Consumer Session

Case Law Update

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CONSUMER LAW UPDATE

Cases reported from January 1, 2014 through July 31, 2014

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Jurisdiction and Authority of Bankruptcy Courts

De novo* review satisfied *Stern. Without deciding the issue of whether a party to a non-core proceeding may consent to the bankruptcy court's entry of final judgment, see footnote 4 to opinion, the Supreme Court held that in a non-core fraudulent conveyance claim, the defendant received *de novo* review by an Article III district court. The district court conducted such a review, "concluding in a written opinion that there were no disputed issues of material fact and the trustee was entitled to judgment as a matter of law." Even if the bankruptcy court's entry of judgment was invalid, the district court's *de novo* review and entry of its own judgment cured any error. *Executive Benefits Insurance Agency v. Arkison,* 134 S.Ct. 2165 (June 9, 2014).

But wait, Court granted *certiorari* on consent and property of estate issues. Subsequent to *Executive Benefits,* the Court granted *certiorari* on July 1, 2014, from the Seventh Circuit's *Wellness Int'l Network, Ltd. v. Sharif,* 727 F.3d. 751 (7th Cir. 2013), specifying two issues: (1) whether the presence of a subsidiary state law property issue in a § 541 action deprives the bankruptcy court of constitutional authority to enter final judgment; and (2) whether Article III permits a bankruptcy court to have authority as a result of a litigant's consent, and if so, whether implied consent is sufficient. *Wellness Int'l Network, Ltd. v. Sharif,* 134 S.Ct. 2901 (July 1, 2014).

Automatic Stay

Emotional distress damages possible but not proven. Although emotional distress damages are potentially available for intentional stay violations, when the notice of foreclosure sale was removed on the day of the publication and the debtor did not offer evidence other than generalized affidavits, the debtors failed to prove those damages. The Eleventh Circuit had not previously decided whether such damages were allowable, but it reviewed the decisions of four other circuits that had addressed the issue, concluding that emotional distress damages fell within the broad term of actual damages in § 362(k). "At a minimum, to recover 'actual' damages for emotional distress under § 362(k), a plaintiff must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay." *Lodge v. Kondaur Capital Corp.,* 750 F.3d 1263 (11th Cir. 2014). *See also In re Voll,* 512 B.R. 132 (Bankr. N.D. N.Y. 2014) (Chapter 13 debtors failed to prove significant emotional distress damages for state taxing authority's willful stay violation, but debtors were entitled to attorney fees. To recover for emotional distress, debtors must establish causal connection between distress and stay violation, and the distress must be "distinct. . .from the anxiety and pressures inherent in the bankruptcy process." *Quoting In re Dawson,* 390 F.3d 1139, 1149 (9th Cir. 2004).).

Debtor's attorney fees defending lender's appeal of stay violation were incurred to remedy stay violation. Affirming, the Ninth Circuit distinguished *Sternberg v. Johnston,* 595 F.3d 937 (9th Cir. 2010), holding that the Chapter 13 debtor's attorney fees incurred in the defense of the creditor's appeal from the bankruptcy court's finding of stay violation were allowed as part of the action to remedy the stay violation. The fees at issue fell within § 362(k)'s "actual

damages." *Sternberg* "does not apply to a situation where a debtor defends herself when a creditor who had violated the automatic stay appeals that finding." A dissenting judge expressed constitutional concern about the Bankruptcy Appellate Panel's citation of its precedent, which had been rejected in *Sternberg*. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard),* 751 F.3d 966 (9th Cir. 2014).

Attorney fee award against IRS was based on litigation cost statute. In another appeal involving the Chapter 7 debtor's attorney fees related to the Internal Revenue Service's violation of discharge injunction (*see Kovacs v. United States,* 614 F.3d 666 (7th Cir. 2010)), the bankruptcy court properly applied the prior *Kovacs* remand instructions, with the debtor's attorney fees determined under 26 U.S.C. § 7430's reasonable litigation fees, which has a statutory fee cap, rather than under 26 U.S.C. § 7433's damages provision. The bankruptcy court found no § 7433 damages, and its finding of $3,750 in litigation costs was affirmed. *Kovacs v. United States,* 739 F.3d 1020 (7th Cir. 2014).

Multiple filings not cause for in rem relief. The fact that the debtor had filed multiple cases, maybe 16 over a number of years, without proof that those filings were part of a scheme to delay, hinder or defraud creditors as to specific property, did not support in rem stay relief. *In re Gray,* 558 Fed.Appx. 163 (3d Cir. 2014).

Stay protected debtor's possessory interest. Affirming, the Bankruptcy Appellate Panel agreed that the automatic stay protected the debtor's bare possessory interest in property and the mortgage lender, which had completed prepetition foreclosure, violated the stay when it changed locks and prevented the debtor's access to personal property in the residence. This was an exercise of control over property of the estate. Although under California law the debtor's ownership interest had ceased, there was still a possessory interest since the debtor was still occupying the residence. The lender's action was void. *Eden Place, LLC v. Perl (In re Perl),* ___ B.R. ___, 2014 WL 2446317 (BAP 9th Cir. June 5, 2014). *See also In re Salov,* 510 B.R. 720 (Bankr. S.D. N.Y. 2014) (Creditors violated stay by filing and serving writ of eviction without seeking stay relief, entitling Chapter 13 debtor to compensatory and punitive damages. Debtor had possessory interest in house owned by relatives, and mortgage had been foreclosed prepetition.).

