immediate turnover of property and whether failure violates § 362(a)(3), with the Third Circuit not yet addressing the issue. Under the particular facts of this case, including that the debtor's interest in the vehicle was not clear prior to the court's determination, § 542(a) was not "self-effectuating." Pending the court's determination of the debtor's interest, the status-quo had been maintained as to the vehicle, and turnover of the vehicle was ordered, but with no sanctions as to stay violation. Alleged stay violation as to personal property within the vehicle was a separate issue in the opinion. *In re Denby-Peterson,* 576 B.R. 66 (Bankr. D. N.J. 2017). *Compare* under Debtor's Attorney Fees, *Wright v. Csabi, et al. (In re Wright),* 578 B.R. 570 (Bankr. S.D. Tex. 2017) (special counsel violated § 362(a)(3) by exercising possession and control over settlement proceeds).

Jurisdiction over in rem stay order. An in rem relief from stay order had been entered in the Chapter 13 case of a debtor unrelated to the current pro se Chapter 7 debtor, and the court had jurisdiction in that prior case over the property subject to the stay, pursuant to § 362(d)(4). The foreclosing creditor was entitled to rely on that in rem relief order and had no liability for alleged violation of the automatic stay in the current Chapter 7 case. The current debtor could have sought relief from the in rem order in this case, because she received notice of the in rem order when the current case was filed, in time for her to move for relief prior to the foreclosure. There was not a violation of the current debtor's procedural due process rights, with the pro se debtor's motion to set aside the in rem order denied on the merits. *Greenstein v. Wells Fargo Bank, N.A., et. al (In re Greenstein),* 576 B.R. 139 (Bankr. C.D. Cal. 2017).

Creditor's truthful post-petition and pre-discharge reporting of credit information did not violate automatic stay. The Chapter 7 debtor alleged that Verizon had violated the automatic stay by reporting credit information, including delinquency, to the credit reporting bureaus, and the court held that "the mere act of reporting a debtor's truthful credit information post-petition—but pre-discharge—without further evidence that the creditor is attempting to collect the debt, is not a violation of the automatic stay." The opinion reviews authority on the issue. *In re Porcoro,* 565 B.R. 314 (Bankr. D. N.J. 2017).

No stay triggered by third filing and in rem relief appropriate. Reviewing §§ 362(c) and (d), there was no automatic stay triggered by the debtor's third filing in less than one

year, but assuming a stay had gone into effect, the mortgagee established cause for in rem relief, because the debtor had made no payments on the mortgage in over six years and had filed successive bankruptcy petitions to stop foreclosure. *In re O'Farrill,* 569 B.R. 586 (Bankr. S.D. N.Y. 2017). *See also In re Mendiola,* ___ B.R. ___, 2017 WL 4117328 (Bankr. E.D. Wisc. Sept. 15, 2017) (six filings in six years was abusive, with in rem relief granted, plus case dismissed with 180-day refiling bar).

Philadelphia Parking Authority not immune from stay violation. Holding that the Supremacy Clause overrides the city Parking Authority's claim to immunity from damages for alleged stay violation when it impounded the debtor's vehicle postpetition, the Eleventh Amendment did not apply to the Parking Authority, which was a city agency, not a state agency. However, § 106(a)(3) permitted monetary recovery against a governmental unit for damages but not for an award of punitive damages. *In re Odom,* ___ B.R. ___, 2017 WL 3484330 (Bankr. E.D. Pa. Aug. 10, 2017). *See also In re Odom,* ___ B.R. ___, 2017 WL 3475478 (Bankr. E.D. Pa. Aug. 10, 2107) (violation of § 362(a)(6) justified civil contempt damages under § 105(a) for emotional distress and debtor's attorney fees).

Reinstatement of dismissed case did not retroactively re-impose automatic stay. A creditor had repossessed the Chapter 13 debtors' vehicle after the case had been dismissed. While the automatic stay is re-imposed on the date of vacating of the dismissal, the stay is not retroactive to the date of dismissal. *In re Holloway,* 565 B.R. 435 (Bankr. M.D. Ala. 2017).

Debtor entitled to discovery from creditor's attorney in stay violation proceeding. The Chapter 7 debtor filed an adversary proceeding contending that the garnishing creditor, through its attorney, had violated the automatic stay, and the debtor moved for responses to interrogatories concerning prior lawsuits against the attorney, sanctionable conduct in bankruptcy cases and violations of the Fair Debt Collections Practices Act. With restrictions on the period subject to discovery, interrogatories sought discoverable information. *Waldrop v. Discover Bank (In re Waldrop),* 560 B.R. 806 (Bankr. W.D. Okla. 2016).

Failure to schedule lease barred alleged stay violation. The Chapter 7 debtors-tenants sought to recover damages for the landlord's alleged violation of the automatic stay and discharge injunction related to postpetition actions to enforce a lease extension

agreement, but the debtors' failure to schedule any prepetition lease interest was a judicial admission that the prepetition lease had expired. The lease extension was a new postpetition lease, and the debtors were prevented from any damage recovery. *Henderson v. White (In re Henderson),* 560 B.R. 365 (Bankr. D. N.M. 2016).

Avoidance Actions

Garnishment was preferential transfer. The transfer of a Chapter 7 debtor's wages did not occur when the garnishment order was issued, which was more than 90-days prepetition; rather, the transfer occurred when the debtor had acquired an interest in the wages, at the time wages were earned. The Circuit Court held "that a creditor's collection of garnished wages earned during the preference period is an avoidable transfer made during the preference period even if the garnishment was served prior to that period." *In Matter of Jackson,* 850 F.3d 816 (5th Cir. 2017).

Equitable Tolling of two-year fraudulent transfer claim. The Chapter 7 debtor's failure to disclose potentially fraudulent transfers on the schedules or statement of financial affairs, coupled with false oaths and failure to turn over documents or cooperate with the trustee, constituted "extraordinary circumstances" for purposes of equitably tolling the two-year time for filing § 544(b) complaints. The Ninth Circuit applied its precedent, *Gladstone v. U.S. Bancorp,* 811 F.3d 1133 (9th Cir. 2016), to hold that equitable tolling of the limitations period was appropriate when there were both extraordinary circumstances and trustee diligence during the time of concealment of the transfers—"it is diligence *during* the existence of an extraordinary circumstance [that] is the key consideration." *Milby v. Templeton (In re Milby),* 875 F.3d 1229 (9th Cir. 2017).

Chapter 13 debtor established fraudulent transfer of property in which she had interest. The Fifth Circuit affirmed finding that the Chapter 13 debtor's ex-husband acted with fraudulent intent in transferring royalty rights of a limited liability company in which the debtor had 25% interest, and damages were 25% of the royalties generated between the transfer and trial of the fraudulent transfer claim. Plus, the debtor was entitled to $250,000 exemplary damages. *In Matter of Galatz,* 850 F.3d 800 (5th Cir. 2017).

***Rooker-Feldman* prevented avoidance of foreclosure.** The Sixth Circuit Bankruptcy Appellate Panel concluded that the bankruptcy court was precluded by the *Rooker-*

Feldman doctrine from finding that a state court's foreclosure judgment violated the debtors' discharge injunction. The bankruptcy court had found that the mortgage was not recorded prior to the bankruptcy filing and that the debtors could avoid the unperfected mortgagee's foreclosure judgment. However, the BAP concluded that under Kentucky law, the mortgage was binding between the parties, even though unperfected, and the state court had ruled the mortgage to be valid and enforceable through foreclosure. *Isaacs v. DBI-ASG Coinvestor Fund III, LLC,* 569 B.R. 135 (B.A.P. 6th Cir. 2017).

Lien avoidance under § 522(f)(2)(C) applied to mortgage deficiency judgment liens. The Sixth Circuit Bankruptcy Appellate Panel found § 522(f)(2)(C) unambiguous, holding that lien avoidance was available as to mortgage deficiency judgment liens. The statute under its plain meaning clarified that entry of a foreclosure judgment did not convert the underlying consensual mortgage into an avoidable judicial lien, but the panel distinguished a mortgage deficiency judgment from a mortgage foreclosure. The panel agreed with the interpretation of the First Circuit at *In re Hart,* 328 F.3d 45 (1st Cir. 2003), and found that only two opinions had disagreed with that view. *In re Pace,* 569 B.R. 264 (B.A.P. 6th Cir. 2017).

Prepetition tax sale foreclosure was avoidable by Chapter 13 debtors as preference. The Chapter 13 debtors' home had been sold for delinquent real property taxes, and the tax sale purchaser then proceeded with foreclosure, resulting in a purchase for $45,000. The debtors then filed Chapter 13, scheduling the property with a value of $335,000, far more than the foreclosure price. The debtors filed an avoidance complaint, asserting the foreclosure was a preferential transfer, as well as a fraudulent transfer. Finding that the foreclosure gave the creditor more than it would have received in a Chapter 7 liquidation and that the transfer satisfied all elements of a preference under § 547(b), the court did not need to rule on whether the transfer was also a fraudulent conveyance. The opinion discusses the split of authority, distinguishing *BFP v. Resolution Trust Corp*., 511 U.S. 531 (1994), which held mortgage foreclosure sales were not fraudulent conveyances. *Hackler v. Araianna Holdings Co., LLC,* 571 B.R. 662 (Bankr. D. N.J. 2017).

Chapter 7 debtor not entitled to turnover of intercepted tax refund. Section 553 preserved the Internal Revenue Service's nonbankruptcy right to prepetition setoff of a

tax refund, which did not become property of the Chapter 7 estate. The refund had been forwarded to the Army and Air Force Exchange Service (AAFES), a component of the Department of Defense, which applied it to a credit card debt. AAFES was a unitary federal governmental creditor for purposes of IRS's setoff, establishing mutuality under § 553. The debtor's turnover proceeding was dismissed. *Faasoa v. Army and Air Force Exchange Service (In re Faasoa),* 576 B.R. 631 (Bankr. S.D. Cal. 2017).

Plausible cause of action for fraudulent conveyance in tuition payments. The Chapter 7 trustee filed an adversary proceeding against a university to recover tuition payments made within two years by the debtor for the education expenses of her adult son, alleging that the debtor received less than reasonably equivalent value for the transfers, which were made while she was insolvent. On the university's motion to dismiss, the court concluded that the proceeding was not core and made recommended findings and conclusions to the district court that the complaint stated a plausible cause of action and that the motion to dismiss should be denied. *Slobodian v. Pennsylvania State Univ. (In re Fisher),* 575 B.R. 640 (Bankr. M.D. Pa. 2017).

Chapter 13 debtor lacked standing to use trustee's avoidance power. Discussing the split of authority on the debtor's standing to use avoidance powers of the trustee, the court found that § 522(h) is limited in what it allows the debtor to pursue and agreed with the majority of courts, concluding that Chapter 13 debtors have no standing to exercise a trustee's Chapter 5 avoidance powers. *In re Kalesnik,* 571 B.R. 491 (Bankr. D. Mass. 2017).

Community property interest prevailed over joint tenancy. The Bankruptcy Appellate Panel had previously affirmed the Chapter 7 trustee's fraudulent transfer avoidance of a conveyance of real property by the debtor husband and nondebtor spouse to a trust, at 2017 WL 1025215, and in this opinion, the BAP held that although the real property had been acquired during the marriage as joint tenants, under California's presumption of community property, the trustee's avoidance of the transfer entitled the estate to recover the entire community property interest. *In re Black,* 566 B.R. 13 (B.A.P. 9th Cir. 2017). *See also In Matter of Wiggains,* 848 F.3d 655 (5th Cir. 2017) (discussing community property and nondebtor spouse's limitation to receive debtor's capped homestead exemption after trustee's sale of property). *See also In re Miller,* 853 F.3d 508 (9th Cir.

2017) (for distinction under California law of co-op apartment as tenancy in common, rather than community property).

Prepetition divorce judgment granted ex-wife mortgage, rather than avoidable judicial lien. The Chapter 13 debtor sought to avoid a lien as impairing his otherwise exempt property, but the pre-bankruptcy divorce judgment awarded the former spouse a mortgage in the former marital home until the debtor sold the home to fund an equalizing payment. The judgment was not a judicial lien subject to avoidance under § 522(f). *Sarazin v. Sternat,* 563 B.R. 285 (E.D. Wisc. 2017).

Bankruptcy court had core jurisdiction over turnover. In an analysis of contested jurisdiction over a turnover proceeding by the Chapter 7 trustee, the district court reviewed the historical standards of summary and statutory jurisdiction, concluding that the bankruptcy court had jurisdiction to enter a final order. There were two components of turnover: (1) determination of whether the assets were property of the bankruptcy estate, over which the bankruptcy court had core jurisdiction; and (2) entry of a final order requiring turnover of the asset, which was also core. The court also held that the bankruptcy court did not err in making its determinations in the context of a contested motion rather than an adversary proceeding; even if error, it was harmless. *Reed v. Nathan,* 558 B.R. 800 (E.D. Mich. 2016). *See also Spradlin v. Khouri (In re Bruner),* 2017 WL 33514 (B.A.P 6th Cir. Jan. 4, 2017) (Chapter 7 trustee failed to prove that funds paid to debtor's attorney remained property of estate for turnover).

United States could intervene in Chapter 7 trustee's preference proceeding. The Chapter 7 debtor had paid $100,000 restitution to former employer as part of plea agreement, and the trustee sued the employer for recovery of a prepetition preferential transfer. The United States moved to intervene, which was granted as a matter of right under Fed. R. Civ. P. 24(a)(2); alternatively, permissive intervention was appropriate. *Spero v. Community Chevrolet, Inc. (In re Grooms),* 561 B.R. 372 (Bankr. W.D. Pa. 2016).

Exemptions and Property of Estate

Funds withdrawn from IRA postpetition remained exempt in Chapter 7. Reversing itself quickly on a petition for rehearing (see prior opinion at 864 F.3d 364), a panel of the Fifth Circuit held that in a Chapter 7 case, the allowance of an IRA exemption became

final when the objection period had passed, even though the debtors had withdrawn funds from the IRA without rolling them over into another qualifying account. Texas law protected IRA distributions from creditors' seizure for sixty days to permit them to be rolled over into another qualifying account. The panel examined prior Circuit precedent on exemption of homesteads, which had a similar protection for six months after a sale, and distinguished Chapter 7 from 13 cases involving IRA and homestead exemptions, noting that under § 1306(a)(1) property that lost its exempt character may come into the Chapter 13 estate, while in Chapter 7, once an exemption is allowed it passes out of the estate. Applying *Taylor v. Freeland & Kronz,* when there were no timely objections to the IRA exemption, the withdrawn funds did not become property of the Chapter 7 estate. *Hawk v. Engelhart,* 871 F.3d 287 (5th Cir. 2017).

Under Georgia law, health saving account was not exempt. Applying Georgia Supreme Court's decision, *Mooney v. Webster,* 794 S.E.2d 31 (Ga. 2016), the debtor's health savings account was not exempt as a "disability, illness, or unemployment benefit" nor as "payment under a pension, annuity, or similar plan or contract." *In re Mooney,* 854 F.3d 1260 (11th Cir. 2017).

Debtor not entitled to exemption in sale proceeds of property that had been surrendered. The Chapter 7 debtor's statement of intention was to surrender her residence, but after the trustee sold the property, the debtor attempted to exempt a portion of the sale proceeds under §§ 522(d)(1) and (d)(5). Assuming the debtor had any redemption rights, she still had no allowable exemption, because there was no residual equity in the property to which her exemption could attach. *In re Brown,* 851 F.3d 619 (6th Cir. 2017).

Tenancy by entirety exemption retained after transfer. The prepetition transfer of residential property that was owned by spouses as tenants by entirety to a trust, of which both spouses were beneficiaries, did not destroy the tenancy by entirety; therefore, the debtor spouse retained ability to claim the entireties exemption. *Loventhal v. Edelson,* 844 F.3d 662 (7th Cir. 2016).

Interest in spendthrift trust not exempt nor excluded from estate. Because the debtor's beneficial interest in a spendthrift trust vested in her as beneficiary before filing Chapter 7, the debtor could not claim that interest as exempt or exclude it from the

bankruptcy estate. The trust had been settled by the debtor's since-deceased parents, and she had a vested right to one-third of the trust residuum after the father's death. *In re Carroll,* 864 F.3d 512 (7th Cir. 2017).

Section 541(c)(2)'s exclusion is permissive. The Chapter 7 debtors reopened a no-asset case to amend schedules, including interest in a state-court suit contesting one debtor's father's will. After settlement of that litigation by the Chapter 7 trustee, the debtor contended that her interest was as a beneficiary of the will's spendthrift trust. Concluding that the exception in § 541(c)(2) "is permissive rather than mandatory, and thus it is a debtor's choice whether or not to include such an interest in his or her bankruptcy estate," the debtor chose to schedule her interest in the litigation and was not entitled to now claim the exclusion. *Scott v. King,* 839 F.3d 1290 (10th Cir. 2016).

Minnesota's property tax refund was not exempt as a government assistance based on need. The debtors claimed exemptions under Minnesota statutes, including a claim of state property tax refund as a "government assistance based on need" under Minnesota's § 550.37. Following its earlier ruling in *In re Johnson,* 509 B.R. 213 (B.A.P. 8th Cir. 2014), which dealt with the same exemption, the panel held that *Johnson* had not been affected by the Eighth Circuit's decision in *In re Hardy,* 787 F.3d 1189 (8th Cir. 2015), which addressed exemption of a child tax credit. *Hanson v. Seaver (In re Hanson)* 562 B.R. 363 (B.A.P. 8th Cir. 2017).

Interpretation of Rule 4003(b)(1). Without deciding the issue, the Bankruptcy Appellate Panel's opinion points out the split of bankruptcy court authority on the question of whether Rule 4003(b)(1)'s thirty days for objections to amended exemption claims permits objections to all exemptions or to only the new exemption raised in the amendment. The bankruptcy court had adopted the view that the trustee could object to all exemptions within thirty days of the debtors' amended exemption claims, and under the standard of review in this appeal, the BAP did not need to decide that legal issue. Although there was no controlling appellate authority in the First Circuit, there was lower court authority (albeit minority) supporting the trustee's position, and the bankruptcy court's position was not "a plain and indisputable error that amounted to a complete disregard of the controlling law." *In re Nieves Guzman,* 567 B.R. 854 (B.A.P. 1st Cir. 2017).

Debtor's scheduled personal injury claim was abandoned by trustee but unscheduled workers' compensation claim was not abandoned. The Chapter 7 debtor had scheduled a cause of action for personal injury and the case was closed with no administration of that cause of action. Under § 554(c), that cause of action was abandoned upon closing of the case, notwithstanding the trustee's attempt in the report of no distribution to keep any future settlement as property of estate. The trustee's no distribution report did not "suffice to preserve the trustee's right to pursue the claim on the bankruptcy estate's behalf," because no court order preserved the cause of action after closing of the case. In contrast, the debtor's unscheduled worker's compensation claim was not abandoned upon closing, pursuant to § 554(d). *In re Wright,* 566 B.R. 457 (B.A.P. 6th Cir. 2017).

Payment to debtor's criminal defense attorney was not property of Chapter 7 estate. In a case converted from Chapter 13 to 7, the trustee sought turnover of funds that had been paid postpetition from a bank account shared by the debtor and his mother to the debtor's criminal defense attorney. The trustee could not obtain turnover without first avoiding the postpetition transfer under § 549, and avoidance was not pled in the trustee's complaint. The trustee also failed to establish that the debtor retained any interest in the funds after they were wire transferred to the attorney. *In re Bruner,* 561 B.R. 397 (B.A.P. 6th Cir. 2017).

Trustee's reply brief qualified as objection to amended exemption claim. After Chapter 7 debtors scheduled a vehicle as not exempt but with an unperfected security interest, the trustee sought turnover of the vehicle, and the debtors' response to turnover was to claim exemption in the full value of the vehicle. The trustee's reply brief to the turnover response included an objection to the exemption. Although better practice would have been for the trustee to file a separate objection to the exemption claim, the reply brief was a timely objection, and the debtors had notice of that objection. Because the debtors had voluntarily conveyed a security interest in the vehicle to one debtor's brother, under § 522(g)(1)(A), the debtors could not claim the vehicle as exempt. *In re Wharton,* 563 B.R. 289 (B.A.P. 9th Cir. 2017).