Stay relief should have been granted for cause. Reversing and remanding, the Bankruptcy Appellate Panel found that the mortgage lender had shown cause for stay relief, based on the Chapter 13 debtors' failure to make 15 of 22 postconfirmation payments. *CitiMortgage, Inc. v. Borm (In re Borm),* 508 B.R. 104 (BAP 8th Cir. 2014).

Stay annulment reversed. The bankruptcy court had annulled the automatic stay, permitting the foreclosure purchaser to complete unlawful detainer action, but the Bankruptcy Appellate Panel held that purchaser's sales report was not admissible into evidence under the business records exception to hearsay. The report had been obtained by the purchaser from the trustee conducting foreclosure sale, and it was offered into evidence to prove that the sale was completed just minutes before the Chapter 13 case was filed. The report lacked foundational support under Fed. Rule of Evidence 803(6) to show that it was a record regularly kept in the

course of the foreclosure purchaser's or trustee's business or that those parties regularly relied on the business record. Admission of the report was prejudicial, requiring reversal of the annulment. *Hudson v. Martingale Investments, LLC (In re Hudson),* 504 B.R. 569 (BAP 9th Cir. 2014).

Judgment creditor violated stay by failing to cancel status conference on discovery. Interrogatories had been issued in aid of the creditor's collection effort, with a hearing set in state court, and the creditor's failure to take steps to cancel the hearing or discontinue the interrogatories was a stay violation. The state court hearing was a continuation of a judicial proceeding to recover a claim against the debtor, barred by § 362(a)(1). The creditor was given notice of the Chapter 7 filing and its failure to act accordingly made it a willful violation. Remand was required for damage findings. *Skillforce, Inc. v. Hafer,* 509 B.R. 523 (E.D. Va. 2014).

IRS willfully violated stay by offset to collect non-tax debt. The government's postpetition setoff of the Chapter 7 debtor's tax refund to collect a non-tax debt was a willful stay violation. The setoff was against the tax refund for the tax year immediately preceding the Chapter 7 filing, and the debt to be collected was an obligation to the United States Department of Rural Development Services, resulting from a prepetition foreclosure. The offset was made under the Department of Treasury's program, authorizing interception of tax overpayment to satisfy enforceable debt owed to another federal agency. 26 U.S.C. § 6402(d)(1). Discussing the split of judicial authority, the court declined to follow *IRS v. Luongo,* 259 F.3d 323 (5th Cir. 2001), and analyzed property of the estate and § 362(b)(26). The latter section excepts from the automatic stay setoff by a governmental unit of a prepetition tax refund "against an income tax liability," which did not protect an offset to collect non-tax liability, absent stay relief. The government was responsible for the debtor's costs and fees related to the seizure, and the government must release the $4,201 tax refund; however, the action did not justify punitive damages. The debtor's interest in the prepetition tax refund had become property of the estate, but the debtor had claimed exemption. Retroactive stay relief was not appropriate, since the government knew of the bankruptcy filing and intercepted the tax refund without seeking stay relief. *Sexton v. Department of Treasury,* 508 B.R. 646 (Bankr. W.D. Va. 2014). *Compare In re Pugh,* 510 B.R. 862 (Bankr. E.D. Wis. 2014) (Stay relief granted to allow IRS to offset debtor's postpetition overpayment of taxes against unpaid prepetition taxes, discussing the split in authority.).

Debtor and ex-husband violated stay. In a prebankruptcy divorce, the debtor's husband had been ordered to pay spousal support of $4,500 monthly, and the wife was ordered to hold the husband harmless from liability on a home equity line of credit after the husband paid thirty-six months of that debt. The wife subsequently filed Chapter 13 and obtained confirmation, but the parties then returned to family court after the wife had defaulted on the line of credit and that creditor obtained judgment against the ex-husband. The parties agreed in family court to a reduction of the ex-husband's monthly support by $750 to protect him against the debtor's default of her hold-harmless obligation, but the parties did not obtain stay relief before going to family court. The result of the parties' agreement in family court was to reduce the debtor's

monthly income, while benefitting her ex-husband's contingent claim at the expense of other creditors, and that action was not excluded from the stay by § 362(b)(2). The court set alternative conditions for the debtor and ex-husband to rectify the stay violation and correct the reduction of debtor's monthly income. *In re Coats,* 509 B.R. 836 (Bankr. W.D. Mich. 2014).

Effect of defective mailing address. Discussing the presumption of receipt of mailed notice of the bankruptcy filing, the court discussed the factors to consider when there was a defect in the address. The address used by the debtor was to the correct street address but contained no suite or floor number, and the address was an office building with 100 other companies. With a weakened presumption of delivery, the testimony of the creditor established that the notice was not delivered, and stay was annulled to retroactively validate foreclosure, in the debtor's third case. *In re Cunningham,* 506 B.R. 334 (Bankr. E.D. N.Y. 2014).

Avoidance

Chapter 7 trustee could not sell home with no equity. The Chapter 7 trustee filed complaint to avoid an assignee's unrecorded first mortgage and to preserve that lien for estate. The debtor objected, and the debtor was current on both mortgages, which would prevent either mortgagee from foreclosing. The debtor also had claimed homestead exemption in all equity. So long as the mortgages remained with the lenders, the trustee would have no claim to sell the property. Assuming the trustee avoided the unperfected mortgage, he could not sell the home in the position of the mortgagee, since the debtor was current and no right of foreclosure existed. And, avoiding the mortgage would not create equity, since the debtor's $500,000 unchallenged homestead would consume the equity created if the mortgage were eliminated. Avoidance of the unperfected mortgage only preserves that mortgage for the benefit of the estate, but does not give the estate ownership of the property. The trustee could sell the avoided mortgage, but if the underlying property had been fully exempted, it no long was part of the estate for purposes of selling the property. Distinguishing *Schwab v. Reilly,* the issue here was whether the trustee's power of sale under § 363 justified sale when there was no equity remaining for the estate after the secured claims and the debtor's exemption. The avoided mortgage would not carry with it the power to foreclose in the absence of default. "The preservation of a lien entitles a bankruptcy estate to the full value of the preserved lien—no more and no less." *Degiacomo v. Traverse (In re Traverse),* 753 F.3d 19 (1st Cir. 2014).

Debtor's transfer to husband's corporation was constructively fraudulent. Seven months before bankruptcy, the Chapter 7 debtor had transferred her interest in property jointly owned with her husband to her husband's corporation, and the transfer was constructively fraudulent, but the district court, which had reversed the bankruptcy court, incorrectly found a resulting trust based on the corporation's having owned the property. The bankruptcy court made findings that no resulting trust was proven, and the Fourth Circuit could not find this to be clear error. Since the district court's finding of a resulting trust was reversed, remand was required to address other issues not reached by the district court. *Anderson v. Architectural Glass Const., Inc. (In re Pfister),* 749 F.3d 294 (4th Cir. 2014).

Judicial lien avoidance motion was properly served. Reviewing the "coherent scheme of procedural due process safeguards" found in Rules 4003(d), 9014 and 7004, the debtors' motion to avoid a judicial lien was properly served, reversing denial of the motion. Rule 7004(h) requires a motion involving an insured depository institution to be served by certified mail addressed to an officer of the institution, unless one of the exceptions found in the Rule applies. These debtors' motion was served in compliance with that Rule, when certified mail was addressed to attention of an officer of the corporate lienholder at the address indicated on the lienholder's proof of claim. Since the debtors complied with the Federal Rule, it was not necessary to comply with a California Rule requiring service on the attorney for the creditor, as listed on the abstract of judgment. An attorney had not appeared for the lienholder in the bankruptcy case to trigger application of Rule 7004(h)(1). The motion also sufficiently notified the lienholder of the property subject to the lien. *Frates v. Wells Fargo Bank, N.A. (In re Frates),* 507 B.R. 298 (BAP 9th Cir. 2014).

Section 547(c)(8) threshold applied. In a Chapter 13 case, one debtor's employer withheld $858.98 as a result of prepetition wage garnishment, but the actual amount transferred to the judgment creditor was less than $600, with the remaining amount returned to the debtor after the creditor cancelled the garnishment. As a result, the aggregate amount was less than the $600 threshold of § 547(c)(8), preventing the avoidance of $572.78 transfer as a preference. *Pierce v. Collection Associates, Inc. (In re Pierce),* 504 B.R. 506 (BAP 8th Cir. 2014).

Valuation sixteen days after petition date was not relevant for lien avoidance. The district court vacated lien avoidance, holding that the debtor's expert appraiser valued residential property as of sixteen days after the petition date, and § 522(a)(2) requires that fair market value be determined as of the petition date. There was nothing in the record to support an inference that value related back to the petition date. Reviewing the formula for avoidance of judicial liens under § 522(f)(2)(A), the avoidance of two liens in their entirety was error, since there was $735.31 of equity after two mortgages to partially satisfy the liens; therefore, on remand the bankruptcy court may consider partial avoidance. *Prangley v. Cokinos,* 509 B.R. 822 (D. Maryland 2014).

Foreclosure judgment lien was not avoidable under § 522(f). The debtor sought to avoid the lien of a foreclosing creditor, asserting that the consensual deed of trust lien merged into the judgment for foreclosure. Even assuming that merger occurred, the foreclosure judgment stated that the deed of trust lien would continue perfected, and § 522(f)(2)(c) states that this section's avoidance does not apply to judgment arising out of mortgage foreclosure. *In re McCracken,* 509 B.R. 329 (Bankr. D. Ore. 2014).

Judgment lien avoidable against debtor's interest in entireties property. Considering the issue of whether a single-filing debtor may avoid a judgment lien against tenancy by entireties property, the court concluded that Maryland's homestead exemption created an exception to the general rule seen in *In re Alvarez,* 733 F.3d 130 (4th Cir. 2013). Maryland had opted out of the § 522(d) exemptions, and its homestead exemption provided that the debtor "may exempt the debtor's aggregate interest in. . .owner-occupied residential real property." *Alvarez* was a lien-stripping case under § 506(a), in which the Fourth Circuit held that the bankruptcy court lacked

jurisdiction over a non-filing spouse's interest in entireties property. The Maryland homestead exemption was distinguished from *Alvarez,* concluding that the Chapter 7 debtor could avoid the judicial lien only as to his interest in the residence, but not as to his non-filing spouse's interest. *Raskin v. Susquehanna Bank (In re Raskin),* 505 B.R. 684 (Bankr. D. Md. 2014).