Exemptions determined as of petition filing. The Chapter 7 trustee's objection to the debtor's Illinois homestead exemption was based upon failure to reinvest the sale

proceeds in another homestead within one year, with the trustee arguing that the Illinois homestead in proceeds was conditional, applying only when timely reinvested. The court disagreed with the Fifth Circuit's *In re Zibman,* 268 F.3d 298 (5th Cir. 2001), under which a trustee could reach homestead proceeds that were not reinvested within six months of a sale, noting that *Zibman* had recently been distinguished in *Matter of Hawk,* 871 F.3d 287 (5th Cir. 2017), which held that the right to an exemption in Chapter 7 was determined as of the date of petition filing. Here, the court applied "the snapshot rule," under which "the filing of the petition does create a 'freeze' for purposes of determining exemptions, [and] nothing in section 522(c) even vaguely suggests that, as a precondition to enjoying the protections of that provision, the debtor must maintain the exempt character of the property." Although the Illinois statute referred to reinvestment within one year, the exemption was still in effect when the petition was filed, and "debtors were entitled to the full benefit of the exemption regardless of circumstances occurring after the petition date." *In re Awayda,* 574 B.R. 692 (Bankr. C.D. Ill. 2017).

Meaning of "any exemption" in § 522(b)(3). The Idaho bankruptcy court "interpreted the hanging paragraph strictly, such that if a debtor has access to 'any' exemption, then the resort to the federal exemptions is not employed." The debtors had not been domiciled in one state for the 730 days, but had been domiciled in North Dakota for the 180 days preceding the 730-day period; thus, the court looked to North Dakota exemption law. Under North Dakota law, nonresidents were entitled to claim certain "absolute" exemptions, and the court concluded that "so long as debtors can receive some exemptions under the applicable state law, there is no reason for recourse to § 522(d) federal exemptions as a fallback under § 522(b)(3)'s hanging paragraph." In re Rodenbough, 579 B.R. 545, 551 (Bankr. D. Idaho 2018) (quoting In re Wilson, 2015 WL 1850919 at *4 (Bankr. D. Idaho 2015).

IRA exempt, notwithstanding unsecured creditors receiving 1%. The trustee objected to the debtor's exemption of $700,000 in IRA funds when unsecured creditors would receive only 1% distribution, but the court found that Congress had intentionally given strong protections to such retirement funds. If the IRA satisfies IRS requirements for a qualified plan, the amount of the account is not at issue, nor is its effect on the distribution to creditors. In this case, the debtor rolled over funds but satisfied the IRS

requirement of rolling over into a qualified account, and what happened to the funds in that interval is irrelevant. *In re Chaudury,* ___ B.R. ____, 2018 WL 671118 (Bankr. M.D. Tenn. Feb. 1, 2018).

Sole member of LLC lacked ownership interest for purposes of homestead. The Chapter 7 debtor moved to avoid a judicial lien on an alleged homestead, but at the time of the attachment of the lien the property was titled in an LLC, with the debtor as sole member. Under Vermont law, an LLC is an entity distinct from its members, who do not own LLC property in their individual capacity; therefore, at the time of lien attachment the debtor individually did not hold an ownership interest, equitable or otherwise. The court found an analogous decision under Ohio's LLC law in *In re Breece,* 2013 WL 197399 (B.A.P. 6th Cir. 2013), and distinguished *In re Caldwell,* 545 B.R. 605 (B.A.P. 9th Cir. 2016), in which that court applied Nevada law's recognition of potential equitable title. *In re Hewitt,* 576 B.R. 790 (Bankr. D. Vt. 2017).

Tenancy by entirety terminated postpetition by death of one spouse, but tenancy did not come into bankruptcy estate. The district court in Maryland applied Fourth Circuit law, holding that when a tenancy by entirety was severed postpetition by the death of one spouse, the severed tenancy did not come into the bankruptcy estate. The court held that the tenancy re-vested in the debtors when they claimed the § 522(b)(3)(B) exemption that was allowed, and under applicable state law when the tenancy was severed by death, the surviving spouse was the sole owner, giving the surviving spouse a *new* interest that could not become part of the Chapter 7 estate because it did not exist at the petition date under § 541(a)(1). The court found no statutory provision in the Bankruptcy Code for bringing the severed tenancy into the Chapter 7 estate, in contrast to Chapter 11, 12 or 13 estates. The survivor's new interest was not inherited, making it potentially subject to "capture" by the bankruptcy estate under § 541(a)(5). Rather, the interest was created by operation of state law on tenancy by entirety, and that interest never "reentered" the Chapter 7 bankruptcy estate. *Bellinger v. Buckley,* ___ B.R. ___, 2017 WL 3722827 (D. Md. August 29, 2017).

Extraterritorial use of Louisiana's personal property exemptions. The district court affirmed conclusion that Chapter 7 debtors filing in West Virginia could claim exemption in personal property under Louisiana law. The debtors had resided in Louisiana form

2011 until 2015, at which time they moved to West Virginia where they filed bankruptcy. They still owned real and personal property located in Louisiana. The district court examined the 730-day look-back for exemptions and the hanging paragraph to § 522(b)(3), with the parties agreeing that the debtors' move to West Virginia within 730 days prior to filing made Louisiana the applicable state law. Louisiana is an opt-out state, confining the debtors to state exemptions. The court found that Louisiana's opt-out statute is not limited to its residents. The trustee objected to use of Louisiana's exemption, arguing a presumption against extraterritoriality, but the court held that the trustee's "anti-extraterritoriality approach. . .is not consistent with the intent of Congress as to how § 522(b) is to operate, and the Court declines to adopt this view." Under a "state-specific" approach, the court found that Louisiana law did not restrict application of its personal property exemptions to property located within the state and that Louisiana liberally construes its exemptions. *Sheehan v. Ash,* ___ B.R. ___, 2017 WL 2778344 (N.D. W. Va. June 27, 2017).

Chapter 7 debtor's damage claim for prepetition employment discrimination was not exempt. The Chapter 7 debtor had claims for monetary damages resulting from alleged prepetition discrimination by a former employer, and those claims were property of the bankruptcy estate. The trustee settled the claims, and the debtor was not entitled to exempt the proceeds under Illinois exemption as a right to receive a disability, illness or unemployment benefit. *In re Sullivan,* 567 B.R. 348 (Bankr. N.D. Ill. 2017).

Debtor's back-pay claim was exempt. The Chapter 7 debtor had $30,000 pending claim for back pay against employer, with $12,725 claimed as exempt. The employer paid the trustee $23,513.82, withholding taxes of $7,581.19. The trustee then deducted that tax amount from the exemption, sending the debtor $5,143.81. The court found that the employer's tax withholding was unauthorized, because any taxes would have been the obligation of the Chapter 7 estate rather than of the debtor. The trustee cannot reduce the debtor's allowed exemption by the employer's improper tax withholding, and the full exemption must be paid to the debtor. *In re Anderson,* ___ B.R. ___, 2017 WL 2457877 (Bankr. M.D. Pa. June 6, 2017).

Exemption of life insurance. Although not labeled as an exemption, under Massachusetts statute protection was given to beneficiaries of life insurance policies from

creditors, and the court analyzed whether there were beneficiaries with insurable interests for purposes of claiming exemption in the cash surrender value of a policy. At the time of the Chapter 7 filing, there was a life insurance policy on the debtor's life, with a family trust named as beneficiary and with the debtor's children and stepson beneficiaries of the trust, giving those individuals insurable interests. The fact that the trust was revocable did not change the result, because the state statute permitted exemption of the cash value whether the right to change the beneficiary was reserved. *In re Volk,* ___ B.R. ___, 2017 WL 3447114 (Bankr. D. Mass. Aug. 10, 2017).

Exemption of tax overpayment and sovereign immunity. After finding that the Chapter 7 debtors' overpayment of prepetition federal income taxes was property of the estate subject to exemption, the court then examined the government's argument that § 505(a)(2)(B) operated to except the United States from § 106(a)(1)'s broad sovereign immunity waiver. Finding that § 505(a)(2)(B) applied to a trustee's or estate's right to a tax refund, the Chapter 7 trustee had abandoned any claim to tax refund and the debtors were not pursuing refund on behalf of the estate. Section 106(a) expressly abrogated sovereign immunity with respect to §§ 522 and 553 involved in this case. *In re Copley,* ___ B.R. ___, 2017 WL 4082354 (Bankr. E.D. Va. Sept. 13, 2017).

Debtor could not exempt back child support for children of majority age. The Chapter 13 debtor claimed exemption under Idaho law, which permitted exemption of alimony, support or maintenance to the extent reasonably necessary for the debtor's and dependent's support. The back child support was owed by the debtor's ex-husband, but the two children had reached the age of majority years earlier. The exemption was construed to be for present and future needs, not for past needs. *In re Mathews,* 565 B.R. 662 (Bankr. D. Idaho, 2017).

Virginia's exemption in workers' compensation benefits was not lost by use of the benefits. The Chapter 7 trustee objected to the debtor's claim of workers' compensation benefits as a result of the debtor's use of a portion to make a business loan to his daughter's company. Virginia's exemptions are to be liberally construed, and the legislature did not intend to foreclose the use of the benefits, with the court finding that the use of the benefits to make a business loan "is indistinguishable from using such

funds to purchase" an asset. A restrictive reading of the statute "would render the statute useless to those it serves to protect." *In re Appel,* 565 B.R. 349 (Bankr. E.D. Va. 2017).

Pension and Social Security payments lost exempt character. The issue was whether pension and Social Security payments that were exempt retained that status after withholdings had been made from the payments for federal and state tax payments and then were returned to the debtors in a tax refund. Under applicable New York exemption statutes, the debtors could not trace funds that had been treated as wages for tax withholding purposes. The withholdings were a tax, no longer exempt. *In re Crutch,* 565 B.R. 36 (Bankr. E.D. N.Y. 2017).

Lack of intent to permanently reside in Ohio deprived debtors of homestead exemption. Finding that the debtors no longer had intention to permanently reside in Ohio, they were not entitled to claim homestead exemption in the Ohio property. *In re Felix,* 562 B.R. 700 (Bankr. S.D. Ohio 2017).

Conversion from Chapter 7 to 13 triggered new exemption objection period. Although Rule 1019(2)(B) only addresses a new objection period upon conversion of a case to Chapter 7 and there is no Rule specifically addressing conversion to Chapter 13, Rule 4003(b)(1) provides for objections within 30 days after conclusion of the § 341 meeting. After conversion to Chapter 13, a new § 341 meeting was held in the converted case and the objection was filed within 30 days of its conclusion. The court disagreed with the line of cases holding that a new objection period did not arise upon conversion to Chapter 13. *In re Sharkey,* 560 B.R. 470, at n. 2 (Bankr. E.D. Mich. 2016).

Expectation of bonus not property of estate. The trustee sought turnover of a bonus received by the Chapter 7 debtor from an employer postpetition, as well as objected to discharge for concealment of property of the estate and false oath by failure to schedule the asset, but the court held that under applicable New York law, an employee has no actionable right to collect a discretionary bonus before it is paid. The debtor did not have a contingent interest in the future bonus at the time of filing the petition; therefore, the bonus did not become property of the Chapter 7 estate. The debtor's failure to schedule the bonus did not support denial of discharge; however, issues of material fact remained on other grounds asserted by the trustee for denial of discharge. *Mendelsohn v. Gonzlez (In re Gonzalez),* 558 B.R. 326 (Bankr. E.D. N.Y. 2016).

Debtor's time-barred personal injury claim not property of estate. The Chapter 7 debtor had been injured while a minor, and under the applicable statute of limitations the cause of action was time barred one year after the minor reached age 18. The time-barred claim did not become property of the estate because the debtor had no enforceable cause of action under § 541(a); therefore, the trustee could not administer the claim, even if a third party offered to pay some compensation. *In re Cibella,* 560 B.R. 494 (Bankr. N.D. Ohio 2016).

Surcharge of exemption. Applying *Law v. Siegel,* 134 S.Ct. 1188 (2014), the court partially denied the Chapter 7 trustee's attempt to surcharge exempt property for the amount necessary to pay the trustee's commission, but allowed the surcharge under § 522(k) to the extent required to reimburse the trustee's reasonable costs and expenses. The debtor had been a plaintiff in a pre-bankruptcy personal injury action, which was not scheduled as an asset, and at the meeting of creditors the debtor stated that he had no outstanding claims. The estate was closed as having no assets, but the trustee then learned of the pending cause of action, and the case was reopened, with the trustee moving to approve settlement. The debtor then filed amended schedules, listing the asset and claiming the settlement as exempt, to which the trustee objected. Under *Law v. Siegel,* the trustee could not surcharge the exemption to recover the commission, but could surcharge to recover costs and expenses, because of § 522(k)'s provision. Those costs and expenses included $825 for necessary legal services. *In re Taylor,* 562 B.R. 16 (Bankr. W.D. N.Y. 2016).

Avoidance of judicial lien. Under Rhode Island's homestead exemption, a mixed-use residential/commercial property fell within the exemption's scope, and the judicial lien impaired the exemption, permitting the debtor to avoid the lien. There was no language in the statute limiting application to purely residential structure; alternatively, under a "predominant-use" test, the property qualified as residential. *In re Carpenter,* 559 B.R. 551 (Bankr. D. R.I. 2016).

Timing of lien avoidance in Chapter 13. Chapter 13 debtor's avoidance of judgment lien that impaired homestead exemption would be effective immediately to allow recognition of homestead exemption for purposes of plan confirmation, but would not be effective for other purposes until completion of plan and entry of discharge. This would

permit the debtors to treat the creditor holding that avoided lien as unsecured in their plan, but the lien would not be completely avoided until the plan was completed and discharge entered. In the event of dismissal, the lien would be reinstated. *In re Petersen,* 561 B.R. 788 (Bankr. D. Utah 2016).

Debtor's right of redemption of property sold at tax sale was property of estate. Denying tax sale purchaser's motion for stay relief to pursue quiet title action, under Alabama law the Chapter 13 debtor had maintained continuous possession of the property and had an indefinite redemption opportunity that became property of the estate. *In re Ferrouillat,* 558 B.R. 938 (Bankr. S.D. Ala. 2016).

Judicial Estoppel

Judicial estoppel en banc ruling in Eleventh Circuit. Overruling portions of its prior judicial estoppel precedent, found in *Barger v. City of Carterville,* 348 F.3d 1289 (11th Cir. 2003), and *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir. 2002), the en banc opinion re-examined when application of judicial estoppel is appropriate in bankruptcy cases involving a debtor's omission of civil claims from bankruptcy schedules. Although the Court "reaffirm[ed] our precedent that when presented with this scenario, a district court may apply judicial estoppel to bar the plaintiff's civil claim if it finds that the plaintiff intended to make a mockery of the judicial system," the Court rejected the prior precedent that "the mere fact of the plaintiff's nondisclosure is sufficient." Under the new standard, in a district court's determination of "whether a plaintiff who failed to disclose a civil lawsuit in bankruptcy filings intended to make a mockery of the judicial system, the court should look to factors such as the plaintiff's level of sophistication, his explanation for the omission, whether he subsequently corrected the disclosures, and any action taken by the bankruptcy court concerning the nondisclosure." Under the prior precedent, even if the plaintiff had corrected the nondisclosure in bankruptcy schedules, judicial estoppel was strictly applied. Now, the Court announced that "voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process." The district court in this case had applied prior Eleventh Circuit precedent to infer from the plaintiff's "nondisclosure alone that she intended to manipulate the judicial system," and the Circuit's original appellate panel had concluded that this was not an abuse of the district

court's discretion. The en banc Circuit Court remanded for the panel's determination of abuse of discretion under the announced new standard. *Slater v. United States Steel Corp.,* ___ F.3d ___, 2017 WL 4110047 (11th Cir. Sept. 18, 2017).

Judicial estoppel applied when debtor did not amend schedules. In an unpublished opinion, the majority of the Ninth Circuit panel applied judicial estoppel to block former Chapter 13 debtors' complaint attacking a foreclosure, holding that judicial estoppel will be applied to a debtor who knows of a cause of action but fails to amend the schedules to disclose that action. The dissent pointed out that these debtors did not hide the cause of action; in fact, it was litigated in the bankruptcy court, thus disclosing the cause of action "in the most conspicuous way possible." *Meyer v. Northwest Trustee Services, Inc.,* 2017 WL 3726760 (9th Cir. July 11, 2017).

Chapter 7 Issues

Abandonment

Trustee's report of no distribution served as notice of abandonment. A scheduled unsecured creditor moved to remove the Chapter 7 trustee and for leave to sue the trustee, based upon alleged failure of the trustee to administer an asset of the estate. The debtor owned 100% of an insurance and consulting business, but the trustee determined that there was no benefit to the estate due to the costs of operating that unique business, which would have required hiring the debtor to run the home-based business. The trustee's report of no distribution triggered Rule 5009(a), giving notice to the unsecured creditor of the trustee's intention to abandon the business as an asset, "by letting the case be closed without the liquidation of any assets," pursuant to § 554(c). Removal of the trustee was not justified when the trustee's "exercise of business judgment was discretionary and reasonable under the circumstances." A prima facie case for suing the trustee had not been established, with the trustee at all times acted within the scope of authority. *In re Carvalho,* ___ B.R. ___, 2017 WL 5900535 (Bankr. D.C. Nov. 29, 2017). *Compare In re Mejia,* 576 B.R. 464 (Bankr. S.D. N.Y. 2017) (trustee's statement at § 341 meeting that property had no value for estate, coupled with no distribution report, was not sufficient to abandon property).

Administrative Expenses

Fees properly denied for services not necessary to case administration. In two cases converted from Chapter 7 to 13, the former Chapter 7 trustee and counsel filed applications for fees and expenses, with the debtors objecting. Affirming the bankruptcy court's denial of the applications in their entirety, the Bankruptcy Appellate Panel agreed that the trustee's attempts to sell the debtors' homesteads through agreement with secured creditors including IRS, carving out a portion of sale proceeds from liens for administrative expenses, were not necessary to administration of the Chapter 7 cases. The proposed sales would exceed encumbrances by minimal amounts, yielding only $10,000 for unsecured creditors, and the debtors had claimed homestead exemptions. The panel noted that abandonment was added to the Code in 1978 to discourage administration of assets burdensome or of no benefit to the estate, and the U.S. Trustee's Handbook for Chapter 7 Trustees emphasized that assets should not be liquidated for the primary benefit of the trustee or professionals. The trustee in these cases did not demonstrate that the proposed carve outs would provide a *meaningful* distribution to creditors, with "the definition of meaningful depend[ing] on the totality of circumstances." The BAP further affirmed that the services were not reasonably likely to benefit the estates under § 330(a)(4)(ii), and the trustee should have abandoned the homesteads. Further, the debtors were entitled to claim homestead exemptions under Utah law, "notwithstanding a lack of equity." Under both Utah's exemption statutes and § 363(f), the debtors were protected from a forced sale of their homesteads, and neither § 522 or § 724(b) gave the trustee additional rights to sell the homesteads. *Jubber v. Bird, et al. (In re Bird and Christensen),* ___ B.R. ____, 2017 WL 5899654 (B.A.P. 10th Cir. Nov. 30, 2017). *See also In re Moore,* ___ B.R. ___, 2017 WL _____ (Bankr. D. Mass. Dec. 18, 2017) (When liquidation of the debtors' home would only benefit secured creditor, Chapter 7 trustee and trustee's attorney, case was converted on debtors' motion to Chapter 13.).

Creditor entitled to administrative expense claim for assistance to trustee in avoidance. Section 503(b)(3)(D) only specifies allowance of an administrative expense claim to a creditor "making a substantial contribution to a case under Chapter 9 or 11," and § 503(b)(3)(B) allows the creditor's claim for recovery of "any property transferred or

concealed by the debtor." Here, the creditor did not recovery property; rather, the trustee did through an avoidance action. However, the creditor made a substantial contribution to the trustee's avoidance recovery. Discussing the split of appellate authority, the court concluded that the Ninth Circuit had held that § 503(b)(3)'s prefatory "'including' is not a limiting term," and the court "has discretion to allow an administrative expense in accordance with the equities of the case" when the creditor had made a substantial contribution in a Chapter 7 case. The claim was reduced "to reflect only those services which were performed for the estate's benefit." *In re Maqsoudi,* 566 B.R. 40 (Bankr. C.D. Cal. 2107). *See also In re Amaral,* 567 B.R. 417 (Bankr. D. Mass. 2017) (Debtor was not liable for payment out of surplus in Chapter 7 estate for attorney fees incurred by his sister's litigating whether debtor's interest in inherited real estate was property of estate, with discussion including impact of *Baker Botts L.L.P. v. ASARCO LLC,* 135 S.Ct. 2158 (2015).).

Compensation to trustee's law firm. In an extensive discussion of a fee application filed by the Chapter 7 trustee on behalf of her own law firm for legal services provided for representation of the trustee, the court discussed the requirement that the law firm's employment be approved prior to allowance of any compensation, and the firm was not entitled to compensation for any time spent on the trustee's obligations. The opinion addresses what had become a common practice in the district of Chapter 7 trustees employing their own law firms, with the court requiring exercise of the business judgment rule by the trustee and a clear basis for such employment applications. Throughout administration of the case, the trustee is required to exercise business and billing judgment to assure that "the estate is actually benefitting from those [employment] arrangements." *In re Peterson,* 566 B.R. 179 (Bankr. M.D. Tenn. 2017).