Discrimination

Former debtor not protected in political appointment. The Wisconsin Governor had intended to appoint an individual as interim county register of deeds but decided not to do so after learning of her prior bankruptcy filing. The individual then sued the Governor and another governmental official for violation of statutory and constitutional rights, but the Seventh Circuit held that the defendants had not waived qualified immunity. The defense of qualified immunity was not raised until the answer to plaintiff's amended complaint. The defendants, as governmental officials, had qualified immunity from the plaintiff's privacy and equal protection claims. The publication of the plaintiff's bankruptcy was not a privacy violation, since the bankruptcy was already a matter of public record. There was no violation of the equal protection clause by the Governor's declining to make a discretionary appointment. *Chasensky v. Walker,* 740 F.3d 1088 (7th Cir. 2014).

Property of Estate and Exemptions

Surcharge of exemption violated § 522(k). The Supreme Court held, in the unanimous opinion of Justice Scalia, that the bankruptcy court had exceeded its authority when it surcharged the Chapter 7 debtor's homestead exemption for the payment of a portion of the trustee's administrative expense. The debtor's only significant asset was his California home, which he valued at $363,348, and the debtor claimed the California homestead of $75,000. The debtor had a first mortgage, apparently valid, for approximately $147,000, but he asserted that there was a second mortgage held by an individual. After litigation, the bankruptcy court determined that the second mortgage did not exist; the asserted second mortgage, which would have consumed all equity in the home, was intended to prevent the trustee's sale of the home. In the course of prolonged litigation, including avoidance of the fraudulent deed of trust, the trustee incurred $500,000 in attorney fees. Under these facts, the bankruptcy court, affirmed by the Ninth Circuit, approved a surcharge of the $75,000 exemption, permitting the trustee to capture that in partial reimbursement of incurred fees. There was appellate authority in that Circuit approving surcharge as an equitable remedy in appropriate cases. *Latman v. Burdette*, 366 F.3d 774 (9th Cir. 2004). The crux of the opinion is that specific Code provisions prevail over equitable remedies: "Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits." The *Law* Court observed that the claimed homestead exemption had been allowed, becoming final before the surcharge was imposed, since no one objected to it, applying *Taylor v. Freeland & Kronz,* 503 U.S. 638 (1992). The Court then stated that the surcharge contravened § 522(k), which prevented the allowed exemption from being liable for the trustee's attorney fees, which were administrative expenses. *Law v. Siegel,* 571 U.S. ____, 134 S.Ct. 1188 (Mar. 4, 2014).

Inherited IRA not exempt. The Supreme Court held that an inherited IRA does not constitute a "retirement fund" within the meaning of 11 U.S.C. § 522(b)(3)(C). Since that Code section is identical to § 522(d)(12), inherited IRAs would not be exempt under the latter section either.

Although the Court affirmed the Seventh Circuit's decision, *In re Clark*, 714 F.3d 559 (2013), the unanimous opinion by Justice Sotomayor is broader than the Seventh Circuit's. The Circuit Court had distinguished the IRA before it, one inherited from someone other than the debtor's spouse, from spousal inheritance, leaving open the argument that an IRA inherited from a spouse would be exempt, but the Supreme Court held that an inherited IRA lacked the legal characteristics of funds set aside for retirement. The Court recognized that if the heir is the original owner's spouse, the heir may "roll over" the IRA into his or her own IRA, while an heir of someone other a spouse does not have the "roll over" option. Notwithstanding this distinction, the Court broadly concluded that an inherited IRA simply does not operate like an ordinary IRA, stating that the inquiry into exempt status is an objective one, not a case-by-case factual examination. Looking at three legal characteristics of an inherited IRA, the heir is not able to invest additional funds in the account; the heir is required to withdraw the funds or take minimum annual distributions, rather than hold the funds for retirement; and the heir may withdraw the funds without tax penalty, rather than wait until age 59 ½, as is the case with a regular IRA. There will be litigation over the extent to which the opinion has impacts on state-law exemptions for retirement funds. *Clark v. Rameker*, 134 S.Ct. 2242 (June 12, 2014)

Debtor's homestead limited to dollar amount claimed and nondebtor spouse's interest protected in forced sale. Affirming, the bankruptcy court had authority to order a sale of the home that was subject to the nondebtor spouse's homestead rights, without deciding the monetary amount of those rights. This property was acquired before enactment of BAPCPA, and was titled only in the name of the subsequent debtor. Less than 1215 days after the property was acquired by the debtor, a creditor filed an involuntary Chapter 7 case, which was subsequently converted by the individual debtor to Chapter 11. Although the debtor claimed unlimited homestead, § 522(p) limited the homestead to that statute's dollar cap, at the time of filing $136,875. Section 363 authorizes a forced sale, even though a third party holds an interest in the property, and a decision from the Texas Supreme Court supports the right of sale under federal law that is enforceable against a non-debtor spouse, even though that non-debtor has homestead rights. As to whether the spouse's homestead was capped by § 522(p), it was stipulated that the residence was the separate property of the debtor, or the property of the debtor's sole management community, or was the joint management community of both spouses. Although the non-debtor spouse had homestead rights, the question was the value of those rights, and the parties had not sufficiently briefed the calculation of value. "Neither argues that the determination by Congress to permit an exemption of $136,875 [the then cap under § 522(p)] for a debtor such as Mr. Kim would not be just compensation for Mrs. Kim's homestead interest since $136,875 in proceeds would be impressed with her homestead rights. The Kims have not adequately briefed their claim that a taking would occur unless Mrs. Kim is compensated more than the $136,875 exemption." The Kims also did not address the applicability of § 363(j), and the Court did not express an opinion as to whether she was entitled to compensation under that section. *Kim v. Dome Entertainment Center, Inc. (In re Kim),* 748 F.3d 647 (5th Cir. 2014).

Objection to tenancy by entirety exemption in vehicles sustained. Affirming, the Chapter 7 trustee objected to the debtor's § 522(b)(3)(B) claimed tenancy by entirety ownership of three vehicles, when the certificates of title contained only the debtor's name. Under Delaware law,

the certificates of title provided presumptive evidence of ownership, and the debtor had the burden of rebutting that presumption. There was no evidence that the funds for purchase of the vehicles came from jointly-held marital funds, and the debtor failed to carry the rebuttal burden. *In re Scioli,* ___Fed.Appx.___, 2014 WL 2119187 (3d Cir. May 22, 2014).

Sale of Texas homestead. Texas law requires that proceeds from the sale of homesteads must be reinvested in another homestead within six months, and when debtor did not reinvest within that time, the proceeds became nonexempt property of estate. The Fifth Circuit had previously held that the six-month limit was an "integral feature" of Texas homestead exemption, and that "this essential element of the exemption must continue in effect even during the pendency of a bankruptcy case." *In re Zibman,* 268 F.3d 298, 301 (5th Cir. 2001). Even though in this case the debtor sold his homestead postpetition, absent reinvestment within six months, the sale "voided the proceeds exemption, regardless of whether the sale occurred pre- or post-petition." Moreover, the holding did not violate § 522(c). *Viegelahn v. Frost (In re Frost),* 744 F.3d 384 (5th Cir. 2014).

Exception from normal judicial estoppel. The debtor was not barred from pursuing cause of action when failure to schedule was attorney's mistake, and debtor's exemption offset any motive to conceal. *Javery v. Lucent Technologies, Inc.,* 741 F.3d 686 (6th Cir. 2014)

Turnover to trustee not restricted to property of estate at time motion filed. The Chapter 7 debtor had a checking account at commencement of case, with an account balance, and the Ninth Circuit held that the plain language of § 542(a) permitted turnover against an entity at any time during the pendency of the case, even if that entity no longer had possession, custody or control over the property at the time the motion is filed. When the debtor has or had possession of the property at some point during the case, turnover is not restricted to possession at the time the trustee filed the motion. Moreover, § 542(a) permits recovery of the "value of the property," indicating that if the entity no longer has possession of the property, the trustee still has a remedy. The Court examined pre-Code turnover practice, as well as current § 542(a) in context with other Code provisions. The Court disagreed with conflicting authority from the Eighth Circuit, *In re Pyatt,* 486 F.3d 423 (8th Cir. 2007). *Shapiro v. Henson,* 739 F.3d 1198 (9th Cir. 2014).

Assets acquired for fledgling outdoor guide business were exempt. Affirming, the bankruptcy court did not err in finding that firearms, boats, camper, all-terrain vehicle, trailers and fishing equipment that the Chapter 7 debtor had acquired for use in a fledgling business of outdoor guiding were exempt as tools of trade under Colorado's statute. That statute permitted $20,000 exemption in tools of trade used "for the purpose of carrying out any gainful employment." Although the business had not yet operated at a profit, and "gainful employment" was not defined in the statute, "whether or not gainful is synonymous with profitable has not been addressed within a bankruptcy context in any meaningful way," which is attributable in part to the unique use of that term in Colorado's statute. See opinion at n. 37. While "complete disregard for profitability with respect to the term 'gainful employment' . . .would be difficult to justify," the debtor was actively engaged in promoting the new business, had developed an expertise in the field and losses of the business were attributable to the start-up

costs. The party objecting to the exemption must prove by a preponderance of the evidence that the debtor's occupation is unlikely to contribute to the support of the debtor and his family in any significant way within a reasonable period of time." Under specific facts of the case, the trustee failed in that burden. *Larson v. Sharp (In re Sharp),* 508 B.R. 457 (BAP 10th Cir. 2014).

Chapter 7 debtor entitled to state homestead increased one week before filing. The Bankruptcy Code and Ohio exemption statute pointed to the petition date as the time for determining entitlement to specific exemptions and the exemption amount. Although uncodified language of the Ohio General Assembly purported to limit application of the increased homestead amount to creditors' "claims accruing" on or after the amendment's effective date, this language was silent as to application in bankruptcy and the codified language of the Ohio homestead exemption made it clear that the debtor's interest was determined as of the bankruptcy petition date. The bankruptcy was filed after the effective date of the increase in the homestead from $21,625 to $125,000, and allowing exemption in the increased amount did not retroactively divest creditors of substantive or vested rights. Moreover, under § 522(c) and majority authority, the Bankruptcy Code preempts application of the uncodified language—to apply that language in this case would cause creditors whose claims "accrued" before the amendment to be excepted from the increased homestead exemption, while creditors whose claims "accrued" after the increase would be subject to the increased exemption. *In re Kyle,* 510 B.R. 804 (Bankr. S.D. Ohio 2014).