Trustee Commission

Section 326(a) commission is presumptively reasonable. The Fifth Circuit examined the statutory interpretation of "reasonable compensation" for Chapter 7 trustees under §§ 326 and 330, in a case in which the bankruptcy court had reduced the trustee's commission. The opinion notes that since the 2005 amendments to those sections, competing views have emerged on trustee compensation. Section 330(a)(7) directs that

"reasonable compensation' for Chapter 7 trustees is a "commission, based on Section 326," and the latter section establishes a cap on the commission. The Seventh Circuit had held that § 326(a) is a presumptively reasonable fixed commission rate to be reduced only in rare instances, in *In re Wilson,* 796 F.3d 818 (7th Cir. 2015). Other courts, including *In re Salgado-Nava,* 473 B.R. 911 (B.A.P. 9th Cir. 2012), held that the presumptively reasonable amount is subject to adjustment in "extraordinary circumstances." Other courts, such as *In re Scroggins,* 517 B.R. 206 (Bankr. E.D. Cal. 2014), had conducted a more in-depth review of the presumptively reasonable commission to ensure that it was justified. The Fifth Circuit adopted the approach taken by the Seventh Circuit, "that the percentage amounts listed in Section 326 are presumptively reasonable for Chapter 7 trustee awards," and any reduction or denial of that commission "should be a rare event. We acknowledge that exceptional circumstances can alter the compensation, but 'exceptional' is the key." *In Matter of JFK Capital Holdings, LLC,* 880 F.3d 747 (5th Cir. 2018).

Statutory commission subject to reduction. Reviewing the authority on whether the court can award less than the maximum commission to the Chapter 7 trustee under § 326(a), the court concluded that it had a mandatory duty to evaluate all fee applications and that it may reduce the requested amount. Section 326(a) does not mean a rubber-stamping of the requested maximum commission, and § 330(a)(7), which requires the trustee's compensation to be treated as a commission, does not confer an absolute right to the maximum. The court considered facts and circumstances in the particular case, first looking "for disproportionality or inequitableness, rather than simply mechanically applying the § 330(a)(3) factors. . . .This Court is required, by statute, to only award fees that the Court finds are reasonable," adopting the "grading" approach used in *In re Phillips,* 392 B.R. 378 (Bankr. N.D. Ill. 2008). *In re King,* 559 B.R. 158 (Bankr. S.D. Tex. 2016). *See also In re Christensen,* 561 B.R. 195 (Bankr. D. Utah 2016) (after conversion to Chapter 13, Chapter 7 trustee not entitled to compensation for efforts to sell debtors residence); *In re Stanton,* 559 B.R. 781 (Bankr. M.D. Fla. 2016) (trustee's special counsel was entitled to fees for time spend supplementing fee application after U.S. Trustee objected to original application).

Debtor's Attorney

Right to practice revoked in district. In litigation begun by the United States Trustee, with multiple findings in a 62-page opinion, the bankruptcy court in the Western District of Virginia revoked the right to practice in that District of a "nationwide" law firm and "local" lawyers associated with that firm. The opinion found, among other things, that the firm engaged in a marketing program that involved a company picking up the debtors' vehicles and holding them in a state where the law allowed possessory liens to prime security interests of the car lenders, and from potential sale of the vehicles the attorney fees for debtors were to be paid. The opinion found that the firm engaged in internet advertisement and that calls were answered by non-lawyers who gave legal advice and pursued a "hard sell" to get the clients to agree to fees. Once engaged, the client was assigned to a local attorney in the district, who functioned as an associate or counsel for the national firm. The national firm was barred from practice in the district for five years and fined $300,000. The local attorneys were barred from practice for 12 to 18 months, with $5,000 sanctions. *In re Williams,* 2018 WL 832894 (Bankr. W.D. Va. Feb. 12, 2018).

Interpretation of Rule 9011(b). The Sixth Circuit Bankruptcy Appellate Panel construed the scope of Rule 9011(b) and its safe harbor exception, finding that under the clear language of Rule 9011(c)(1)(A), the exception did not apply to "the filing of a petition in violation of subdivision (b)." The attorney sanctioned and appealing did not sign or file the bankruptcy petition, allegedly acting as shadow counsel behind the attorney who did sign and file; therefore, the non-signing attorney could not be sanctioned under Rule 9011(b) absent compliance with the safe harbor provisions. Moreover, a sanction under 28 U.S.C. § 1927 for "unreasonably and vexatiously" multiplying the proceedings requires a finding of "objective bad faith" or that the attorney "knew or should have known the actions were frivolous. Mere incompetence or negligence does not justify § 1927 sanctions." *Montedonico v. Blasingame (In re Blasingame),* 559 B.R. 676 (B.A.P. 6th Cir. 2016).

Jurisdiction

At termination of Chapter 7 case, debtors' adversary proceeding was dismissed for lack of jurisdiction. The Chapter 7 debtors filed an adversary proceeding against the

mortgage lender, alleging RESPA violations and lack of valid mortgage. The debtors received discharge, and the Chapter 7 trustee filed a no-asset report and abandoned a similar cause of action that had been filed in district court. The debtors' adversary proceeding was properly dismissed because it did not arise under the Bankruptcy Code, no longer had "related to" jurisdiction after termination of the bankruptcy case, and was not core. *Okoro v. Wells Fargo Bank, N.A.,* 567 B.R. 267 (D. Maryland 2017).

Debtor's Duties

Debtor had duty to turn over information about property to trustee. First noting that the debtor's present possession is not a predicate to turnover under § 542(a), the Bankruptcy Appellate Panel held that the debtor had a duty to produce or turn over information about property or the debtor's financial affairs. *In re Auld,* 561 B.R. 512 (B.A.P. 10th Cir. 2017).

Ride-through option for personal property doesn't exist in Code. The Chapter 7 debtor's statement of intention provided that she intended to retain the mobile home and continue to pay the secured debt, and the creditor moved to compel the debtor to either reaffirm, redeem or surrender the collateral. The court examined the debtor's duties under §§ 521(a)(2)(A), (B) and (a)(6), with the first two applying to both personal and real property, while (a)(6) applies only to personal property, prohibiting the debtor's retention unless, within 45 days after the § 341 meeting, the debtor either enters into a reaffirmation or redeems the property. Finding that the text of the Code does not include a "ride-through" option, the Court then examined the legal consequences of a debtor's failure to perform either reaffirmation, redemption or surrender, with § 362(h)'s remedies specifically applying to personal property, without the need for a motion. In addition, the hanging paragraph following § 521(a)(6) provides these remedies for failure to comply with (a)(6): the stay is terminated as to the personal property; such property is no longer in the bankruptcy estate; and the creditor may take nonbankruptcy action against the property. The creditor's remedies did not include compelling the debtor to amend the statement of intention or delaying discharge until the debtor complied. *In re McCray,* ___ B.R. ___, 2017 WL 5956639 (Bankr. E.D. Mich. Nov. 30, 2017).

Discharge

Dismissal of complaint as sanction was overly severe. The Bankruptcy Appellate Panel found that dismissal of a complaint for exception from discharge at the initial status and scheduling conference was an abuse of discretion, with the bankruptcy court required to consider less severe sanctions for the creditor's failure to properly prosecute or comply with scheduling conference order. *In re Roessler-Lobert,* 567 B.R. 560 (B.A.P. 9th Cir. 2017). *See also In re Tukhi,* 568 B.R. 107 (B.A.P. 9th Cir. 2017) (Dismissal as sanction for failure to comply with local rule concerning pretrial conferences was abuse of discretion.).

Burden shifted to debtor for failure to comply with discovery order. A Chapter 7 debtor filed an adversary proceeding against IRS, attempting to discharge federal tax obligations; however, the debtor failed to comply with discovery demands and the court's order, with the debtor's boilerplate objections to discovery overruled. Failure to comply with the discovery order would shift the burden of proof from IRS to the debtor on the § 523(a)(1)(C) issue, "because the IRS will be unable to discover Terrell's actual income and expenses or whether he spent his disposable income in lieu of paying his tax liabilities." *Terrell v. Internal Revenue Service,* 569 B.R. 881 (Bankr. W.D. Okla. 2017).

Service member's unearned reenlistment bonus was not dischargeable. 37 U.S.C. § 303a(e)(4), a part of the National Defense Act for Fiscal Year 2006, provides that an obligation to repay the United States an unearned bonus is not dischargeable under Title 11 if the discharge order is entered less than five years after termination of the agreement or the date of termination of service upon which the debt was based. Here, the Chapter 7 debtor was discharged from military duty but did not serve the six years contracted for under a reenlistment contract, under which he had been paid a bonus. The court concluded that § 727(b) and 37 U.S.C. § 303a(e)(4) are not irreconcilable and both statutes are effective, with the latter statute controlling discharge in this case. Section 523(a) does not contain an exclusive list of nondischargeable debts, because to so conclude would render 37 U.S.C. § 303a(e)(4) superfluous and void. The reenlistment bonus debt was not dischargeable. *In re Ryan,* 566 B.R. 151 (Bankr. E.D. N.C. 2017).

Relief from default judgment. Default had been entered in an adversary proceeding for an exception from discharge when the Chapter 7 debtor failed to answer, and considering

the factors for Rule 60(b), relief from the default was appropriate. The motion was timely, and it appeared that the debtor had a meritorious defense under a complaint that may not have sufficiently pled one or more elements of §§ 523(a)(2)(A) and (a)(4). *Ferguson v. Zering (In re Zering),* 560 B.R. 671 (Bankr. M.D. N.C. 2016).

Timeliness of complaint presented "advocate-witness" issue. The creditor's complaint was filed one day late, and the attorney for the creditor asserted by affidavit that he attempted to file on the evening of the last day but could not connect to the court's ECF system. The factual question was whether that inaccessibility was due to a problem with the clerk's system or the attorney's computer, and the court examined whether the attorney could testify while continuing as counsel for the creditor. Citing Model ABA Rule 3.7(a), the attorney could be a witness but was disqualified from acting as counsel for the creditor at trial. Disqualification would not be a substantial hardship for the client. *Golden v. Gibrick (In re Gibrick),* 562 B.R. 183 (Bankr. N.D. Ill. 2017).

Default judgment in state court given preclusive effect under New York law. A default judgment had been entered in state court after the defendant had answered the complaint and defended for some period of time, and under New York law, the judgment was entitled to preclusive effect for purposes of §§ 523(a)(2)(A) and (a)(4) exceptions from discharge. Further, a three-day damage inquest held in state court subsequent to the default judgment made it unnecessary for the bankruptcy court to conduct further damage determinations. *Parklex Assoc. v. Deutsch (In re Deutsch),* 575 B.R. 590 (Bankr. S.D. N.Y. 2017). *See also Lupe Development Partners, LLC v. Deutsch (In re Deutsch),* 575 B.R. 50 (Bankr. S.D. N.Y. 2017) (giving preclusive effect to default judgment under Minnesota law). *But compare Jalbert v. Mulligan (In re Mulligan),* ___ B.R. ___, 2017 WL 4897633 (Bankr. D. Conn. Oct. 27, 2017) (under Connecticut law, some portions of state court's findings were entitled to issue preclusive effect and other portions were not entitled to collateral estoppel effect).

523(a)(1)

Third Circuit holds post-assessment 1040 filing was not "return" under *Beard* test. Noting that "forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law," the Third Circuit

continued to apply the test found in *Beard v. Commissioner of Internal Revenue,* 793 F.2d 139 (6th Cir. 1986), holding in this case that the Chapter 7 debtor's "belated filings after assessment are not an honest and reasonable effort to comply with the tax law under the *Beard* test." The Court "did not need to reach the question of whether the 'one-day-late rule' is correct." *In re Giacchi,* 856 F.3d 244 (3d Cir. 2017).

Tax form filed after IRS notice of deficiency and assessment was not "return" for purposes of discharge. The Chapter 7 debtor, a tax protester, did not file a 1040 form until after IRS had issued its deficiency notices and assessment, and that form did not represent an honest and reasonable attempt to comply with tax law requirements; therefore, under the *Beard* test used in the Eleventh Circuit by *In re Justice,* 817 F.3d 738 (11th Cir. 2016), the late-filed 1040 form was not a "tax return" under applicable nonbankruptcy law. The tax was not dischargeable under § 523(a)(1)(B). *In re Bell,* 565 B.R. 702 (Bankr. M.D. Fla. 2017). *See also United States v. Beane,* 841 F.3d 1273 (11th Cir. 2016) (for calculation of interest on unpaid taxes and effect of net operating loss carryback).

IRS failed to prove that debtor did not file tax return. In Chapter 7 debtor's adversary proceeding to determine discharge of federal taxes, the issue was whether the debtor had filed 2006 return, not whether a late-filed return qualified as a "return" under § 523. The opinion summarizes the split of authority on the late-filed return issue. As to whether the 2006 return had been filed at all, the debtor testified that she filed it and that IRS had lost the return. The court found that IRS did not prove by preponderance of evidence that the debtor failed to file her 2006 return, and the tax for that year was dischargeable. *McGrew v. Internal Revenue Service (In re McGrew),* 559 B.R. 711 (Bankr. N.D. Iowa 2016).

Willful evasion of tax liability under § 523(a)(1)(C). In an examination of the "willful evasion" requirement under § 523(a)(1)(C), willfulness required showing that the debtor acted willingly, not necessarily with intent to defraud the United States. Evasive conduct is satisfied by proof of affirmative acts to avoid payment, which could be either acts of commission or culpable omission. *Barto v. United States of America (In re Barto),* 564 B.R. 87 (Bankr. N.D. Ga. 2016).

523(a)(2)

Exception from discharge for misrepresentation of intention to convey property. In a family dispute, the Chapter 7 debtor was found to have promised to convey property to her daughter and son in law, while misrepresenting her intention to keep that promise, and the bankruptcy court did not err in finding that she entered the agreement with the family members to induce their contribution of money and services, while never intending to convey the property. The obligation to the family members was nondischargeable under § 523(a)(2)(A). *In re Smith,* ___ B.R. ___, 2017 WL 3908622 (B.A.P. 1st Cir. Sept. 6, 2017).

Debt to sister was obtained by false representation. Affirming, the bankruptcy court did not clearly err in its determination that the debtor made a false representation to his sister in promising to repay her from proceeds of sale of real property that he had encumbered without the sister's knowledge, and the sister had justifiably relied on the fraudulent promise of repayment. *In re Zutrau,* 563 B.R. 431 (B.A.P. 1st Cir. 2017).

List of assets was not false for purposes of § 523(a)(2)(B). The First Circuit had before it an issue which has divided some Circuits, "whether the phrase 'statement. . .respecting the debtor's. . .financial condition, as used in 11 U.S.C. § 523(a)(2)(B), should be interpreted narrowly to refer only to those documents that speak directly to the debtor's overall financial condition or broadly to include those documents that merely reference a single asset or liability." However, rather than ruling on that issue, the Court decided the case "on less controversial principles of pleading and materiality." This Chapter 7 debtor had provided, at the request of the creditor, a list of property that belonged to him or that he possessed and used in his landscaping business, but the list did not reveal that some of the assets were encumbered by liens. The Circuit panel observed that the complaint would need to plausibly plead "either that the debtor affirmatively misrepresented the status of the items enumerated in the List or that he omitted information he was obligated to furnish," but the complaint did not allege affirmative misrepresentation, and the plaintiff did not allege that the substance of the list was untrue. The debtor was only asked to provide a list of assets and was not asked whether the assets were unencumbered. The § 523(a)(2)(B) claim was not supported by "a reasonable inference of material falsity." Moreover, the bankruptcy court properly denied the creditor's motion to amend to plead

a § 523(a)(2)(A) cause of action, because the new claim would have been futile under these facts. *In re Curran,* 855 F.3d 19 (1st Cir. 2017).

False representation in legal services agreement. The law firm representing Chapter 7 debtor in unsuccessful effort to modify mortgage proved that the debtor made false representation about intention to pay fees. The debtor contended that he was not obligated to pay unless the modification was achieved, but the enforceable written legal services' agreement clearly provided that success was not guaranteed and that the legal fees were payable irrespective of whether the loan modification was obtained. The debtor had no intention of paying the fee at the time the agreement was executed, with the fee excepted from discharge under § 523(a)(2)(A). *Vokshori Law Group v. Henriquez (In re Henriquez),* 559 B.R. 900 (Bankr. C.D. Cal. 2016). *See also* for § 523(a)(2)(A) analysis, *Higgins v. Nunnelee (In re Nunnelee),* 560 B.R. 277 (Bankr. N.D. Miss. 2016) (misrepresentation but no reliance proven); *K.A.P., Inc. v. Hardigan*, 560 B.R. 895 (Bankr. S.D. Ga. 2016) (fraudulent intent not proven); *Ray Klein, Inc. v. Webb (In re Webb),* 560 B.R. 814 (Bankr. D. Utah 2016) (misrepresentation, including of heirship to wealth and ability to make monthly payment on boat).

Collateral estoppel applied to prior district court determination of fraud. In a case converted from Chapter 11 to 7, the United States District Court had found, pre-bankruptcy, that the debtor engaged in common law fraud in the sale of rare coins, and that determination was entitled to collateral estoppel effect in a nondischargeability proceeding under § 523(a)(2)(A). *Marini v. Adamo (In re Adamo),* 560 B.R. 642 (Bankr. E.D. N.Y. 2016).

523(a)(4)

Bail bondsman's obligation to surety was excepted from discharge under §§ 523(a)(4) and (a)(7). The district court held that a bail bondsman's obligation to the surety under defaulted bail bonds was excepted from discharge under § 523(a)(7), when the surety had paid a judgment to the state and subsequently obtained a judgment against the bondsman for the bail bond forfeiture. Moreover, applying *Bullock v. BankChampaign, N.A.,* 133 S.Ct. 1754 (2013), the court held that the bondsman's conversion of premium payments that were held in trust for the surety met the definition

of defalcation, with the bondsman breaching his fiduciary duty to the surety. "Permitting a bail bondsman to discharge in bankruptcy the financial consequences of his failure to assure the criminal defendant's appearance would seriously undermine the integrity and function of the bail bond system and the criminal justice system as a whole." *Financial Casualty & Surety Co., Inc. v. Thayer,* 559 B.R. 102 (D. N.J. 2016).

Debt nondischargeable under § 523(a)(4), but court abstained from determining value. State court judgment and agreed settlement had been entered in litigation alleging that debtor had misappropriated funds from trust, and the debt was nondischargeable as a defalcation while acting in fiduciary capacity, but the court abstained from deciding the value of the nondischargeable claim, citing *In re Leonard,* 744 Fed.Appx. 612, 620 (6th Cir. 2016) ("[A] bankruptcy court may answer the nondischargeability question without deciding the value of the claim."). The value determination was purely state law, and abstention was appropriate. *Cervac v. Littman (In re Littman),* 561 B.R. 79 (Bankr. N.D. Ill. 2016). *See also Caldwell v. Hester (In re Hester),* 559 B.R. 472 (Bankr. W.D. Ky. 2016) (theft of money from pawn shop was embezzlement or larceny).

523(a)(5)

Examination of the *Brunner* test. In an extensive examination of the *Brunner* test and its second prong, the bankruptcy court concluded that the time period for consideration of whether the debtor's current financial difficulties will persist is not "open-ended and courts should limit that period of time, as stated in *Brunner,* to 'a significant portion of the repayment period.'" The court found that the applicable "repayment period" in this Chapter 7 case would be the seven years remaining on the debtor's loan, not the twenty or twenty-five-year repayment period potentially available under income-based, extended-period repayment programs. This debtor's present inability to repay the student loan, while maintaining a minimal standard of living for herself and her children, would continue for a significant portion of the seven-year repayment period remaining on the loan, and the debt was discharged as an undue hardship. *Price v. Devos,* ___ B.R. ___, 2017 WL 2729073 (Bankr. E.D. Pa. June 23, 2017).

523(a)(8)

Under totality-of-circumstances test, student loan debt not dischargeable. Affirming, the Eighth Circuit Bankruptcy Appellate Panel held that the evidence of the debtor's age, health, skills and abilities supported finding that she had not established undue hardship under that Circuit's totality-of-circumstances test. The debtor had sufficient income to make modest monthly payments on her debt. *Piccinino v. U.S. Dept. of Education, et al. (in re Piccinino),* ___ B.R. ___, 2017 WL 6328995 (B.A.P. 8th Cir. Dec. 7, 2017).

Arbitration clause enforced in § 523(a)(8) dispute. The Chapter 7 debtor reopened a case and filed an adversary proceeding to determine that a student loan debt had been discharged and that the creditor had violated the discharge injunction by collection attempts. The creditor moved to compel arbitration under the contract. In an analysis of the Federal Arbitration Act, the court held that enforcement of the contractual arbitration and class action waiver agreement "does not inherently conflict with the underlying purposes of sections 523(a)(8) and 524(a)(2)." *In re Williams,* 564 B.R. 770 (Bankr. S.D. Fla. 2017).

523(d)

Section 523(d) analysis. Debtor's obligation on loans to enable payment of delinquent real estate taxes was a consumer debt for purpose of § 523(d), and the court conducted analysis of the statute's "substantially justified" element. The fact that the plaintiff was self-represented was a "special circumstance" making a fee award unjust. *Tomey v. Dizinno (In re Dizinno),* 559 B.R. 400 (Bankr. M.D. Pa. 2016).

727(a)(2)

Post-petition transfer of funds to satisfy tax levy did not support denial of discharge. Affirming, the Seventh Circuit found that a transfer by the debtor's accountant from the debtor's account to satisfy a state tax levy was made without the debtor's knowledge or approval; therefore, the transfer did not satisfy § 727(a)(2)'s requirement of a knowing fraudulent transfer. Moreover, misstatements in the schedules were either innocent mistakes or typographical errors, not rising to the level of knowing and fraudulent

false oath under § 727(a)(4). *In re Kempff,* 847 F.3d 444 (7th Cir. 2017). *Compare Lardas v. Grcic,* 847 F.3d 561 (7th Cir. 2017) (affirming denial of discharge for debtor's false oath), and *In re Robinson,* 849 F.3d 577 (4th Cir. 2017) (affirming finding of false oath in the debtor's valuation of minority interest in land trust).

Badges of fraud for § 727(a)(2)(A). Concealment of property and transfer to spouse supported a denial of discharge, with the district court discussing "badges of fraud" for purposes of § 727(a)(2). Failure to schedule the property and a related state-court suit also supported denial of discharge under § 727(a)(4)'s false oath. *United General Title Insurance Co. v. Karanasos,* 561 B.R. 316 (E.D. N.Y. 2016). *See also Northeast Community Bank v. Manfredonia (In re Manfredonia),* 561 B.R. 1 (Bankr. D. Mass. 2016) (failure to keep adequate records and to disclose transfers supported denial of discharge).

Omission of retirement fund as asset was materially false oath and implied consent existed to litigate unpleaded claim. The First Circuit affirmed determination that discharge was denied for false oath when the debtor did not schedule a retirement account. The opinion also affirmed the bankruptcy court's consideration of a claim that was not pled regarding the unscheduled asset, based upon the parties' implied consent to litigate that claim under Fed. R. Civ. P. 15(b)(2). *Premier Capital, LLC v. Crawford (In re Crawford),* 841 F.3d 1 (1st Cir. 2016).

Denial of stay of § 727(a) complaint pending criminal investigation. The U.S. Trustee filed a § 727(a) complaint for false oath and concealment of properties, and the debtor moved to stay that proceeding pending resolution of an alleged parallel criminal investigation, and the court concluded that it had discretionary authority to stay the proceeding; however, because the debtor had not yet been indicted, the stay was denied without prejudice. The opinion reviews factors to be considered. *In re Garcia,* 569 B.R. 480 (Bankr. N.D. Ill. 2017).

Failure to disclose receipt of postpetition tax refund not basis for discharge denial. Under § 727(a)(2)(B), the creditor failed to show that the debtor acted with intent to hinder, delay or defraud when a postpetition tax refund was used to pay some creditors who had loaned him money, and there was no proof that the debtor knowingly violated § 727(a)(4)(A) in failing to amend schedules to disclose the refund. *Hampton v. Young (In re Young),* 576 B.R. 807 (Bankr. E.D. Pa. 2017). *See also Brookfield Global Relocation*

Services, LLC v. Burnley (In re Burnley), 574 B.R. 905 (Bankr. N.D. Ga. 2017) (creditor failed to show testimony at § 341 meeting was knowingly false for purposes of § 727(a)(4)(A)); *In re Jackson,* 576 B.R. 282 (Bankr. D. Mass. 2017) (failure of taxi dispatcher with $2,500 monthly take-home to keep receipts for living expenses paid in cash was not basis for denial of discharge under § 727(a)(3)).

727(a)(4)

Inadequate records justified denial of discharge. Affirming, the Bankruptcy Appellate Panel found no error in determination that the debtor's records were inadequate and that a loss of assets occurred, which was not adequately explained by the debtor. *In re Sears,* 565 B.R. 184 (B.A.P. 10th Cir. 2017).

Means Test

Above-median debtors could take full standard expenses when actual expenses were less. On direct appeal, the Fourth Circuit held that § 707(b)(2) permitted Chapter 7 debtors, who were above-median, to deduct in the means test the full National and Local Standard expense amounts, even though their actual expenses were less than the Standard. Direct appeal was granted because of a split between bankruptcy courts in the Eastern District of North Carolina. The Circuit panel observed that *Ransom v. FIA Card Services,* 562 U.S. 61 (2011), did not address the issue of whether a debtor could deduct the Standard expense when actual expenses were lower, and the panel found the statutory language to be clear. If there is a particular expense category, the statute provides that the "monthly expenses *shall be* the debtor's applicable monthly expense amounts *specified* under National Standards and Local Standards." 11 U.S.C. § 707(b)(2)(A)(II)(I) (emphases supplied). The panel held that interpreting this statute's "applicable" to mean "actual" would create an absurd result, "punishing frugal debtors." *Lynch v. Jackson,* 853 F.3d 116 (4th Cir. 2017).

Petition Preparer

Bankruptcy petition preparer's use of term "paralegal" in website violated § 110(f). Affirming the bankruptcy court's determination that the preparer's use of the term

"paralegal" in website and promotion of "Low Cost Paralegal Services" violated § 110(f), the bankruptcy court did not err in imposing statutory damages and ordering forfeiture of fees. *Strickland v. U.S. Trustee (In re Wojcik),* 560 B.R. 763 (B.A.P. 9th Cir. 2016).

Short-sale consultant acted as petition preparer. The non-attorney defendant operated a business under which she found homes subject to sheriff's sales and then contacted the owners, offering to pursue short sales of the property or loan modifications. That individual acted as a petition preparer, assisting clients in filing bankruptcy, in violation of § 110 and contrary to prior consent orders that the individual would refrain from acting as a petition preparer. The defendant was ordered to disgorge fees received in six cases, with treble fines imposed in each case and with the defendant enjoined from so acting in the future. The defendant was in contempt of the prior consent orders, with a civil sanction of $25,000 for the repeated violations. *United States Trustee v. Martin,* 576 B.R. 798 (Bankr. D. Del. 2017).

Complaint did not state cause of action under § 526(a). In dismissing a complaint filed by the United States Trustee against an attorney, Upright Law, LLC and others, the court found that the allegation that the defendants violated § 526(a) by falsely stating that UpRight Law had nationwide offices did not state a cause of action, because any such representation was not made in a document filed with the court in a case or proceeding. Such a representation, if made, was on UpRight's website, not in a document filed with the court. As to the complaint's claims that the LLC was engaged in unauthorized practice of law, in the interest of comity and respect for state law, the bankruptcy court abstained, concluding that § 526's enactment "did not impinge upon the states' interest in regulating the practice of law." *United States Trustee v. Racki, et al.(In re Bishop),* ___ B.R. ___, 2017 WL 5125741 (Bankr W.D. N.Y. Nov. 3, 2017).

Surrender

Chapter 7 debtors must surrender in compliance with statement of intention. When Chapter 7 debtors' § 521(a)(2) statement of intention was to surrender their residence, they were required to surrender to both the trustee and secured creditor, and even if the trustee abandoned the property, the duty to surrender to the creditor continued. Surrender was not limited to the trustee. Therefore, the act of surrender requires the

debtors to drop opposition to the creditor's foreclosure action. The bankruptcy court had authority to order the debtors to stop their foreclosure opposition. *Failla v. Citibank, N.A. (In re Failla),* 838 F.3d 1170 (11th Cir. 2016). *See for disagreement, In re Ryan,* 560 B.R. 339 (Bankr. D. Hawai'i 2016).

Reaffirmation

Reaffirmation agreement cannot be filed after entry of discharge. Denying the Chapter 7 debtors' motion to reopen the case and to then file a reaffirmation agreement on a vehicle, the court held that § 524(c)(1) clearly requires that a debtor seek approval of reaffirmation prior to obtaining discharge, and Rule 4008(a) also restricts the time for filing a reaffirmation agreement. *In re Eastep,* 562 B.R. 783 (Bankr. W.D. Okla. 2017).

Show cause to debtor's attorney as to declaration that reaffirmation would not be undue hardship. In a reaffirmation hearing, the court determined that the reaffirmation would impose an undue hardship on the debtor, and a show cause was issued for the debtor's attorney concerning violation of Rule 9011 by filing a declaration with inaccurate facts or without personal knowledge of its contents. *In re Griffin,* 563 B.R. 171 (Bankr. M.D. N.C. 2017).

Discharge Injunction

Coercion or harassment not established. In their allegation of violation of the discharge injunction by continued foreclosure action, the debtors did not allege that the creditor's conduct constituted coercion or harassment in attempt to collect a discharged debt, an element required under § 524(a)(2). Denial of the contempt motion was affirmed. *Rosado v. Banco Popular De Puerto Rico (In re Rosado),* 561 B.R. 598 (B.A.P. 1st Cir. 2017).

Bankruptcy court had authority to award "relatively mild" punitive damages for discharge injunction violation. The bankruptcy court had awarded Chapter 7 debtors $1,000 for emotional distress damages for each of the 100 phone calls and 19 letters that violated the discharge injunction, but that court had denied punitive damages, concluding that it lacked such authority. The Bankruptcy Appellate Panel affirmed the bankruptcy court's finding that the mortgage servicer knowingly and willingly violated the discharge

injunction, and the $119,000 damage award was reasonable and supported by the evidence. However, the BAP remanded, holding that the Ninth Circuit's *In re Dyer,* 322 F.3d 1178 (9th Cir. 2003), while prohibiting "serious" punitive damages by the bankruptcy courts, left open the potential for "relatively mild noncompensatory fines," which the BAP found to be "simply punitive damages by another name." In its remand the BAP did not hold that the bankruptcy court must award a fine or punitive damages, but that it could consider whether such an award was appropriate. Alternatively, if appropriate, the bankruptcy court could propose findings and make recommendations for judgment on punitive damages to the district court or refer the matter for criminal contempt proceedings. *Ocwen Loan Servicing, LLC v. Marino (In re Marino),* ___ B.R. ___, 2017 WL 6553691 (B.A.P. 9th Cir. Dec. 22, 2017).

Discharge of unscheduled prepetition claims. Noting that § 727(b) provides for discharge of all pre-bankruptcy debts, except those expressly excepted from discharge, the debtor did not schedule a claim by his former domestic partner; nevertheless, in a no-asset case unscheduled prepetition debts are discharged under Ninth Circuit authority. Therefore, the former domestic partner was subject to the discharge injunction, and the debtor's remedy for a violation is to seek contempt sanctions. However, the claimant's pursuit of counterclaims in state court was done in the belief that as an unscheduled creditor she was not subject to the discharge injunction, and her violations were not willful. *In re Davies,* ___ B.R. ___, 2017 WL 4863012 (Bankr. D. Idaho Oct. 26, 2017).

Mortgage servicer's monthly statements violated discharge injunction. After the Chapter 7 debtors received discharge, and continuing after the mortgage was foreclosed, the servicer mailed monthly statements indicating the mortgage was past due. The case was reopened and debtors filed an adversary proceeding alleging violations of the discharge injunction. Each of the statements contained disclaimer in fine print that if there was a pending bankruptcy, the statements were informational and not for the purpose of collecting a debt. The twenty-one monthly statements "expressly and implicitly reflect attempts to collect discharged obligations from the Debtors. No pro forma bankruptcy disclaimer can overcome the effects of repeated and continuous communications in which Ocwen took the position that these obligations were collectible." Moreover, discharge injunction violations occurred through five letters sent to the debtors after foreclosure,

advising that hazard insurance was required and that an escrow shortage must be paid. Emotional distress damages of $13,000 and $30,000 attorney fees were awarded, but no punitive damages. *In re Todt,* 567 B.R. 667 (Bankr. D. N.H. 2017).

Unscheduled creditor violated discharge injunction. An unscheduled creditor had sufficient notice of the Chapter 7 filing, so that the post-discharge collection attempts were violations of the discharge injunction; however, the fact that it was unclear whether the unscheduled claim was discharged justified a finding that the creditor acted in good faith, with no award of damages or attorney's fees. *In re Hardej,* 563 B.R. 855 (Bankr. N.D. Ill. 2017).

Revocation of Discharge

Pro se debtor failed to comply with trustee's requests for tax return. The Chapter 7 trustee made efforts to compel the debtor to provide a copy of a tax return for the pre-bankruptcy tax year, including moving to conduct a Rule 2004 examination of the debtor and filing an adversary proceeding to revoke the debtor's discharge under §§ 727(d)(2) and (3). The debtor did not appear for the Rule 2004 examination and did not respond to the complaint, leading to the trustee's motion for default judgment. The bankruptcy court denied the motion for default, vacated the order for Rule 2004 examination, based on questioning the trustee's failure to move for dismissal of the case when the debtor did not provide the tax return, to continue the § 341 meeting until the debtor provided the tax return, or to move for delay of entry of discharge. The Bankruptcy Appellate Panel vacated, finding that leaving the bankruptcy court's orders in place "may allow Chapter 7 debtors that fail to deliver to the trustee an estate asset to keep their discharge and perhaps suggests that such debtors cannot be compelled to participate in discovery as to their § 521 obligations. Alternatively, it requires Chapter 7 trustees to extend the date to object to discharge until an asset such as a future tax refund is turned over, despite § 727(d)(3)'s design to avoid this type of situation, or it may suggest that dismissal prior to discharge is an acceptable remedy in an asset Chapter 7 case." The BAP found that denial of the trustee's motion for default judgment on the revocation complaint and vacating the Rule 2004 order were abuses of discretion. The Panel also noted that because the trustee's approach in this case was "within the bounds of the Code,

deference to the Trustee's determinations as to how to proceed in this matter is warranted." *In re Stubbs,* 565 B.R. 115 (B.A.P. 6th Cir. 2017). *See also In Matter of Cooper,* 2017 WL 945085 (Bankr. N.D. Ga. Mar. 9, 2017) (judgment of default on U.S. Trustee's § 707(d)(1) complaint to revoke discharge).

Dismissal

No cause for dismissal when Chapter 7 filed in response to single debt. The debtor filed Chapter 7 because a $1.275 million judgment against him was certified in state court, and that judgment constituted 90% of his unsecured debt. The debtor had assets of $5.348 million, but the majority of those were statutorily exempt as tenancy by entirety or retirement plans. The debtor had turned over non-exempt assets to the trustee. The bankruptcy court did not abuse its discretion in denying the judgment creditor's motion to dismiss, finding that the decision to file Chapter 7 did not rise to the level of bad faith as cause under § 707(a). The Fourth Circuit noted that "cause" under the statute is not defined, with the determination made case-by-case. Observing the split of authority on whether bad faith may be "cause," the Circuit found the majority view to be correct, recognizing that it may be cause under § 707(a). Although the judgment may have been the primary motivation for filing Chapter 7, it was not the only reason. The debtor's wife was suffering from a brain injury which incapacitated her for work, with a live-in caretaker required. The debtor's lifestyle was "comfortable, but not exorbitant," and his expenses for care of his wife would increase. The debtor was unable to obtain employment and he had been candid and cooperative with the trustee. In addition, the debtor had attempted twice to settle with the judgment creditor. "It is altogether right that the parties can rest assured that, should settlement fail, bankruptcy will provided a way for them to resolve their case." The Circuit commented that it was not asked to say whether it would have necessarily agreed with the bankruptcy court's findings, only that the court had given "good and sound reasons for ruling as it did." *Janvey v. Romero,* ___ F.3d ____, 2018 WL 987801 (4th Cir. Feb. 21, 2018).

Section 707(b) applies to petition originally filed as Chapter 13 but converted to Chapter 7. The Eleventh Circuit concluded that § 707(b) dismissal applied in a case filed under Chapter 13 and then voluntarily converted to Chapter 7 after two years of plan

payments. "Congress passed § 707(b) specifically to emphasize the responsibility of courts to dismiss Chapter 7 cases filed by debtors with repayment ability." The debtor made a "textual" argument that the statute was limited to "a case filed by an individual under this chapter," but the panel rejected an interpretation "that would lead to consequences that are inconsistent with the statutory scheme, . . .[finding] unmistakable indications in the Code that Congress intended § 707(b) to apply to converted cases." These indications included the legislative history behind § 707(b) and the fact that "Congress expressly excluded converted cases from the reach of other sections of the Code, but not from § 707(b)." *Pollitzer v. Gebhardt,* 860 F.3d 1334 (11th Cir. 2017).

Employer's housing loan was not consumer debt for purposes of § 707b)(1). Affirming denial of § 707(b)(1) dismissal for abuse, the Ninth Circuit agreed with the bankruptcy court's determination that a housing loan made by the Chapter 7 debtor's former employer was not a consumer debt under the facts of this case. The loan was a key part of a compensation package, incurred "primarily for the non-consumer purpose connected to furthering [the debtor's] career." Determination of the debtor's purpose for the loan is made at the time the debt was incurred, and all of the circumstances must be considered. The Circuit panel also held that the denial of a creditor's dismissal motion was final and appealable, "because it conclusively resolved the debtors' ability to file a Chapter 7 bankruptcy petition and conclusively determined the discrete issue whether a debt was primarily non-consumer." *In re Cherrett,* 873 F.3d 1060 (9th Cir. 2017).

Creditor's dismissal motion barred by laches. Finding that the creditor's delay in filing a motion to dismiss under § 707(a) was unreasonable and inexcusable and that the Chapter 7 debtor was materially prejudiced by the delay, the motion was barred by laches. The moving creditor was the debtor's former business partner, who had previously litigated § 727(a) discharge issues. Examining the doctrine of laches, there was a two-year delay in filing the § 707(a) motion after the creditor had previously filed a § 707(b) motion, which had raised the same allegations about the debtor's postpetition lavish lifestyle. Moreover, the creditor waited thirteen months after the Seventh Circuit's decision in *In re Schwartz,* 799 F.3d 760 (7th Cir. 2015), which held that "cause" under § 707(a) could be based on a debtor's lavish lifestyle. Under the circumstances of this

case, thirteen months' delay after the *Schwartz* opinion was not reasonable. *In re Dini,* 566 B.R. 220 (Bankr. N.D. Ill. 2017).

Denial of reconsideration of dismissal. Affirming denial of the pro se Chapter 7 debtor's third motion to reconsider dismissal of the case for failure to file required petition documents, the bankruptcy court did not abuse its discretion, and the debtor failed to file a timely appeal of the dismissal order. *Lee v. Edwards (In re Lee),* 561 B.R. 93 (B.A.P. 8th Cir. 2016).

Abuse found for dismissal, with student loans consumer debts. Finding that the debtor's student loans were incurred for personal interests and that the debts fell squarely within § 101(8)'s definition of consumer debt, there was an unrebutted presumption of abuse under § 707(b)(2), and abuse was found under § 707(b)(3)'s totality of circumstances. The debtor had ability to pay all debt, including student loans, within a five-year Chapter 13 plan. *In re Robinson,* 560 B.R. 352 (Bankr. D. Colo. 2016). *But see Palmer v. U.S. Trustee,* 559 B.R. 746 (D. Colo. 2016) (debtor's testimony was unequivocal that doctorate was pursued for business purpose, with student loan found not to be a consumer debt). *See also In re Lowe,* 561 B.R. 688 (Bankr. N.D. Ill. 2016) (under totality of circumstances, including debtor's substantial monthly income available to pay creditors, case was dismissed as abusive); *In re Chovev,* 559 B.R. 339 (Bankr. E.D. N.Y. 2016) (exploring split of authority on whether bad faith is "cause" for § 707(a) dismissal, assuming it is cause, bad faith was not established).

Reopening Closed Case

Factors for determination. For a discussion of factors for consideration in whether cause has been shown to reopen a closed case, see *In re Kim,* 566 B.R. 9 (Bankr. S.D. N.Y. 2017). *See also In re Derosa-Grund,* 567 B.R. 773 (Bankr. S.D. Tex. 2017) (Chapter 7 case reopened on debtor's motion to allow trustee to administer unscheduled asset, finding the trustee's motion to approve compromise with debtor core.).