"Separate filing rule" applied to tax refund. Reversing, the district court held that when the Chapter 7 trustee and debtors disagreed about how much of a tax refund belonged to the estate, the IRS's "separate filing rule" should be applied, rather than a "50/50 rule." The debtor claimed that all of a refund from a joint tax return was attributable solely to the nondebtor wife's overpayment, and the trustee insisted on receiving one half of the refund. "Specifically, the formula is based on IRS Revenue Ruling 74-611 which states that when a husband and wife file a joint return, each spouse has a separate interest in the jointly reported income and a separate interest in overpayment." The formula must take into account the respective spouse's withholdings, income and contributions as a whole, as well as tax credits attributable to each spouse. *Lee v. Walro (In re Lee),* 508 B.R. 399 (S.D. Ind. 2014).

Debtor's exemption under resulting trust theory denied. The debtor-wife claimed exemption in a vehicle that was titled in debtor-husband's name, asserting that she owned the vehicle under a resulting trust; however, under Massachusetts law requirements for a resulting trust, there was not clear evidence that the parties intended a trust relationship when the car was purchased and titled only in the husband. The wife's exemption claim was denied. *In re Frankel,* 508 B.R. 527 (Bankr. D. Mass. 2014).

Social Security Act protects benefits. Rejecting the Chapter 7 trustee's argument that Social Security benefits could be reached on equitable grounds when the debtor did not have present need for the benefits that had been paid and were held in bank account, the court applied *Law v. Siegel* to hold that it lacked such equitable authority. Moreover, "§ 407(a) [of the Social Security Act] implements a three-pronged protective regime for social security benefits, both paid and

payable," including protecting those benefits from the operation of bankruptcy laws. *In re Franklin,* 506 B.R. 765 (Bankr. C.D. Ill. 2014).

Interest in retirement plan received through marital dissolution decree was exempt. The Chapter 7 debtor received $80,000 interest in former husband's tax-qualified employee retirement plan in a marital dissolution decree, and the funds were entitled to Illinois exemption, despite fact that the transfer meant that proceeds were no longer in hands of employee who had funded the plan. Under Illinois law, the retirement plan was marital property before the entry of marital dissolution, and the debtor's interest became quantified as her separate property on entry of the decree. Although that interest became property of the Chapter 7 estate, it was exempt, distinguishing *In re Clark,* 714 F.3d 559 (7th Cir. 2013). "The critical factor in *Clark* was that the IRA's retirement attributes had been lost upon inheritance by a non-spouse. In contrast, a retirement plan transferred pursuant to a QDRO is done expressly for the purpose of preserving the retirement nature of the plan." The trustee's objection to exemption was overruled. *In re West,* 507 B.R. 252 (Bankr. N.D. Ill. 2014).

New objection period only for those amended exemptions. Under Bankruptcy Rule 4003(b) and the majority of opinions applying it, the filing of an amended list of exemptions does not restart the objection period for original exemptions, with a new 30-day objection period applying only for those exemptions that were amended. *In re Walker,* 505 B.R. 217 (Bankr. E.D. Tenn. 2014).

Debtor-husband not entitled to wildcard exemption in inheritance of debtor-wife. The Chapter 7 debtor-husband had no separate property interest in an inheritance received by his debtor-wife, rejecting the argument that the husband had an exemptible property interest based on equitable distribution rights that could be asserted in an unfiled divorce proceeding or probate. Under the majority view, "a spouse has no present property interest in the separate property of the other spouse unless and until the contingency occurs." Moreover, § 541(a)(5) defines property of the estate to include property acquired by "bequest, devise, or inheritance" within 180 days after the petition filing. *In re Hampshire,* 505 B.R. 668 (Bankr. E.D. Pa. 2014).

Debt Relief Agency

Petition preparers acted as more than referral service. Affirming bankruptcy court's finding that individual and wholly-owned corporation acted as bankruptcy petition preparers, they violated disclosure requirements in advertising, failed to provide required notices to customers, misrepresented services that were provided, and caused untrue statements to be made in bankruptcy documents. Violations justified injunctive relief, disgorgement of fees and liquidated damages. *Jonak v. McDermott,* 511 B.R. 586 (D. Minn. 2014).

Debt relief agency did not provide reasonably equivalent value to debtor. In Chapter 7 trustee's § 548 complaint, the court found that a debt resolution entity acted as a debt relief agency, failing to perform required duties and making misrepresentations to the debtor, justifying $28,000 civil penalty under § 526. Moreover, the debtor did not receive reasonably equivalent value for $7,000 that was paid to agency, which agreed to negotiate at least 35% reduction in debts, but agency failed to settle any debt, applying bulk of prepetition payments to its fee.

Henderson v. Legal Helpers Debt Resolution, L.L.C. (In re Huffman), 505 B.R. 726 (Bankr. S.D. Miss. 2014). *See also In re Falck,* 503 B.R. 904 (Bankr. S.D. Fla. 2014) (Individuals preparing and executing debtor's petition were non-attorney bankruptcy petition preparers, who filed false disclosure of fees, with preparers ordered to disgorge $7,600 fees and enjoined from acted as bankruptcy petition preparers in any district.).