Cause did not exist to reopen case to allow extension to file certificate of financial management course. The Chapter 7 debtor's case had been closed for five years, with no discharge granted because of failure to file the required certificate of completion of the financial management course. On the debtor's motion to reopen the case and permit the

certificate's filing, the court found no cause under § 350(b), applying a four-factor test found in prior case authority: "(1) whether there is a reasonable explanation for the failure to comply; (2) whether the request was timely; (3) whether fault lies with counsel; and (4) whether creditors are prejudiced." *In re Sims,* 575 B.R. 789 (Bankr. E.D. Mich. 2017). *Accord In re Wilson,* 575 B.R. 783 (Bankr. E.D. Mich. 2017) (no cause in case closed fifteen months); *In re Rondeau,* 574 B.R. 824 (Bankr. E.D. Mich. 2017) (no cause in case closed three years); *In re Whitaker,* 574 B.R. 819 (Bankr. E.D. Mich. 2017) (no cause in case closed one-year).

Chapter 13 Issues

Co-debtor Stay

Co-debtor stay applied only to consumer debt of the debtor. In a case filed by only one spouse, the credit card company did not violate the co-debtor stay when it sued the debtor's non-filing husband for collection of a debt incurred by the husband on a credit card that was solely his. Section 1301(a) does not define "consumer debt of the debtor," but the "best reading of the co-debtor stay involves shielding non-filing co-debtors from actions to collect on the consumer debts only *of the filing debtor.* As the [debtor] does not demonstrate that her husband's credit card debt is her own, the co-debtor stay does not apply." Also, Wisconsin marital law did not convert the husband's debt into the debtor's obligation. *Smith v. Capital One Bank (U.S.A.), N.A.,* 845 F.3d 256 (7th Cir. 2016).

Judicial sale violated co-debtor stay and debtor had standing to enforce that stay, but § 362(k) does not authorize damages for co-debtor violations. Although the automatic stay did not come into effect for the Chapter 13 debtor on this fifth case, because two prior cases were pending and dismissed within the prior year, the co-debtor stay did come into effect for the non-filing spouse, who owned real property as tenant by entirety with the debtor. The day after the petition filing, the mortgagee sold the property at foreclosure. The court concluded that the debtor had Article III standing and statutory authority to enforce the co-debtor stay, looking to legislative history of § 1301 and the language of § 1301(d), and the mortgagee's motion in state court to approve the sale violated the co-debtor stay. That motion also sought a deficiency judgment against both

co-tenants. The court then examined whether acts in violation of the automatic stay were void *ab initio* or voidable, discussing the split of judicial authority on that issue, with the court determining that "actions taken in violation of the co-debtor stay are 'ordinarily' void, . . .and are in fact void in this matter." Next, the court examined § 362(k), concluding that it was expressly limited to the automatic stay; however, the court had authority under § 105(a) to redress violations of the co-debtor stay. The debtor failed to carry her burden of proving monetary damages, with the relief limited to voiding the postpetition sale and motion to approve that sale. *In re Whitlock-Young,* ___ B.R. ___, 2017 WL 3432368 (Bankr. N.D. Ill. Aug. 10, 2017). *See also In re Tucker,* ___ B.R. ___, 2017 WL 2773523 (Bankr. N.D. Iowa June 26, 2017) (finding authority under § 105(a) to award monetary damages for violation of co-debtor stay, with § 1301 being silent on remedy).

Eligibility

Student loan debt being repaid by income-based repayment plan was noncontingent but not included in unsecured debt limit. The Chapter 13 debtor had $374,108 student loan debt owing to the U.S. Department of Education, and that debt was being repaid through an income-based repayment plan (IBR plan), with monthly payments of $268, subject to adjustment if the debtor's income increased, but capped at $3,655.75 monthly. The Chapter 13 petition scheduled $591,223 in unsecured debt, including the government's student loan. On a motion to dismiss for exceeding the unsecured debt limit, the court first found the IBR plan debt to be noncontingent, with the debtor arguing that it was contingent because potentially subject to forgiveness in the future. However, the court concluded that § 1307(c) is permissive, providing for dismissal only if "cause" exists. The trustee asserted "cause" for dismissal based upon the total amount of unsecured debt, but "ineligibility is not an absolute cause for dismissal or conversion when a debtor owes more than the § 109(e) debt limit." Finding no published opinions on the specific issue of whether the existence of educational debt in excess of § 109(e)'s limit required dismissal, neither §§ 1307(c) nor 109(e) expressly required dismissal. The court looked to history of congressional enactment of the debt limit, as adjusted over time. The court found that the "debt limits were created in response to the expansion of chapter 13 eligibility to business owners," and that "individuals with large amounts of educational debt are not the type of debtors whom Congress intended to

exclude from chapter 13." The court recognized that some courts permit "debtors to cure and maintain educational debt payments through their chapter 13 plans," and that "educational debt is generally nondischargeable." The court also noted that subsequent to enactment of the Code in 1978, "the law has evolved to treat educational debt differently from other general unsecured debt," with student loan debt substantially increasing, while at the same time the Chapter 13 debt limits had increased only an average of 7.6% per year. Although the debtor exceeded the unsecured debt limit, dismissal of the case "would not advance the Congressional intent behind the debt limits." *In re Pratola,* ___ B.R. ___, 2017 WL 6605264 (Bankr. N.D. Ill. Dec. 27, 2017).

Unsecured debt limit did not include any portion of 910-car claims. Referring to the § 506(a) analysis of *In re Scovis,* 249 F.3d 975 (9th Cir. 2001), for determination of whether a lien was secured or unsecured in the eligibility context, the bankruptcy court found that the debtor's schedules "permit an inference that § 506(a) may not be applicable to allow bifurcation of the automobile claims into secured and unsecured components," with those schedules raising the "possibility that § 1325(a)'s hanging paragraph could preclude such bifurcation." The trustee had moved to dismiss the case for ineligibility, alleging that the unsecured portion of the 910-car claims would push the debtors above the unsecured debt limit. The court denied the motion, observing that "when the court lacks sufficient certainty as to whether such claims may be bifurcated under § 506(a) because of § 1325(a)'s hanging paragraph," the alleged unsecured portion should not be included in the eligibility calculation. *In re Wilkins,* 564 B.R. 419 (Bankr. E.D. Cal. 2017). *Compare In re Wilkins,* 564 B.R. 268 (Bankr. M.D. Pa. 2017), for holding that case should be converted to Chapter 11 based on debtor's exceeding unsecured debt limit for Chapter 13, citing majority view that a "second lienholder's debt, as wholly unsecured, does count toward the eligibility debt limit for unsecured debt."

Debtor had not completed required prepetition credit counseling. A Chapter 13 debtor was incarcerated and did not personally complete § 109(h)'s credit counseling; rather, his non-debtor wife utilized a power of attorney and took the counseling. The court found that the certificate was legally ineffective. No affidavit was submitted by the debtor or spouse, and the debtor and counsel had not been forthcoming with information that the

debtor did not take the course as the certificate represented. The debtor was ineligible. *In re Mackey,* 565 B.R. 238 (Bankr. E.D. N.Y. 2017).

Debtor's Standing

Chapter 13 debtors lacked independent standing to pursue avoidance claims. The debtors had filed adversary proceeding to avoid preferential and fraudulent transfers under §§ 544(b), 547(b), and 548, but granting the defendant's motion to dismiss, the court referred to the split of authority on whether the Chapter 13 debtors have such standing. "When a statute gives a right to a particular party, it should be presumed that the right in question vests exclusively with that party," and Congress did not give these avoidance powers to the debtors; therefore, the court held that these Chapter 13 debtors did not have standing to bring the avoidance claims independent of the trustee. Bankruptcy Rule 7019 did not solve the standing problem, because it allows joinder of an involuntary party only in a "proper case," and "allowing the Plaintiffs to use Rule 19 as a post hoc mechanism to gain standing when they have none would be repugnant to foundational principles of federal jurisdiction, especially since the standing inquiry is made at the commencement of an action." The Chapter 13 trustee had refused to join in the action and had no obligation to let the plaintiffs use the trustee as a means to gain standing. *In re Cole,* 563 B.R. 526 (Bankr. W.D. N.C. 2017). *Compare Simmons v. Federal Home Loan Mortgage Corp. (In re Simmons),* 560 B.R. 308 (Bankr. S.D. Ohio. 2016) (debtors had derivative standing to sue for setting aside mortgage under trustee's strong-arm powers).

***Barton* Doctrine precluded Chapter 13 debtor's litigation against Chapter 7 estate.** The Chapter 13 debtor moved to reopen his Chapter 13 case in order to litigate with the liquidating agent of a master loan pool, which was owned by a Chapter 7 estate. The pool was the assignee of the second mortgage on the debtors' home, and the liquidating agent was acting as an agent of the Chapter 7 trustee in administering assets of the pool. The court held that any action against the agent of the Chapter 7 trustee required the debtors' obtaining leave from the bankruptcy court that had appointed the liquidating agent. *In re Bedell,* 563 B.R. 731 (Bankr. D. Kan. 2017).

Applicable Commitment Period

Plan payments could exceed 60 months. The Third Circuit addressed the issue of whether the bankruptcy court had discretion to grant a grace period beyond the 60-month plan to permit the debtors to cure an arrearage, concluding that the Code permitted it and that the bankruptcy court here did not abuse its discretion. These debtors had obtained confirmation of a 60-month plan and in the 61st month, the trustee moved to dismiss based on the debtors still owing $1,123 to complete the plan's base payments, but the trustee's motion stated that it would be withdrawn if the debtors paid the arrearage. An unsecured creditor joined the trustee's dismissal motion, arguing that the Code required all payments to be completed within 60 months. Before the motion was heard the debtors had cured the remaining balance and the dismissal motion was denied. The creditor had also filed an adversary proceeding objecting to discharge, but a discharge was granted. The Circuit panel found that the order denying dismissal was final for purposes of appeal, holding "that bankruptcy courts retain discretion under the Bankruptcy Code to grant a reasonable grace period for debtors to cure an arrearage, and we also hold that the Bankruptcy Court here did not abuse its discretion in doing so in this case." Although §§ 1322(d) and 1329(c) provide that the court may not confirm, or modify, a proposed plan that schedules payments exceeding five years, that does not address the issue of whether the court "may deny a motion to dismiss and/or grant a completion discharge when there remains at the end of that plan term a shortfall that the debtor is willing and able to cure." Section 1307's dismissal provision contains no express restriction on term length, and its provision for dismissal for material default contains the discretionary "may." "That permissive language. . .stands in contrast to the 'may not' language of §§ 1322 and 1329." Section 1328(a)'s provision for discharge contains no "express requirement that such payments were made within five years." The Circuit panel found that *In re Brown,* 296 B.R. 20 (Bankr. N.D. Cal. 2003), stated appropriate factors relevant as a starting point to analysis of the bankruptcy court's exercise of its discretion: (1) how much longer will be required to complete payments; (2) has the debtor been diligent in making payments; (3) how much time has elapsed between the confirmation and dismissal motion; and (4) was the debtor culpable for the shortfall? The Circuit panel added additional factors that could be considered, including whether a cure was feasible within a short period and whether

the grace period would adversely affect a creditor. *In re Klaas,* 858 F.3d 820 (3d Cir. 2017).

60-month maximum strictly construed. After the debtors had paid their 5-year plan, the trustee learned that one debtor had obtained new employment with increased income, and the trustee moved to dismiss the case. The debtors agreed to pay an additional $17,000 over a 5-month period, which would extend the plan to 67 months, and the trustee was holding funds pending the court's approval of the settlement. Noting the split of authority on the starting point for the running of the 5-year period, the court held that it should be the time when the debtor is first required to make payments under § 1326(a)(1). The court then held that it lacked discretion to allow the debtor to complete plan payments beyond the maximum 60 months, disagreeing with *In re Klaas,* 858 F.3d 820 (3d Cir. 2017). Extensions beyond five years would require congressional action or binding Tenth Circuit authority. *In re Humes,* 579 B.R. 557 (Bankr. D. Colo. 2018).

Current Monthly Income

Current monthly income includes police pension. Although the debtor's monthly police pension payments may either be excluded from the estate or exempt, the definition of disposable income in § 1325(b)(2) includes income from all sources, with three specific exclusions that are not relevant in this case, and § 101(10A) includes income from *all* sources. Under the plain meaning of the Code, *all* includes exempt property. Congress knew how to exclude income from the definition, as it did with Social Security benefits, and since the adoption of BAPCPA "there has been no debate: the disposable income/CMI calculation includes all current monthly income, which includes many forms of exempt or excluded assets." The trustee's objection to confirmation was sustained, with the debtor to file an amended plan that included the pension payments in current monthly income. *In re Sjogren,* 570 B.R. 1 (Bankr. D. Mass. 2017).

Disposable Income

Contribution to retirement account. In an unpublished decision, the Fourth Circuit affirmed confirmation of a plan, when the Chapter 13 trustee's objection, in part, was that the debtor improperly deducted from disposable income his $338 monthly repayments on

loans from retirement accounts. The debtor's response to the objection was that when the loans were fully repaid, he would resume contributions to the accounts. The Circuit panel noted the split of judicial authority on exclusion of such contributions from disposable income. Because the trustee's objection to the contributions was based upon lack of good faith, the majority of the panel saw no clear error in the bankruptcy court's good faith findings; therefore, the majority saw no need to reach which view of retirement contributions was correct. The dissenting judge agreed that the bankruptcy court did not err in its good faith findings, but thought the trustee had sufficiently raised issues of statutory interpretation and that the panel should have addressed whether a debtor may exclude from disposable income those post-petition retirement contributions. *Gorman v. Cantu,* 2017 WL 6422351 (4th Cir. Dec. 18, 2017).

Debtor could pay 100% of claims without interest. Interpreting § 1325(a)(1)'s phrase "as of the effective date of the plan," debtors who did not propose devotion of all projected disposable income could obtain confirmation by paying 100% of allowed unsecured claims, and interest on those claims is not required. *In re Egger,* 560 B.R. 797 (Bankr. W.D. Wash. 2016).

Curing Default

Debtor's opportunity to cure mortgage default ended with conclusion of foreclosure. Applying Sixth Circuit authority, a debtor's right to cure home mortgage default under § 1322(c)(1) ends with the conclusion of the foreclosure sale, which occurs when the hammer falls on the last bid. The debtor's retention of legal title, possession or state law right to redeem did not give the debtor a right to cure after foreclosure. Also, the debtor may not pay the foreclosed mortgage over the five-year life of the plan. *In re Parker,* 563 B.R. 650 (Bankr. E.D. Ky. 2017).

Equal Monthly Payments

Plan confirmation denied for failure to provide equal monthly payments to car creditor. Adopting holding and rationale of *In re DeSardi,* 340 B.R. 790 (Bankr. S.D. Tex. 2006), equal monthly payments to car creditor must begin immediately after full payments to the debtor's attorney. This court's opinion points out that there is a split of authority on

the issue, agreeing with other courts that balloon payments are not consistent with the Code's requirement for equal monthly payments, when the plan proposed to pay less on secured claims during early post-confirmation months and fund increases during subsequent years to pay the secured claims in full. The plan in this case proposed to make adequate protection payments to Nissan for ten months, while the debtor's attorney fees were paid, but the proposed payments on Nissan's secured debt over the remaining 49 months of the plan were not equal. Rather, the plan proposed to make extra payments annually to Nissan in order to fully pay its claim. The plan was not confirmed. *In re White,* 564 B.R. 883 (Bankr. W.D. La. 2017).

Separate Classification

Separate classification and favored treatment of student loan debt was not unfairly discriminatory. In an extensively footnoted analysis of a plan's treatment of student loan debt, the court found that the debtors had substantially paid non-student loan debt prior to filing bankruptcy through a debt management plan and their proposed plan provided for payment of student loan claims in full without post-petition interest before any further payment to other general unsecured creditors. The opinion reviews the dischargeability issue under § 523(a)(8), and the various approaches to determination of whether separate classification and discrimination is unfair. Using the "Baseline Test" from *In re Bentley,* 266 B.R. 229 (B.A.P. 1st Cir. 2001), the court found that the debtor's plan did not discriminate unfairly; the proposed plan was "fair as Debtors' non-student loan unsecured creditors received a significant [83%] prepetition dividend that discriminated against the Student Loan Claims." Moreover, Congress had favored the status of student loan debt, and the opinion considered the benefits of separate classification on both debtors, student loan creditors, taxpayers and other interests. *In re Engen,* 561 B.R. 523 (Bankr. D. Kan. 2016). See also *In re Kindle,* 2017 WL 5035080 (Bankr. D. S.C. Nov. 1, 2017) (separate plan treatment for student loans allowed).

Expense Deduction

Secured debt does not have to be "reasonably necessary." Pointing out the split of authority since BAPCPA, a "reasonably necessary" standard for deductions does not

apply to secured debt under § 707(b)(2)(A)(iii)(I). Secured debt on a camper was properly deducted and did not have to satisfy the "reasonably necessary" standard, overruling the trustee's motion. The opinion also discusses the "growing trend in bankruptcy courts" to apply a "good faith" inquiry to a debtor's disposable income calculation, but "listing a secured debt in compliance with the Bankruptcy Code cannot, on its own, establish a lack of good faith." *In re Colon,* 561 B.R. 682 (Bankr. N.D. Ill. 2016). *See also In re Hall,* 559 B.R. 463 (Bankr. S.D. Tex. 2016) (above-median debtor was not entitled to standard vehicle ownership deduction for vehicle owned by non-filing spouse).

Bifurcation of Mortgage and Lien Stripping

Escrow funds, insurance and miscellaneous proceeds were incidental property of principal residence. The Fourth Circuit affirmed the Chapter 13 debtor's inability to modify a residential mortgage, holding that the deed of trust's inclusion of escrow funds, insurance proceeds and other miscellaneous proceeds did not remove the mortgage from § 1322(b)(2)'s anti-modification. Those items were "incidental property," under § 101(27B)'s definition, and to characterize them as additional security "would completely eviscerate the anti-modification exception of § 1322(b)(2) because many deeds of trust which encumber improved real property contain these provisions to protect the lender's investment in the real property." *In re Birmingham,* 846 F.3d 88 (4th Cir. 2017).

Petition date, rather than loan origination date, was used for § 1322(b)(2) anti-modification determination. In the context of a contested plan, in which the debtors proposed to modify a mortgage, the debtors asserted that the loan origination date should control, because at that time the loan was secured by both a residence and commercial property. The court found that the majority view was that the petition date was the appropriate date for determining whether § 1322(b)(2) prevented modification. At the petition date, only the debtor's residence collateralized the loan, with the commercial property's lien having been released through foreclosure. The debtor was prevented from modification of the mortgage and confirmation was denied. *In re Hueramo,* 564 B.R. 604 (Bankr. N.D. Ill. 2017).

Property subject to lien stripping is valued at petition date. First holding that the Supreme Court's decision in *Bank of America v. Caulkett,* 135 S.Ct. 1995 (2015), did not

affect a Chapter 13 debtor's ability to strip off a wholly unsecured junior lien under a combination of sections 506(a) and 1322(b)(2), the court then examined the appropriate date for valuation of the property subject to lien stripping. The parties agreed that on the petition date, the value of the property at issue was less than the first mortgage; however, by the time of the confirmation hearing the property had increased in value, giving the junior lien some value. Adopting a "flexible approach to valuation depending on a debtor's proposed use or disposition of the property at issue in accordance with § 506(a)(1)," the court nevertheless concluded that "absent unusual circumstances regarding such proposed use or disposition, the petition date is the proper date to value real estate in order to determine whether a claim is wholly unsecured for purposes of lien stripping under a chapter 13 plan and not subject to the anti-modification provisions of § 1322(b)(2)." *In re Guerra,* 2017 WL 1190604 (Bankr. D. Mass. March 29, 2017).

Mortgage on two-unit structure was not subject to modification. The debtor asserted that she could modify a mortgage because it was secured by a lien on a two-unit structure, with the debtor residing in one half and renting out the second half. The court reviewed three approaches to the construction to be given § 1322(b)(2)'s use of "secured *only* by a security interest in real property that is the debtor's principal residence:" (1) bright-line approach, "so long as principal residence," applying § 1322(b)(2) if the real property includes the debtor's residence, even though a portion of the real property has other purposes; (2) bright-line approach, "principal residence only," holding that § 1322(b)(2) does not prevent modification of a multi-unit property in which the debtor resides but derives income from another portion of the property; and (3) case-by-case approach, looking to the parties' intentions. The court concluded that § 1322(b)(2), in conjunction with the definition of "debtor's principal residence" in § 101(13A)(A) and § 101(27B), prevented the debtor's proposed modification. Congress defined the debtor's principal residence to include rents derived from the real property; therefore, the facts that the debtor rented out one unit of this property and that the mortgagee also had security in the rents did not change the conclusion that the mortgage was secured only by a security interest in the debtor's principal residence. The transaction should be examined at the time the agreement was entered into and how the parties intended the property to be used, and the parties intended at that time that the debtor would reside in one unit and

rent out the other unit. Nevertheless, under § 1322(b)(2), the security interest could not be modified. *In re Addams,* 564 B.R. 458 (Bankr. E.D. N.Y. 2017).

Debtor with prior Chapter 7 discharge could not strip off residential mortgage. Although the Chapter 13 debtors had previously been discharged from personal liability on a mortgage note, the holder of the mortgage was protected by §1322(b)(2)'s anti-modification provision. Even if the mortgage holder's proof of claim were disallowed as filed late, that would not result in stripping of the otherwise valid mortgage. *In re Garner,* 565 B.R. 110 (Bankr. M.D. Ga. 2017).

Debtors could prepay mortgage but could not reduce interest rate. When mortgage contractually permitted debtors to prepay the mortgage without penalty, they could pay the mortgage early during the life of the plan. Prepayment would not be an impermissible modification; however, the debtors could not modify and lower the interest rate. *In re Sierra,* 560 B.R. 296 (Bankr. S.D. Tex. 2016).

Burden on valuation. Debtor bore initial burden to show that residential mortgagee's lien was not supported by $1 of equity, but creditor had ultimate burden to prove, by preponderance of evidence, that value existed to support its lien. *In re Pod,* 560 B.R. 77 (Bankr. E.D. N.Y. 2016). *See also Miller v. Citibank, N.A. (In re Miller),* 558 B.R. 146 (Bankr. E.D. Pa. 2016) (debtor could not strip off junior lien because equity supported lien).

Condominium association's claim could be bifurcated. The debtor's plan proposed to reclassify a portion of the condominium association's claim as unsecured under § 1322(b)(2). The association had recorded its lien for unpaid assessments prior to the Chapter 13 filing, and the association asserted that New Jersey law permitted a limited priority for its lien, over the lien of a prior recorded mortgage (six-months of maintenance fees), and that the state's Condominium Act provided for a portion of the lien to be secured, thus preventing modification under § 1322(b)(2). The debtor also argued that the lien was modifiable under § 1322(c)(2). Reviewing first §1322(b)(2) and the prior case law in New Jersey on an association's lien, the court concluded that the association's claim was secured by both a statutory and consensual lien, the latter arising out of the master deed; thus, § 1322(b)(2) did not prevent modification because the lien was not secured *only by* a security interest. Nevertheless, the association's state-law lien had

priority over the mortgage for six-months of unpaid assessments, and the priority lien was not modifiable. The balance of the lien was subordinate to the mortgage and may be treated in the plan as unsecured. *In re Smiley,* 569 B.R. 377 (Bankr. D. N.J. 2017). *See also In re Keise,* 564 B.R. 255 (Bankr. D. N.J. 2017) (Viewing the homeowners' association's claim as secured by two components—a consensual lien created by the association's declaration, and a statutory lien created by New Jersey's Condominium Act, "the claim is secured by *both* a security interest (consensual lien) and a statutory lien; accordingly, it is not afforded the protections of §1322(b)(2)." The lien can be modified in a plan, which proposed to pay the secured portion, representing six months of unpaid assessments.). *But compare In re Holmes,* ___ B.R. ___, 2017 WL 4174337 (Bankr. D. N.J. Sept. 19, 2017) (Discussing split of authority on issue in the district, and on remand from district court holding that condominium association held a security interest that was partially secured due to limited-priority under New Jersey's Condominium Act; therefore, claim could not be modified.).

Confirmation

Denial of confirmation not final, appealable order. The Ninth Circuit applied *Bullard v. Blue Hills Bank,* 135 S.Ct. 1686 (2015), holding that it lacked jurisdiction to consider an appeal by the debtors of the district court's vacating of confirmation order and remanding to the bankruptcy court. The district court vacated confirmation of a plan providing for vesting in the creditor, but that was not a final order for appeal, because it did not "fix the rights and obligations of the parties." Instead, the vacating and remanding allowed the parties to continue negotiations and efforts to obtain an alternative confirmed plan. The opinion notes that the debtors had other routes to seek appellate review, such as seeking certification for appeal, interlocutory appeal, or obtaining confirmation over the debtors' objection. Although *Bullard* arose under 28 U.S.C. § 158(a), its logic applied to this appeal, which presented the jurisdiction issue under § 158(d). *Bank of New York Mellon v. Watt,* 867 F.3d 1155 (9th Cir. 2017). *See also Gugliuzza v. FTC,* 852 F.3d 884 (9th Cir. 2017), for holding that remand by district court was not final, appealable order.

Modification of local model plan improperly avoided fixed term period. The Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's denial of confirmation

of plans that had added provisions to the district's mandatory plan form which, if confirmed, would have permitted the debtors to complete the plans early without allowing for potential § 1329 modification. Under these attempted plans, debtors would pay unsecured creditors nothing, leading to completion and discharge after paying priority and secured claims and without opportunity for unsecured creditors to seek modification of the confirmed plans. The panel was critical of the Chapter 13 trustee's participation in this plan process by not filing formal objections, which would have triggered "the mandatory imposition of the applicable commitment period under" *In re Flores,* 735 F.3d 855 (9th Cir. 2013). The panel pointed to the bankruptcy court's independent determination that a plan satisfies the requirements of the Code, which include the potential for § 1329(a) modification, and the Panel noted its precedent that a "Chapter 13 trustee has an affirmative statutory duty to appear and be heard on the question of plan confirmation. . . .In this Circuit, a plan provision which amounts to a plan modification without notice to the chapter 13 trustee or unsecured creditors and without otherwise complying with the plan modification provisions under § 1329 is not authorized." Moreover, the bankruptcy court did not err in finding that these debtors' plans were not proposed in good faith. *In re Escarcega, et al.,* ___ B.R. ____, 2017 WL 3891779 (B.A.P. 9th Cir. Sept. 6, 2017).

Plan confirmed based on monthly contribution from ex-husband. When the debtor's ex-husband executed an affidavit of his willingness and ability to contribute $1,050 monthly for funding of plan, and where the plan provided for dismissal in event of payment default, the plan was feasible and was confirmed. *In re Hager,* ___ B.R. ___, 2017 WL 5513627 (Bankr. W.D. Mich. Nov. 17, 2017).

Plan objection was basis for timely dischargeability complaint. A creditor moved to amend its prior confirmation objection to be a timely complaint contesting dischargeability of a debt under § 523(a)(4). The creditor had previously filed a fraud-based lawsuit and it had timely objected to confirmation, including in its objection that the debtor had not provided notice of the bankruptcy to the creditor and was attempting to discharge a $31 million claim in the fraud suit. The court found that the confirmation objection sufficiently provided notice to the debtor of the creditor's claim, and the objection could be amended

to initiate an adversary proceeding under Fed. R. Civ. P. 15(a)(2) and Fed. R. Bankr. P. 7015. *In re Palmeroni,* 570 B.R. 144 (Bankr. M.D. Pa. 2017).

Confirmation denied for lack of feasibility and good faith. Observing that the debtor had "squandered the benefits" of her recent Chapter 7 discharge by gambling away her wages and other income, while incurring new, unmanageable debt, under the totality of circumstances, the debtor failed to demonstrate that her proposed plan was feasible or in good faith. *In re Hager,* ___ B.R. ___, 2017 WL 3889895 (Bankr. W.D. Mich. Sept. 5, 2017).

Plan properly confirmed based on tax returns and debtor's evidence of property value. Denying a creditor's motion to reconsider a prior affirmation of confirmation, at 567 B.R. 543, the Bankruptcy Appellate Panel held that the § 521(e)(2)(A)(i) only requires the debtor to provide the trustee with the most recent pre-petition tax return and the debtor's failure to sua sponte provide copies of other years' returns was not basis to deny confirmation. Moreover, the bankruptcy court properly relied on the debtor's and debtor's appraiser's testimony about property value, when the creditor did not offer any expert valuation testimony to show property was undervalued. *In re Coppess,* 567 B.R. 893 (B.A.P. 8th Cir. 2017). In its prior opinion, the BAP found nothing to review, because the appealing creditor did not provide a transcript or recording of the confirmation hearing. *See also In re Wojciechowski,* 568 B.R. 682 (B.A.P. 8th Cir. 2017) (Bankruptcy court did not err in denying creditor's request for evidentiary hearing on debtor's second amended plan, with "nothing in the statutes or case law requir[ing] a hearing every time the issue of good faith is raised in a Chapter 13 proceeding.").

Plan confirmed with 100% payment to unsecured claims but without interest. The above-median debtor's plan proposed to pay unsecured creditors in full, but without interest, over 60 months, but the trustee objected because the debtor was not devoting all monthly disposable income to the plan, which would either pay clams earlier than 60 months or pay interest. Section 1325(b)(1) has disjunctive provisions, and subpart (A) permits confirmation if the plan proposes to pay allowed unsecured claims in full, even though the debtor is not devoting all disposable income. The disposable income test is found in subpart (B) as an alternative confirmation method. Citing the split of judicial authority on whether election of subpart (A)'s full payment option requires payment of

interest, the court found that unsecured creditors have no expectation of immediate payment; rather they are paid from the debtor's future income during the plan. "Where there is no forced deferral of any pre-existing payment right, there is no entitlement to interest." The language of § 1325(b)(1)(A) also persuaded the court that the phrase "as of the effective date of the plan" does not modify the term "value," drawing a distinction from §§ 1325(a)(4) and (a)(5)(B)(ii) in which "value" is clearly modified by "as of the effective date of the plan." The debtor could overcome the trustee's confirmation objection by full payment, without interest, of allowed unsecured claims. *In re Gillen,* 568 B.R. 74 (Bankr. C.D. Ill. 2017).

Effect of Confirmation

Creditor bound by plan modifying mortgage. The confirmed and modified, now completed, plan contained language modifying the home mortgage, a provision impermissible under § 1322(b)(2); nevertheless, the creditor withdrew its objection to the plan, and the creditor was bound by the confirmed plan's terms. The plan provided for full payment of the mortgage, in a specified amount, over the life of the plan, and the debtor expected plan completion to satisfy the mortgage in full. The claim was "provided for in the plan," with the creditor having notice and opportunity to object or appeal the confirmation order. *In re Smith,* 575 B.R. 869 (Bankr. W.D. Ark. 2017). *Compare Title Max v. Northington and Wilber (In re Northington and Wilber),* ___ F.3d ___, 2017 WL 6276001 (11th Cir. Dec. 11, 2017), discussed under Pawn and Redemption, for the majority not relying on the effect of confirmation order. *But see Nationstar Mortgage, LLC v. Iliceto (In re Iliceto),* 2017 WL 6311682 (11th Cir. Dec. 11, 2017), *per curiam*, for holding that mortgage creditor had adequate due process notice of invalidation of its lien, with the court relying, in part, on *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260 (2010).

Vehicle lessor's claims for excess mileage and fees are subject to confirmed plan. After Ford Motor Credit filed a proof of claim on vehicle lease, the parties stipulated that the debtor was assuming the lease, and although the confirmed plan did not specify that the lease was assumed it did provide for ongoing lease payments. The court held that the stipulation for assumption was incorporated into the plan, notwithstanding the plan's lack of specific assumption language. The vehicle was returned to Ford at lease

termination, and Ford moved for administrative expenses related to excess mileage, taxes, and attorney fees. The form plan included terms for claims arising from executory contracts and unexpired leases, and both the debtor and Ford were bound by those terms. Rather than have its administrative expense claims allowed, Ford must comply with the plan terms, which included filing a claim itemizing any post-petition lease obligations that the creditor believed were recoverable from the debtor or debtor's property. *In re Manning,* 567 B.R. 260 (Bankr. S.D. N.Y. 2017).

Debtor bound by plan's surrender of property. The debtor's plan provided for surrender of her homestead property, and the court had previously ordered the debtor to comply with the surrender and cease opposition to state-court foreclosure. The debtor was not entitled to relief from that prior order, and even if relief were available the debtor was still bound by the surrender terms of the confirmed plan. Citing *In re Failla,* 838 F.3d 1170 (11th Cir. 2016), surrender requires relinquishment of the right to possess the property, and continued opposition to foreclosure violates the confirmed plan, constituting an abuse of the bankruptcy process. *In re Scott,* 567 B.R. 847 (Bankr. S.D. Fla. 2017).

Debtor's Authority

No requirement for approval of professional's employment by debtor. Pointing out the split of authority but that the third Circuit "has made it clear that powers reserved for a trustee cannot be exercised by a Chapter 13 debtor," the court denied the debtor's application to appoint a real estate agent to market real estate. In the absence of a requirement to approve a debtor's employment of a professional, such an order would be an advisory opinion, and a federal court lacks such authority. *In re Roggio,* ___ B.R. ___, 2017 WL 6462987 (Bankr. M.D. Pa. 2017). *Compare Wright v. Csabi, et al. (In re Wright),* ___ B.R. ____, 2017 WL 6001685 (Bankr. S.D. Tex. Dec. 1, 2017), discussed below under Debtor's Attorney.

Lease Assumption and Executory Contracts

Debt for assumption of vehicle lease became prepetition debt upon conversion to Chapter 7. The lessor asserted that the Chapter 13 debtor's assumption of a prepetition vehicle lease made the obligation postpetition in nature and that the obligation was not

subject to discharge; however, even assuming the debt became postpetition under "Chapter 13 alchemy," upon conversion of the case to Chapter 7, § 348(d) plainly treats a postpetition debt as prepetition. The opinion notes that no authority was offered for the lessor's contention that assumption during a Chapter 13 case rendered the debt postpetition and nondischargeable. *Motors Acceptance Corp. v. Stokes,* 570 B.R. 854 (Bankr. M.D. Ala. 2017).

Buy-sell agreement for stock was not executory contract. In the Chapter 13 case, the confirmed plan did not assume a buy-sale agreement that had been entered into by the debtor, who was President and shareholder of a Texas corporation, and the minority shareholders of that corporation. The plan had "blanks" under the listing of assumed and rejected contracts. The Bankruptcy Appellate Panel affirmed the bankruptcy court's finding that the buy-sell agreement was not an executory contract under Texas law and the facts of the case, but the Circuit did not decide whether the agreement was "ridden-through" the bankruptcy case as a result of the plan's failure to either assume or reject. In footnote 10, the Panel also expressed "no opinion on the question whether a debtor may modify a chapter 13 plan to provide for the assumption or rejection of a previously omitted executory contract," citing §§ 365(d)(2) and 1329. *Carruth v. Eutsler (In re Eutsler),* ___ B.R. ___, 2017 WL 6607196 (B.A.P. 9th Cir. Dec. 27, 2017).

Tax Refunds

Trustee's objections to confirmation, on basis that debtors were not turning over tax refunds, were denied. Examining the local practice that debtors often seek to modify their confirmed plans to use tax refunds for necessary expenses, the court overruled the trustee's objections. Plans could be confirmed without language requiring debtors to pay all expected tax refunds to the trustee as additional plan payments. The opinion describes procedures that debtors must follow to obtain confirmation. *In re Blake,* 565 B.R. 871 (Bankr. N.D. Ill. 2017). *Accord, In re Gibson,* 564 B.R. 608 (Bankr. N.D. Ill. 2017).

Tax Rate

Tennessee statute setting interest rate for delinquent taxes in bankruptcy case could not be used under § 511. The Chapter 13 debtors' plan proposed to pay 12% on

oversecured claims for delinquent property taxes, and the State asserted that the rate should be 18%, based on a statute providing that any penalties assessed on delinquent tax debts would constitute interest in bankruptcy cases. The statute created an interest rate that was applicable only in bankruptcy cases; therefore, under § 511's plain language that "nonbankruptcy law" would be the source of interest rates, this Tennessee statute did not control. Rather, another Tennessee statute setting the interest rate generally at 12% was appropriate "nonbankruptcy law." *In re Corrin,* 849 B.R. 653 (6th Cir. 2017).

Vesting of Property

Bankruptcy Code does not authorize forced vesting in creditor. The district court examined section 1325(a)(5)'s three methods for treating secured creditors, concluding that the section's "surrender" had a meaning distinct from "vesting" in section 1322(b)(9). Neither term is defined in the Code, but "surrender" of collateral "leaves the mortgagee free to exercise its rights in the collateral. Vesting, however, threatens to impair those same rights. By shifting the debtor's interest to the mortgagee, vesting prevents the mortgagee from exercising its most important state-law right—foreclosure—as a method of eliminating junior liens. . . .Vesting also forces a mortgagee to assume risks and obligations—such as environmental remediation, maintenance, or taxes—that it would not bear in the absence of vesting." The court concluded that "surrender" and "vesting" are mutually exclusive, and forced vesting is not permitted under section 1325(a)(5). *In re Brown,* 563 B.R. 451 (D. Mass. 2017). *Accord, In re Sagendorph,* 562 B.R. 545 (D. Mass. 2017).

Pawn and Tax Sale Redemption

Expiration of state-law time to redeem pawned vehicle removed it from bankruptcy estate, unaffected by plan confirmation. With a dissenting opinion, the Eleventh Circuit panel held that the time period under applicable Georgia law for redemption of a pawned vehicle expired postpetition, as that time had been extended by § 108(b), and upon expiration, the vehicle was removed from the Chapter 13 bankruptcy estate. The majority first noted that property interests are created and defined under state law, citing *Butner v. United States,* 440 U.S. 48 (1979), and under Georgia's pawn statute, pledged goods

must be redeemed within the applicable time period; otherwise, the pledgor's ownership interest is extinguished automatically. The majority found no clear textual indication that Congress intended the Bankruptcy Code to counteract the ordinary operation of the pawn statute, and the majority rejected the view that the automatic stay tolled "an as-yet-unexpired state-law redemption period indefinitely. . . .While section 362(a)'s text undoubtedly prevents creditors from taking steps to actively pry assets out of a bankruptcy estate, it does not separately prevent those assets from evaporating on their own—as here, 'automatically'—pursuant to the ordinary operation of state law." The majority also found nothing in § 541(a) to keep the bankruptcy estate static, concluding that once the debtor's conditional right to redeem the property expired, he had "no rights in the car, possessory or otherwise," because those rights had been automatically extinguished. In view of this conclusion, there was nothing that § 1322(b)(2) could do to allow treatment of a claim, because at the time of confirmation Title Max didn't have "a mere claim—it had (by operation of Georgia law) a 2006 Dodge Charger." As to the argument that the effect of confirmation, which treated Title Max's claim as secured and provided for payment in monthly installments, the majority found that Title Max had asserted its position that the car had been forfeited through its pre-confirmation stay-relief motion, which was the substantive equivalent to a formal objection to confirmation; thus, the majority rejected the dissent's position that the effect of confirmation controlled. The dissenting judge found that "this should be an easy case," as a result of Title Max's admitted failure to object to confirmation, with the dissent stating that the majority improperly went to the merits of redemption when it should have relied upon the text of § 1327(a). *Title Max v. Northington and Wilber (In re Northington and Wilber),* 876 F.3d 1302 (11th Cir. 2017).

Expiration of time for redemption did not prevent treatment of taxes in plan. Looking to prior precedent in the District, the court held that the pre-bankruptcy expiration of the time for a debtor/taxpayer to redeem taxes sold in an Illinois tax sale did not prevent that debtor from treating the taxes in the plan, provided the tax deed had not been issued and recorded. Furthermore, the expiration of the redemption period before bankruptcy did not in itself justify relief from the stay to the tax buyer. *In re Robinson,* ___ B.R. ___, 2017 WL 5992213 (Bankr. N.D. Ill. Dec. 4, 2017).

Tax sale purchaser had secured claim for redemption amount. Under Georgia law, debtor had right of redemption of property sold prepetition at tax sale, and redemption right had not expired, becoming property of the estate. The debtor's plan to redeem was filed before expiration of § 108(b)'s sixty-day period. Tax sale purchaser was regarded as fully secured creditor, and the redemption claim could be paid over the life of the plan. *In re Jimerson,* 564 B.R. 430 (Bankr. N.D. Ga. 2017).

Modification

Timeliness of motion for modification. The issue was whether modification of a confirmed plan would be untimely when the motion was filed before the debtor completed plan payments but a ruling on objection to the modification was not entered until after plan payments were completed. The court held that § 1329(a) does not make that motion untimely, concluding that the "critical date for purposes of timeliness is when the proposed plan modification is filed, rather than when the Court later rules on any objection to the modification," citing authority from the Fifth, Seventh and Ninth Circuits. *In re Baxter,* 569 B.R. 153 (Bankr. E.D. Mich. 2017). *See also In re Coughlin,* 568 B.R. 461 (Bankr. E.D. N.Y. 2017) (Modification motion filed by debtors in final week of 60-month plan was timely, and debtors could modify to surrender home on which they had failed to make all postpetition direct mortgage payments.).

Conversion

Debtor's bad faith in filing Chapter 13 was cause for conversion to Chapter 7. In a decision dealing with subordination of a claim under § 510(b), the Ninth Circuit affirmed that the bankruptcy court did not abuse its discretion in converting a Chapter 13 case to Chapter 7, based on finding of the debtors' bad faith filing, including manipulation of the bankruptcy process and concealment of assets. *In re Khan,* 846 F.3d 1058 (9th Cir. 2017).