Chapter 7 Issues

Eligibility

Filing 47 days after voluntary dismissal and two stay relief motions was Rule 9011 violation. The debtors voluntarily dismissed their Chapter 11 case after the filing of two stay relief motions, but then filed a Chapter 7 case 47 days later. Under Rule 9011, a debtor's attorney must perform reasonable investigation of facts and law before filing a pleading, and the refiling was a Rule 9011 violation, as one for improper purpose to delay state foreclosure proceeding. Admonishment of attorney and monetary sanction of reasonable attorney fees for creditor were appropriate. *In re Terron Hernandez,* ___ B.R. ___, 2014 WL 2467974 (Bankr. D. Puerto Rico June 2, 2014). *See also Desiderio v. Parikh (In re Parikh),* 508 B.R. 572 (Bankr. E.D. N.Y. 2014) (Numerous inconsistencies in Chapter 7 and 13 schedules showed lack of pre-filing investigation by debtor's attorney, justifying sanction for Rule 9011 violation, but sanction was publication of decision, with no attorney fees awarded against attorney or debtor.).

Chapter 7 Trustee

Trustee entitled to commission compensation absent extraordinary circumstances. Unless there are extraordinary circumstances, the Chapter 7 trustee's commission must be based on § 330(a)(7)'s commission calculation, which refers to § 326. Noting a split of judicial authority subsequent to BAPCPA, the Fourth Circuit cited as persuasive authority, *Hopkins v. Asset Acceptance LLC (In re Salgado-Nava),* 473 B.R. 911 (BAP 9th Cir. 2012). The bankruptcy court should determine maximum statutory commission under § 326(a) and then determine if there are extraordinary circumstances to show that the commission is unreasonable. *Gold v. Robins (In re Rowe),* 750 F.3d 392 (4th Cir. 2014).

Trustee could employ own firm as counsel. The Chapter 7 trustee had burden to show that employment of her own firm to represent trustee was in best interest of the estate. Reviewing the trustee's statutory duties and the basis for employment of counsel under the Code and Rules, the court provided the following guidelines for an application: (1) state why the employment of an attorney is necessary; (2) identify the person to be employed; (3) set forth why the particular selection was made; (4) set forth the range of potential services to be rendered; (5) set forth contemplated fee arrangement; and (6) set forth all connections of the person to be employed with the debtor, creditors, any party in interest, and the United States trustee. If the application seeks to employ the trustee's own firm or attorneys in that firm, the application must set forth why that is in the best interests of the estate in order to satisfy § 327(d). *In re Edwards,* 510 B.R. 554 (Bankr. S.D. Texas 2014).

Means Test

Nondischageable student loans are not priority debts for means test. The mere fact that $240,000 student loan debt would be nondischargeable, in absence of undue hardship proof, did not make it priority debt for purposes of the means test calculation, nor did the fact that the student loan debt was substantial constitute a special circumstance—the debtors put on no proof to support special circumstance finding. *In Matter of Martin,* 505 B.R. 517 (Bankr. S.D. Iowa 2014).

Current monthly income includes pay earned in six-month look-back, even though received afterwards. Concluding that the date of receipt of pay was not determinative, § 101(10A)'s definition of current monthly income included pay that "derived" during the six months. Also, reviewing what other courts had held, the debtor's prepetition wage garnishment was not a deductible expense, since the automatic stay prevented the garnishment from being an ongoing expense. And, the debtors' monthly student loan payments were not a special circumstance rebutting the presumption of abuse. The U.S. trustee's motion to dismiss for abuse was granted, with opportunity for the debtors to convert to Chapter 13. *In re Strickland,* 504 B.R. 542 (Bankr. D. Minn. 2014).

Ability to pay 24% to unsecured established cause for dismissal. Under totality-of-circumstances test, United States trustee established that debtor had ability to pay 24% of unsecured debt in Chapter 13, and under *In re Seafort,* 669 F.3d 661 (6th Cir. 2012), after retirement plan loan would be repaid funds were then available to Chapter 13 plan. *In re Pittman*, 506 B.R. 496 (Bankr. S.D. Ohio 2014).

Priority Claims

Payment of priority, nondischargeable tax did not subrogate debtors to rights of tax authority. In their schedules, the Chapter 7 debtors admitted liability for prepetition sales and withholding taxes, which fell within § 507(a)(8)(C) and § 523(a)(1)(A)'s exception from discharge. The case administration continued after the grant of discharge, and the debtors had negotiated with the state an amount of nondischargeable taxes, which they had substantially paid. The debtors then sought reimbursement from the trustee of their tax payments, but adopting the majority view, the court held that the debtors, rather than the bankruptcy estate, were liable for nondischargeable taxes and they were not subrogated to the rights of the state taxing authority. The debtors had no right to reimbursement. *In re Lettieri,* 506 B.R. 208 (Bankr. W.D. N.Y. 2014).