Debtor's Attorney

Court had jurisdiction over fees after dismissal of case. The bankruptcy court had previously awarded $46 million in actual and punitive damages for the lender's stay violation in conducting foreclosure, with most of that amount payable to public purpose entities (see *Sundquist v. Bank of America, N.A*., 566 B.R. 563 (Bankr. E.D. Cal. 2017), with $70,000 reasonable compensation awarded to the debtor's attorney, but the parties reached settlement while that order was pending on appeal and counsel for those debtors asserted attorney-fee lien for larger fees under the parties' contingency fee agreement. The court first found that it had jurisdiction under 28 U.S.C. § 1334 to determine whether the attorney was entitled to additional fees and whether it could expunge the asserted attorney-fee lien, and this was a core proceeding under 28 U.S.C. § 157(b)(K) & (O). The attorney fees incurred by the debtor in prosecuting a stay violation remained subject to the court's jurisdiction and authority to cancel the contingency fee agreement and determine the reasonable value of the attorney's services under § 329(b). Finding that the attorney provided "poor quality" of representation and that the contingency fee exceeded the "reasonable value" of the services, the lodestar compensation of $70,000 was found to be reasonable, notwithstanding the debtors' recovery through settlement of more than $6 million. The attorney was not permitted to collaterally attack the bankruptcy court's determination by pursuing threatened actions in state courts, with those actions subject to removal to the bankruptcy court. *In re Sundquist,* 576 B.R. 858 (Bankr. E.D. Cal. 2017). *See also In re Grabanski*, ___ B.R. ___, 2017 WL 4844401 (Bankr. D. N.D. Oct. 24, 2017) (court had jurisdiction after case dismissal to determine creditor's motion for disgorgement of excess debtor's attorney's fees); *In re Campbell,* 575 B.R. 811 (Bankr. W.D. Mich. 2017) (fees for assisting in saving debtor's home were excessive, warranting disgorgement and cancellation of retainer agreement).

Counsel failed to show cause why undistributed funds on dismissal of confirmed case should be paid to attorney. In a confirmed case with the plan providing for $3,000 fees to the attorney and no distribution to unsecured creditors but with two secured automobile payments, the case was dismissed for default in payments, and the debtors' attorney sought to have the undistributed funds paid to her. Finding *In re Demery,* 570 B.R. 220 (Bankr. W.D. La. 2017) instructive, the court held that § 349 required the funds

to be paid to the debtor unless "cause" is shown to do otherwise, and the debtor's attorney failed to show cause. Merely because the attorney had not been fully paid the agreed fee did not satisfy the cause requirement or § 349(b). *In re Hooks,* ___ B.R. ___, 2017 WL 6343504 (Bankr. M.D. Ala. Oct. 30, 2017). *See also In re Gonzales,* ___ B.R. ___, 2017 WL 6508976 (Bankr. W.D. Mich. Dec. 18, 2017) (trustee in possession of pre-confirmation plan payments on case dismissal must remit them to debtor, rather than to debtor's attorney).

Debtor's special counsel fees. Reminding attorneys that they are expected to have knowledge of and comply with the Code and applicable Rules, special counsel for a debtor or estate must seek employment from the court, with the court noting a split of authority on whether Chapter 13 debtors must seek such employment authority. The court concluded that § 327(e) required the court's approval for employment of counsel for a special purpose. Although one attorney sought court approval to represent the debtor in a non-bankruptcy cause of action, that attorney entered into a fee-sharing agreement with other attorneys, which was not disclosed to the court in violation of § 327, Rule 2014 and Local Rule 2014-1. Under § 329(a), "an attorney's services are considered in connection with a bankruptcy case when services rendered or to be rendered by an attorney have or will have an impact on the debtor's bankruptcy case." Rule 2016 and § 329 requirements include disclosure of any sharing of compensation, and § 504 "prohibits the splitting of fees without prior court approval." Proceeds from settlement of the nonbankruptcy cause of action were property of the estate, and obtaining possession of or exercising control over property of the estate was a stay violation under § 362(a)(3), with the court finding that the three attorneys willfully violated the stay by accepting and maintaining possession of their unauthorized fees. *Wright v. Csabi, et al. (In re Wright),* ___ B.R. ____, 2017 WL 6001685 (Bankr. S.D. Tex. Dec. 1, 2017).

Disgorgement of fees denied. The Chapter 13 trustee moved for the debtor's attorney to disgorge $4,000 prepetition fee under Rule 2017 and § 329, asserting that the fee was excessive because of debtor's ineligibility for Chapter 13, exceeding the unsecured debt limit. Finding that the debtor's goal was to delay a state-court contempt proceeding and postpone enforcement of a dissolution judgment, he got what was bargained for in paying $4,000 fee, and the debtor was not overcharged. The attorney might be subject to

sanction under Rule 9011, but disgorgement of fees under § 329 is not a vehicle for sanctioning a debtor's attorney. *In re Petrovic,* 560 B.R. 312 (Bankr. N.D. Ill. 2016).

Attorney fees cannot be charged for preparing and prosecuting fee application. Although additional fees requested by debtor's attorney were not unreasonable, the attorney could not be paid by the estate for billing time or for defending a fee application. The rationale of *Baker Botts, L.L.P. v. ASARCO LLC,* 135 S.Ct. 2158 (2015), although a Chapter 11 case, applied in Chapter 13. The attorney was not seeking fees for representing the interests of the debtor; rather, the additional fees were for representing the professional's interests. The court was not bound by a provision in the attorney's retention agreement that the debtor was responsible for fees in connection to preparing and prosecuting fee applications. *In re Rose,* 561 B.R. 70 (Bankr. W.D. Mich. 2016). *See also In re Kyung Tae Ko,* 560 B.R. 245 (Bankr. E.D. Pa. 2016) (partial denial of additional fees when questions existed of whether engagement was completed in timely, efficient manner, and when attorney accepted $4,000 postpetition compensation before obtaining court approval).

Debtors' attorney fees after final plan payment. Although supplemental fees awarded after the debtors had completed plan payments would be subject to discharge, that did not prevent court from approving fees as an administrative expense. The court suggested potential future practices for debtors' counsel that might prevent discharge of such fees, including plan provisions for a small administrative reserve, filing fee applications quickly after the trustee noticed final plan payments, and plan provisions for payment of supplemental fees "outside the plan" that may not be subject to discharge. *In re Conner,* 559 B.R. 526 (Bankr. D. N.M. 2016).

Discharge

Payments under plan include direct payments by debtor. Affirming, the district court held that when the confirmed plan provided for payments directly by the debtor on the postpetition mortgage, those direct payments were considered "payments under the plan," and the debtor was not eligible for discharge due to failure to complete those direct payments. Failure to make those payments, notwithstanding completion of payments to be made to the trustee, was a material default, and appropriate remedy was dismissal of

the case. The opinion points out that of the circuit courts, only the Fifth Circuit had precisely addressed this issue in *In re Foster,* 670 F.2d 478 (5th Cir. 1982), and the district court found that plain language of § 1328(a) required completion of *all payments under the plan* as a threshold for discharge. *Evans v. Stackhouse,* 564 B.R. 513 (E.D. Va. 2017).

Debtors' failure to make postpetition direct payments on mortgage were payments under plan and prevented discharge. Reviewing the interpretations of the statutory requirements for discharge "after completion of all payments under the plan," the court concluded that postpetition mortgage payments under the confirmed plans were to be paid directly by debtors and those were "payments under the plan for purposes of § 1328(a), which, absent other circumstances, would require this Court to not grant these debtors a discharge" due to failure to make those payments. The opinion noted that in a conduit district the trustee would quickly observe failure to pay and would seek appropriate remedy, but in a direct-pay district, unless the mortgage creditor moved for stay relief or dismissal, the trustee, court and other creditors would not know of the default until perhaps the trustee's filing of final cure notice. The result of failure to pay should be the same in conduit and direct-pay districts. However, for one debtor who had already received discharge, despite default in direct pay of the mortgage, the court declined to vacate the discharge, because the discharge had not been obtained by the debtor's fraud. *In re Coughlin,* 568 B.R. 461 (Bankr. E.D. N.Y. 2017). *Accord In re Thornton,* 572 B.R. 738 (Bankr. W.D. Mo. 2017) (Agreeing with *In re Gonzalez,* 570 B.R. 788 (Bankr. S.D. Tex. 2017), that "since the Debtor's plan provides for payment of the ongoing mortgage directly to the mortgagee, and the Debtor defaulted in such payments, the Debtor is not entitled to a discharge under § 1328(a).").

Discharge Injunction

State Department of Social Services not in contempt for post-discharge collection of domestic support obligation. Affirming its Bankruptcy Appellate Panel, the Eighth Circuit held that the State Department of Social Services could not be sanctioned for allegedly violating the Chapter 13 discharge injunction, even though the Department's proof of claim had been disallowed in part and the confirmed plan had provided for

payment in full of the allowed portion. The debtor's spousal and child support was a domestic support obligation, which survived discharge, despite the disallowance of part of the claim. The debtor did not raise until the appeal the alternative issues that the Department was bound by the terms of the confirmed plan and that the bankruptcy court thus had § 105 authority to issue contempt sanctions for violation of the confirmed plan, and the Circuit agreed with the BAP this argument came too late. Notwithstanding the partial disallowance of its claim, the Department "had a reasonable basis for believing that the disallowed portion of the support arrears would survive" discharge. The Circuit opinion ended with expressing "no view on the merits of whether [the former debtor] remains personally liable for the disallowed portion of [the Department's] claim," demonstrating that the only issue ruled upon was that sanctions against the Department for its collection attempt were not appropriate. *State of Missouri Department of Social Services v. Spencer,* 868 F.3d 748 (8th Cir. 2017).

Bankruptcy court retained jurisdiction after case closed to determine discharge injunction violation. The bankruptcy court had jurisdiction after confirmation and case closing to consider violations of the discharge order; "the order of discharge necessarily implicates the implementation or execution of the plan." The bankruptcy court properly found that a creditor was judicially estopped by a prior release from pursuing state court litigation. *Galaz v. Katona (In re Galaz),* 841 F.3d 316 (5th Cir. 2016).

Dismissal of Case

Debtor's attorney's failure to file timely appeal of dismissal was not excusable neglect. Affirming, the First Circuit held that the bankruptcy court had wide discretion and there was no abuse in denial of the debtor's motion for extension of time to appeal. The debtor failed to establish excusable neglect by her attorney's failure to file a timely notice of appeal, and there was "no error in the bankruptcy court's rational determination that counsel's carelessness [in missing the 14-day appeal deadline] is an insufficient reason for the delay," under the excusable neglect standard of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380 (1993). *Sheedy v. Bankowski (In re Sheedy),* 875 F.3d 740 (1st Cir. 2017).

Bankruptcy court could issue refiling injunction as part of granting debtor's voluntary dismissal. The Chapter 13 debtor and his spouse had filed three petitions under Chapter 13 to stop foreclosure, and in the husband's second case the mortgage lender moved for dismissal and to bar the debtor from filing again for 180 days. Before that motion was heard, the debtor moved to dismiss under § 1307(b), but the bankruptcy court dismissed with prejudice, barring the debtor's re-filing without prior permission of the court. The debtor appealed, arguing that his absolute right to dismiss prevented the bankruptcy court from issuing a filing injunction. The Third Circuit disagreed, holding that "a bankruptcy court does indeed have the authority to issue a filing injunction even in the context of approving a debtor's § 1307(b) voluntary dismissal because nothing in the Bankruptcy Code's express terms says otherwise." However, the Court remanded, finding that the refiling bar went beyond what was sought without stating reasoning for the broader injunction. It did not decide the issue of whether the debtor has an absolute right to dismiss, but found that the bankruptcy court had general authority to issue an injunction against refiling, citing *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365 (2007). *Marrama* did not conflict with *Law v. Siegel,* 134 S.Ct. 1188 (2014), because the latter opinion held that general, equitable authority could not be used if it conflicted with express terms of the Code. Here, the Code contains nothing in its text "that prohibits the entry of a filing injunction alongside a § 1307(b) dismissal order." *In re Ross,* 858 F.3d 779 (3d Cir. 2017).

Noncompliance with deadlines cause for dismissal. After the bankruptcy court had established deadlines for prosecuting the plan's proposal to litigate an adversary proceeding concerning a disputed mortgage, the mortgage holder moved to dismiss the Chapter 13 case for noncompliance with those deadlines. The bankruptcy court did not abuse its discretion in dismissal for the noncompliance, and the mortgage creditor had standing to file its dismissal motion, notwithstanding no proof of claim having been filed—"the filing of a proof of claim is not a prerequisite for standing to pursue dismissal under § 1307." *In re Benoit,* 564 B.R. 799 (B.A.P. 1st Cir. 2017).

Absolute right to dismiss, but with sanctions. After a creditor moved to convert a Chapter 13 case to Chapter 7, the debtor moved for voluntary dismissal. The opinion examined the split of authority on whether the debtor has an absolute right to dismiss,

finding that "the statutory language of the Code, and the conflicting case law addressing this issue, compel the Court to dismiss the Debtor's chapter 13 case, rather than convert the Debtor's case to one under Chapter 7 for bad faith." Dismissal would put the parties back in state court, where creditors can assert state-law remedies. However, the case and plans were filed in bad faith, justifying dismissal with sanctions. The dismissal was with prejudice to refiling within 180 days, with prevention of discharge of prepetition debts in future bankruptcy cases under § 349, and if a case were filed after the 180-day bar, the debtor would be required to file a status of the state court proceedings. This sanction would not prevent creditors' filing involuntary case under § 303. *In re Sinischo,* 561 B.R. 176 (Bankr. D. Colo. 2016).

Omission of material information supported dismissal. Cause for dismissal of the case was found in the debtor's omission of material information in the schedules and statement of financial affairs. Although the debtor corrected omissions through various amendments, that was done only after being caught because of ex-wife's motion. The omissions, coupled with manipulation of income and expenses, were evidence of bad faith. *In re Bouchard,* 560 B.R. 385 (Bankr. D. R.I. 2016). *See also Paulson v. U.S. Trustee (In re Paulson),* 560 B.R. 317 (B.A.P. 8th Cir. 2016) (after bankruptcy court found no meritorious defense to U.S. Trustee's motion to dismiss for cause, pro se debtor was not entitled to relief from judgment based on excusable neglect).

Dismissal order modified to require disbursement of portion of settlement to creditors. The debtor did not disclose a postpetition, pre-confirmation automobile accident, which resulted in substantial settlement before expiration of the plan, at which point the debtor moved to dismiss the case. The trustee moved to set aside the dismissal, but the court modified the dismissal order, finding cause under § 349(b)(3) to condition the dismissal on $40,000 of the settlement being disbursed by the trustee to pay the allowed unsecured claims. The debtor would retain $700,000 from the settlement. The cause of action came into the bankruptcy estate under § 1306(a)(1). *In re Haddad,* 572 B.R. 661 (Bankr. E.D. Mich. 2017).

Sales

Debtors could not force sale of co-owned property. Examining the statutory authority given to Chapter 13 debtors to use a trustee's powers, the court concluded that § 363(h)'s power of the trustee to sell an interest of a co-owner was not incorporated into § 363(b). The court identified five published opinions that permitted a Chapter 13 debtor to proceed under § 363(h), but found them unpersuasive considering the Code's omission of § 363(h) from the debtor's § 363(b) authority. The court also found that a majority of recent cases have rejected an "incorporation" theory, relying instead on the plain language of § 363(b). The debtor could not force a sale of property co-owned with a nondebtor. *In re Andrade,* 570 B.R. 121 (Bankr. D. Mass. 2017).

Claims

Chapter 13 confirmation did not bar debtors' post-confirmation objections to time-barred claims. The Fourth Circuit held that Chapter 13 debtors were not barred by the effect of confirmation from later objecting to proofs of claim filed by LVNV Funding for unsecured debts, with the objections based on the claims being time barred. The debtors' plans had only one class of unsecured creditors, which was to be paid *pro rata* to the extent funds were available; therefore, the plan's confirmation did not preclude a later determination of the allowance of those unsecured claims. The Court drew a distinction from secured claims that would be separately classified, with each secured creditor's claim to be paid based on value under § 506. Moreover, each plan contained a reservation of the right to object to claims after confirmation. No actions were taken by the debtors or trustee on LVNV's claims prior to confirmation, and the Court noted that it is typical for plans to be confirmed prior to the claims' bar date. LVNV conceded that collection of its claims would be barred by the applicable statute of limitations, but it argued that confirmation's res judicata effect prevented the debtors' objections. The Circuit panel held that requirements for res judicata were not met, because confirmation did not litigate or determine LVNV's unsecured claims. Section 1322 permits a debtor to classify unsecured creditors in a single class, and in that situation the bankruptcy court's confirmation only determines whether a pool of funds would be available for treatment of the unsecured class, as required to satisfy the best interests of creditors' test under §

1325(a)(4). Although filed claims are "deemed" allowed, "nothing in either § 502, § 1325, or elsewhere in the Bankruptcy Code ties adjudication of the allowance of an unsecured creditor's claim to the process or event of Chapter 13 plan confirmation." LVNV's claims were deemed allowed prior to confirmation, but the post-confirmation objections were the first opportunity for the bankruptcy court to determine the amount of each claim and its allowance. "Nothing in the Bankruptcy Code ties contested matters for unsecured claims to a timeline related to plan confirmation. . . .Determining the validity of individual unsecured claims is a distinctly separate process under § 502 both in procedure and timing." *LVNV Funding, LLC v. Harling, et al.,* 852 F.3d 367 (4th Cir. 2017). *Accord, In re Haskins,* 563 B.R. 177 (Bankr. W.D. Va. 2017).

Conflict of law and proofs of claim. The Ninth Circuit examined a proof of claim filed in a California bankruptcy case by a junior lienholder, based on a note's provision that it was governed by Ohio law. The debtors objected to the claim, asserting that it was barred by California's four-year statute of limitations, but the creditor asserted that Ohio's six-year limitations period controlled. The bankruptcy court agreed that Ohio's limitations period applied, but the Bankruptcy Appellate Panel reversed. Now, the Circuit panel reversed the BAP, first examining prior authority in a federal securities case, which followed the rationale that "choice-of-law provisions are concerned mainly with substantive law, and 'generally do not contemplate . . .statutes of limitation,' which are 'usually considered' a matter of local procedure 'related to judicial administration.'" *Des Brisay v. Goldfield Corp.,* 637 F.2d 680, 682 (9th Cir. 1981) (citing Restatement (Second) of Conflict of Laws § 122 cmt. a). Noting that the Ninth Circuit's federal choice-of-law rules follow the Restatement, "the Second Restatement's preference for the forum state's statute of limitations, in cases where it has the shorter limitations period, is based on the policy that 'a state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'state.'" However, under the 1988 version of Second Restatement, "where a countervailing interest exists such that 'under the special circumstances of the case dismissal . . .would be unjust,' the forum (here, California) will apply another state's longer statute of limitations." The Circuit majority found that a special circumstance existed here, in that the creditor had no choice but to file its proof of claim in the California bankruptcy case, and "to reject PNC's claim as time-barred would

be the functional equivalent of a dismissal on the merits." The bankruptcy court correctly applied Ohio's six-year statute of limitations, overruling the debtors' objection to the claim. The concurring judge would have used a more direct route to the same result, based on the note's choice-of-law provision that it was governed by Ohio's laws, "without regard to conflict of law principles." *In re Sterba,* 852 F.3d 1175 (9th Cir. 2017).

Creditor has affirmative duty to file timely proof of claim. The Ninth Circuit held that to participate in a Chapter 13 plan, the creditor has an affirmative duty to file a timely proof of claim. The credit union filed untimely proofs of claim, and the claims bar date in Chapter 13 is rigid, with the bankruptcy court having no equitable power to extend the date. The fact that the debtor scheduled the debt did not qualify as an informal proof of claim nor as a claim filed on behalf of the creditor. *Spokane Law Enforcement Federal Credit Union v. Barker (In re Barker),* 839 F.3d 1189 (9th Cir. 2016).

United States Trustee's challenges to practice of filing time-barred claims. In complaints filed by the United States Trustee, various theories were alleged concerning the practices of defendants, which involved the filing of proofs of claim for debts that would otherwise be time barred under applicable nonbankruptcy law. In granting the defendants' motion to dismiss in large part, the court made numerous findings. As to the complaints of improper signatures to the proofs of claim, the court found that the fixing of a signature to a proof of claim by a person who had no role in the preparation of that proof of claim was inconsistent with the bankruptcy rules and the instructions on the proof of claim; however, there was evidence that the defendants had modified their practice and were not engaged in a continuing improper course of conduct. Therefore, no sanctions were appropriate in the absence of a bad-faith allegation. Moreover, no damages were alleged because of the defendants' prior proof-of-claim preparation practices. Next, the court examined the defendants' filing of claims for time-barred debts, finding that under Missouri law a claim is not extinguished by the expiration of the statute; therefore, creditors are entitled to file such claims. Rule 9011 was not applicable unless the claimant continued to pursue the claim after the time-barred defense was raised, and the complaints did not allege bad faith. Although numerous claims had been filed without complying with Rule 3001(c)(3)'s requirements for attachment of specific information, the appropriate remedy for that failure is loss of prima facie validity of the claim, and the court

rejected the request for other creative remedies, observing that Rule 3001(c) does not create an independent cause of action. The court also held that it did not have the power to award relief that would bind other courts in cases, other than those before this court, pointing, in part, to the differing views among courts as to the practices alleged in the complaints. And, the court did not decide whether it had authority to appoint a monitor, finding that such an appointment was not warranted due to the dismissal of most counts of the complaints. The issues surviving dismissal concerned only the few proofs of claim filed in the cases before the court, finding that the complaints raised valid objections to allowance of those claims, including alleged noncompliance with Rule 3001(c). *In re Freeman-Clay, et al.,* ___ B.R. ____, 2017 WL 3841739 (Bankr. W.D. Mo. Sept. 1, 2017).

Administrative expense allowed to attorney for substantial contribution in Chapter 13 case. The district court affirmed allowance to a law firm for administrative expense under § 503(b)(3)(D) for its substantial contribution to a case by its successful objection to an exemption claim in annuities. The law firm had represented the Chapter 7 trustee prior to conversion of the case to Chapter 13 and had objected to the exemption in the Chapter 7 phase of the case. On conversion, the law firm was a creditor for unpaid fees and the litigation over the exemption continued in Chapter 13, with the exemption disallowed. Although § 503(b)(3)(D) only refers to substantial contribution in Chapter 9 or 11 cases, the court held that it was bound by a prior Sixth Circuit decision, *Mediofactoring v. McDermott (In re Connolly North America, LLC),* 802 F.3d 810 (6th Cir. 2015), which had allowed administrative expense for substantial contribution in a Chapter 7 case. The district court found the Sixth Circuit precedent to stand for the proposition that the word "including" in the introductory portion of § 503(b) "confers discretion on a bankruptcy court to award administrative expenses on a case-by-case basis, and that the express mention of Chapter 9 and Chapter 11 in § 503(b)(3)(D) does not negate that fact." *Sharkey v. Stevenson and Bullock, PLC (In re Sharkey),* 2017 WL 5476486 (E.D. Mich. Nov. 15, 2017).

Postpetition traffic tickets not administrative expense. Affirming the bankruptcy court's decisions, the district court held that the City of Chicago did not have administrative expense claims under § 503(b) for traffic fines incurred after the filing of Chapter 13 cases. Under the test of *Reading v. Brown,* 391 U.S. 471 (1968), the City

argued that the debtors' postpetition fines were liabilities of their bankruptcy estates, because the Municipal Code established prima facie responsibility for the fines in the person in whom the vehicle is registered. However, the court found distinction between Chapter 11 and 13 cases, with the Seventh Circuit having recognized that a Chapter 13 debtor continues in possession of estate assets but also "reserves the enhanced value of the assets to the debtor personally." The fines did not become priority administrative expense claims against the Chapter 13 estates. *City of Chicago v. Marshall,* ___ F.Supp.3d ___, 2017 WL 5891261 (N.D. Ill. Nov. 27, 2017).

Postpetition parking and traffic tickets not entitled to priority. The City of Chicago filed a proof of claim asserting priority for parking and traffic tickets, and the court analyzed the requirements for administrative expense priority under § 503(b)(1)(A). The City asserted that its claim was for necessary costs and expenses of preserving the bankruptcy estate, and the City argued that the rationale of *Reading Co. v. Brown,* 391 U.S. 471 (1968), would apply, but expanding that holding beyond tort claims to claims of involuntary postpetition creditors. Pointing to the differences between Chapter 11, which was involved in *Reading,* and Chapter 13, the City failed to prove that its claim arose from a transaction with the bankruptcy estate. The estate was not the registered owner of the vehicle that violated the parking or traffic ordinances. And, the City failed to prove that its debt provided a benefit to the estate. The claim was not entitled to priority status. *In re Haynes,* 569 B.R. 733 (Bankr. N.D. Ill. 2017).

Permissive abstention for determination of whether lump-sum payments were domestic support obligation. The Chapter 13 debtor filed an adversary proceeding to determine that his obligation to make lump-sum payment to his ex-wife was not a domestic support obligation and was subject to discharge after plan completion; however, the state court had already conducted a day-long hearing on the ex-wife's motion for contempt for failure to pay $100,000 installment due under the marital dissolution agreement. Noting that the state court had concurrent jurisdiction, there was cause to exercise discretion and permissively abstain, permitting the state court to make the determination. *Zhuk v. Zhuk (In re Zhuk),* 576 B.R. 273 (Bankr. S.D. Fla. 2017).

Attorney fees by divorce court and priority claim. $13,000 attorney fee awarded by state divorce court, which was related to debtor's efforts to obtain modification of the

divorce decree, was not a domestic support obligation, notwithstanding fee order stating that it was deemed to be support in nature and nondischargeable in bankruptcy; the state court did not make a determination that the fee was actually in the nature of support based upon the relative financial circumstances of the parties, and the bankruptcy court could not find the fee to be support under the record in the case. The fee award was allowed as an unsecured, nonpriority claim, with other portions of the former spouse's claim related to the divorce decree allowed as priority. *Mosely v. Mosely (In re Mosely),* ___ B.R. ___, 2017 WL 4990409 (Bankr. N.D. Ga. Oct. 31, 2017).

Overpayment of domestic support obligation. The court examined the issue of whether a debt owed to a governmental unit was a domestic support obligation when the debt resulted from overpayment by the governmental unit for the support of the debtor and her minor children. The debtor had received benefits from the Illinois Department of Human Services based upon income and household size, and the Department subsequently determined that she was not eligible and that the benefits had been overpaid. The Department then intercepted the debtor's tax refund within the 90 days before Chapter 7 bankruptcy to recover the overpayment, and the debtor sued to avoid the recovery as a preference, with the Department arguing that its recovery was protected by § 547(c)(7), as a domestic support obligation. The opinion discusses the split of judicial authority on the issue, concluding that the debt to the government was not in the nature of support, but was "merely a debt to the government for the return of benefits that should never have been paid to the Debtor at all, and that debt does not automatically retain any supportive nature that the benefits may have had. *Halbert v. Dimas (In in Halbert),* 576 B.R. 586 (Bankr. N.D. Ill. 2017).

Rule 3002.1 postpetition fees, expenses and charges. The debtor objected to the mortgage creditor's notice of inspection fees, and while the lender established that it was contractually entitled to inspect the property in the event of default, it failed to satisfy the mortgage's requirements that it was authorized under HUD regulations to charge a fee for such inspections. The creditor failed to carry its burden to show existence of such regulations. *In re Brumley,* 570 B.R. 287 (Bankr. W.D. Mich. 2017).

Untimely claim not allowed under excusable neglect. Advisory Committee Notes to Rule 9006(b)(3) specifically provide that bankruptcy courts are not permitted to authorize

untimely claims in Chapter 7 and 13 because of excusable neglect, and none of the exceptions found in Rule 3002(c) applied in this case. The consequence of a late-filed claim is that the mortgage creditor will not receive distributions under the plan, even though the plan provided for participation in a loss mitigation program. *In re Heyden,* 570 B.R. 489 (Bankr. W.D. Pa. 2017). *See also In re Sims,* ___ B.R. ___, 2017 WL 4220426 (Bankr. W.D. Mich. Sept. 21, 2017) (applying strict disallowance of tardily filed claim in Chapter 13 under § 502(b)(9)).

Dormant judgment claim not allowable. Applying Illinois law, the creditor had obtained judgment more than seven years before the filing of the Chapter 13, and although state law permitted revival of that judgment within twenty years, the creditor had not taken any action to revive. Therefore, its claim was currently unenforceable under state law, with the debtors' objection to allowance sustained. The creditor could potentially file an amended proof of claim if it revived its judgment in state court. *In re Contreras,* 571 B.R. 789 (Bankr. N.D. Ill. 2017).

Disallowance of mortgage servicer's claim did not void lien. Affirming, the district court found that the bankruptcy court's disallowance of the mortgage servicer's proof of claim was based solely on the debtors' objection, which alleged that the proof of claim lacked sufficient documentation and that the arrearage amount was incorrect. The bankruptcy court's order of disallowance stated that there was no opposition to the objection, but the bankruptcy court did not make any determination of the validity of the lien. The district court observed that the debtors' § 506(d) argument presented a "close call" and that the Ninth Circuit's *In re Blendheim,* 803 F.3d 477 (9th Cir. 2015), provided "persuasive support for Debtors' position." And, the court pointed out the risk a mortgage creditor runs by filing a proof of claim, submitting itself to the claims allowance process and then failing to defend the validity of its lien by responding to a claim objection. *In re Kohout,* ___ B.R. ___, 2017 WL 3995588 (N.D. N.Y. Sept. 11, 2017).

Unscheduled creditors were bound by claims' deadline. The Chapter 13 trustee objected to two untimely proofs of claim, but the creditors argued that they were not scheduled and that they did not have notice in time to file timely claims. Applying Rule 3002(c), the court found that the 90-day deadline for claims in Chapter 13 contained no exception for an unscheduled creditor. However, unscheduled creditors are not subject

to discharge; therefore, there is no deprivation of property interests without due process. The trustee's objections were sustained. *In re Pangaro,* 567 B.R. 878 (Bankr. M.D. Pa. 2017).

State's claim for overpayment of child care subsidy is domestic support obligation. Illinois Department of Human Services filed a priority claim in the Chapter 13 case for overpayment of child care subsidy, and under BAPCPA's expanded definition of domestic support obligation, § 101(14A)(A)(ii), assistance provided by a governmental unit is a nondischargeable obligation. Section 507(a)(1) gives priority to such obligations. *In re Etnire,* 568 B.R. 80 (Bankr. C.D. Ill. 2017).

Divorce-related debt was property settlement. Applying Sixth Circuit authority on support obligations, the divorce court did not award spousal support originally, but attempted to have support spring into existence if either party defaulted in property settlement obligations; therefore, the debtor's obligation to former spouse was not support in nature and was dischargeable in Chapter 13 under § 523(a)(15). *In re Vander Roest,* 569 B.R. 277 (Bankr. W.D. Mich. 2017).

Lack of documentation did not require disallowance of claim. Applying Ninth Circuit authority, § 502(b) provides exclusive basis for disallowing claims, and failure to comply with Rule 3001(c) is not included in the statute's grounds for disallowance. *In re Sheedy,* 567 B.R. 597 (Bankr. W.D. Wash. 2017). *Accord In re Norris,* 568 B.R. 363 (Bankr. W.D. Wash. 2017).

Debtors' claims on behalf of secured creditor were untimely and confirmed plan was not informal proof of claim. Following confirmation of a plan that provided for full payment, with interest, of claims secured by vehicles, the credit union did not file timely proofs of claim, and the trustee moved to modify the plan to pay the funds allocated for the secured creditor to unsecured claims. The debtors then filed proofs of claim on behalf of the credit union, to which the trustee objected as untimely. Citing *In re Pajian,* 785 F.3d 1161 (7th Cir. 2015), the rules for timely claims applies to both secured and unsecured creditors, and Rule 3004 requires the debtor to file a claim on behalf of a creditor within 30 days following the creditor's deadline. The court lacked equitable authority to alter the claims' deadlines, and the confirmed plan, despite providing for payment of the secured claims, was not an informal proof of claim. Without an allowed

claim, the credit union is not entitled to distribution under the confirmed plan, and the plan could be modified to apply those allocated funds to payment of unsecured claims. *In re Burns,* 566 B.R. 918 (Bankr. N.D. Ind. 2017).

Rule 9006(f) did not extend time for filing proof of claim. The creditor's proof of claim was filed after the bar date, and the creditor argued that it should have three extra days to file the claim, because Rule 9006(f) extended time to take an action by three days due to mail service of the claims bar date. The court held that Rule 3002(c)'s 90-days after the first date set for the meeting of creditors controlled, and the claims' bar date is not "set by reference to service by mail of anything on the creditors." *In re Lewis,* 565 B.R. 439 (Bankr. M.D. Ala. 2017).

Debtor's ex-wife held unsecured claim. The divorce court had awarded the ex-wife a sum as her share of the couple's equity in real estate that was awarded to the ex-husband. The ex-wife failed to deliver a quitclaim deed to the property and filed a secured proof of claim in the ex-husband's Chapter 13. She no longer retained sufficient interest in the property to give her a secured claim, and the debtor's objection to her proof of claim as secured was sustained. *Goesel v. Goesel (In re Goesel),* 562 B.R. 529 (M.D. Fla. 2016).

Debtor's fees against creditor for vexatious litigation claim disallowed. Proof of claim was disallowed on debt for which debtor was not liable, and that claim never should have been filed. After disallowance, claimant filed 102-page motion for reconsideration, and court awarded debtor's attorney $1,900 fees on vexatious litigation theory. Creditor had been ordered to settle attorney's prior request for $700 fees for appearing in opposition to the meritless proof of claim. *In re Falbo,* 560 B.R. 203 (Bankr. W.D. N.Y. 2016).

Fair Debt Collection Practices Act

Act's definition of "debt collector" does not include debt buyer. In a unanimous opinion by Justice Gorsuch, the Supreme Court affirmed the Fourth Circuit, holding that the FDCPA's definition of a "debt collector" as one who "regularly collects or attempts to collect . . .debts owed or due. . .another" does not encompass a debt buyer who seeks to collect its own debt that it acquired from the original lender. CitiFinancial Auto was the original lender of car loans, which were then purchased by Santander Consumer USA,

Inc., after the loans were in default. Santander was the subject of suits alleging that it violated provisions of the FDCPA in its collection efforts, but the Court agreed with the Fourth Circuit that Santander did not qualify as a debt collector because it was collecting debts that it purchased and owned, rather than collecting the debts owed to another. The opinion focused on the plain meaning of the statute's term "debt collector" in 15 U.S.C. § 1692a(6), concluding that the term's definition is directed toward debt collectors working for a debt owner, not toward a debt owner collecting its own debt, and the opinion found no reason to treat the purchaser of defaulted debt any differently under the statute. The opinion did not address the issue of whether Santander could fall within the FDCPA's other subsections because it otherwise regularly collected debts of another entity or because its principal business was the collection of debts—those issues were not within the Court's grant of certiorari. *Henson v. Santander Consumer USA, Inc.,* 582 U.S. ____, 137 S.Ct 1718, 2017 WL 2507342 (2017).

Filing proof of claim for time-barred debt did not violate FDCPA. A debt buyer filed a proof of claim in a Chapter 13 case, disclosing that the debt was more than ten years old, with collection beyond Alabama's six-year statute of limitations. The Court's majority found that the claim was not false, deceptive or misleading under the FDCPA because the claim's attached statement made it clear on the face of the claim that collection was beyond the applicable statute of limitations. The proof of claim fell within the Bankruptcy Code's definition of a "claim," and under Alabama law the running of the statute of limitations did not extinguish the right to payment of the debt. The Code's definition of "claim" does not include the word "enforceable," and the Code's provision for disallowance of a claim that is unenforceable is an affirmative defense to an otherwise valid claim. The majority found a distinction between a civil suit to collect a time-barred debt and the filing of a proof of claim for such debt. The majority did not find the practice of filing proofs of claim for time-barred debt to be "unfair" or "unconscionable" within the meaning of the FDCPA. A strong dissent by Justice Sotomayor would find the practice unfair. *Midland Funding, LLC v. Johnson,* 137 S.Ct. 1407, 2017 WL 2039159 (May 15, 2017).

Eighth Circuit interprets *Spokeo's* "injury in fact." The Eighth Circuit reversed the district court's dismissal of a consumer's complaint for damages under the Fair Debt

Collection Practices Act, based on the filing of a civil suit in state court for "charged off" debt. The complaint alleged, in part, that the defendant law firm threatened to take legal action on which it had no intention to pursue; the firm allegedly filed suits but if the consumer defendant appeared for trial the suit was continued and ultimately dismissed. The Circuit panel held that a false threat to proceed to trial could form that basis for a FDCPA cause of action. Interpreting the Supreme Court's decision in *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540 (2016), the Circuit panel found that the plaintiff's complaint sufficiently alleged injury in fact, holding that § 1692f(1) of the Act identified a real risk of harm in being subjected to attempts to collect a debt that was not owed. As a part of its analysis, the Circuit found that sending discovery requests to the consumer's attorney could form the basis for an injury because those requests were related to a debt that allegedly was not owed by the consumer. The fact that the consumer hired counsel to defend a baseless civil suit supported the alleged injury in fact. The Circuit also construed the Act's statute of limitations, finding that each alleged violation must be considered, and if the plaintiff sues within one year of a violation, that suit is timely under § 1692k(d). *Desmarais v. Gurstel Chargo, P.A., et al.,* 869 F.3d 685 (8th Cir. 2017).

Fair Credit Reporting Act

Creditor's postpetition credit reporting did not violate stay or confirmation order. In a matter of first impression, the Ninth Circuit Bankruptcy Appellate Panel considered the issue of whether a creditor's postpetition reporting of overdue or delinquent payments to a credit reporting agency was a per se violation of § 362(a)(6)'s stay of collection activity. The Chapter 13 debtors had obtained confirmation of a plan to pay prepetition arrears and ongoing mortgage obligations, and the debtors obtained 3-bureau credit reports showing the mortgage servicer as reporting postpetition late or past due payments on the mortgage account. The BAP held "that postpetition credit reporting of overdue or delinquent payments, without more, does not violate the automatic stay as a matter of law," and it noted that the debtors were not contending that the reported information was inaccurate. The BAP observed a "dearth of case law on the precise issue before us. Most courts have addressed this issue in the context of the discharge injunction," and the opinion found those decisions to be relevant because "the standard for violations of the automatic stay and the discharge injunction are similar," with the latter decisions

"stand[ing] for the proposition that negative credit reporting, without more, does not violate the discharge injunction. The debtor must show that the credit reporting was done with the purpose of coercing the debtor to pay the reported debt." The BAP further found that the "few cases addressing the issue of negative credit reporting in the context of § 362. . .hold that postpetition negative reporting alone is not an act to collect a debt in violation of the stay; such reporting must have been done with the intent to harass or coerce the debtor to pay the reported debt." Moreover, the bankruptcy court did not err in its determination that the postpetition credit reporting did not violate the confirmation order under § 1327(a). *In re Keller,* 568 B.R. 118 (B.A.P. 9th Cir. 2017). *See also,* for example of opinion that Fair Credit Reporting Act plaintiff must show "actual inaccuracy" in the reported information, *Messano v. Experian Information Solutions, Inc., et al.,* ___ F.Supp.3d ___, 2017 WL 1833280 (N.D. Cal. May 8, 2017) (concluding, in part, that §§ 1322(b)(2) and 1327 do not "alter the manner in which a CRA should report an undischarged debt in a credit report," and that "reporting a delinquent debt post-confirmation but pre-discharge is not inaccurate or misleading as a matter of law."). *Compare Aulbach v. Experian Information Solutions, Inc., et al.,* ___ F.Supp.3d ____, 2017 WL 1807612 (N.D. Cal. May 4, 2017) (Terms of confirmed Chapter 13 plan changed legal status of obligations, and credit reporting agency may violate FCRA by failing to investigate and modify records accordingly; however, plaintiffs did not allege that violations were willful, a requirement for recovery of statutory damages.).

Credit report showing past due mortgage balance after discharge was inaccurate. Denying a motion to dismiss, the district court found that the complaint stated a cause of action under the Fair Credit Reporting Act, when the Chapter 13 debtors had confirmed their plan to surrender their home and extinguish their obligation on a residential mortgage. The court distinguished the credit reporting agency's post-confirmation reports from its post-discharge report. Reports issued prior to entry of discharge had included an account history section that showed a monthly balance and 180-days past due, and the court found this information factually accurate, because the plaintiffs had not made payments during that time. Agreeing with another district court, *Hupfauer v. CitiBank, N.A.,* 2016 WL 4506798, the court found that the FCRA claims failed as to the those reports. However, a third credit report, issued after the debtors' discharge, contained a

positive and past due balance on the mortgage account, and the court found that a tradeline discharged in bankruptcy should report a zero balance; therefore, a FCRA claim was plausible under this post-discharge report. To sustain their claim, the plaintiffs must show that a third party denied them credit after receiving this post-discharge report from the credit reporting agency. *Handrock v. Ocwen Loan Servicing, LLC and Experian Information Services, Inc.,* 2016 WL 6465900 (N.D. Ill. Nov. 1, 2016).