Discharge and Dischargeability

State's Single Business Tax of defunct company was nondischargeable excise tax in former officer's case. Michigan's Single Business Tax owed by a defunct company, of which the Chapter 7 debtor had been an officer, was an excise tax under § 507(a)(8)(E), and the debtor's derivative liability on that tax was excepted from discharge under § 523(a)(1)(A). "Because whether a tax is an 'excise' or not does not depend upon who is required to pay it, section 507(a)(8)(E)'s reference to 'excise tax' denotes only the nature of the assessment, not who is ultimately required to pay the assessed funds." Michigan's statute placed derivative liability on

the former officer. *Rizzo v. State of Michigan Department of Treasury (In re Rizzo),* 741 F.3d 703 (6th Cir. 2014).

Late-filed state income tax returns qualified as "returns" for discharge. Interpreting BAPCA's hanging paragraph definition of "return," § 523(a)(1)(B) excludes from discharge those tax liabilities for which a return was never filed, but this debtor filed returns, albeit late, and there was no contention that the state prepared returns for the taxpayer. Under Massachusetts state law, a "return" was defined as a "taxpayer's signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer's representative on a form prescribed by the Commissioner and duly filed with the Commissioner." There is no timeliness requirement in this state definition. "In other words, the determination is controlled by what the debtor filed, not when." In this case, the debtor's late-filed returns supported discharge of the relevant state income taxes. *Gonzalez v. Massachusetts Department of Revenue (In re Gonzalez),* 506 B.R. 317 (BAP 1st Cir. 2014).

Debtor's late tax return did not qualify as "return" for § 523(a)(1)(B). BAPCPA's definition of "tax return" in hanging paragraph of § 523(a) does not exclude the pre-BAPCPA test found in *Beard v. Commissioner,* 793 F.3d 139 (6th Cir. 1986); rather, the definition incorporated the *Beard* factors to determine the meaning of a "return." The court discussed the majority and minority views on the issue. The return filed by the debtor seven years after it was due and more than three years after IRS prepared a substitute return did not qualify as a "return" for purposes of discharge. *IRS v. Smith (In re Smith),* ___ B.R. ___, 2014 WL 1727011 (N.D. Cal. Apr. 29, 2014). *Compare Pendergast v. Massachusetts Dept. of Revenue (In re Pendergast),* 510 B.R. 1 (BAP 1st Cir. 2014) (Section 523(a)'s definition replaced *Beard* test but "a late-filed, post-assessment Massachusetts state income tax return does not qualify as a return for discharge purposes." Under prior holding of *In re Gonzalez,* 506 B.R. 317 (BAP 1st Cir. 2014), a late return is treated as a return under that state's law, but when the return is filed after the state's assessment, the treatment changes, and the taxes related to that post-assessment return were not dischargeable.).

Bankruptcy court has constitutional authority to enter monetary judgment in dischargeability action. The Sixth Circuit held that *Stern v. Marshall* did not deprive the bankruptcy court of constitutional authority to enter final monetary judgments as a part of a dischargeability determination. The bankruptcy court had found four loans to be nondischargeable debts under § 523(a)(2)(B) and also determined the monetary amounts. *Stern* did not alter the reasoning of the Sixth Circuit's pre-*Stern* decision that the bankruptcy court could enter final monetary judgment in such proceedings, *In re McLaren,* 3 F.3d 958 (6th Cir. 1993). *Hart v. Southern Heritage Bank (In re Hart),* ___ Fed.Appx. ____, 2014 WL 1663029 (6th Cir. Apr. 28, 2014). *See also Ray Cai v. Shenzhen Smart-In Ind. Co., Ltd. (In re Ray Cai),* ___ Fed.Appx. ____, 2014 WL 1647730 (9th Cir. Apr. 25, 2014) ("Determining the scope of the debtor's discharge is a fundamental part of the bankruptcy process, and determining whether a claim against a creditor is discharged under § 523(a)(2)(A) does not raise any issues of state law.").

Fraudulent intent was actually litigated in prepetition slander of title suit. Applying Illinois law for whether the debtor's fraudulent intent was actually litigated for purposes of collateral estoppel, it is only required that the parties disputed the issue and that the trier of fact resolved the issue—actual litigation does not mean "thoroughly litigated." The debtor's fraudulent intent was a necessary element of the state court's decision in a slander of title suit, with the state court finding that the debtor acted fraudulently and with malice, which findings formed the basis for punitive damages. The debt was nondischargeable under §§ 523(a)(2)(A) and (a)(6). *Gambino v. Koonce,* ___ F.3d ____, 2014 WL 2959130 (7th Cir. July 2, 2014). *See also Cherry v. Neuschafer (In re Neuschafer),* 2014 WL 2611258 (BAP 10th Cir. June 12, 2014), slip copy, for discussion of issue preclusion and effect of default judgment.

No abuse of discretion in denying amendment of complaint from § 523(a)(6) to § 523(a)(2). The plaintiff filed a timely complaint under § 523(a)(6), but the bankruptcy court found no evidence to support action under that section, and denied the plaintiff's request to amend to plead § 523(a)(2)(A). The request was made seventeen months after the complaint's filing and just one week before scheduled trial. Rule 15(a)'s liberal amendment policy does not excuse lack of diligence, and the bankruptcy court did not abuse its discretion in denying amendment, when there was no explanation for the seventeen-month delay. *Zullo v. Lombardo (In re Lombardo),* 755 F.3d 1 (1st Cir. 2014).

Creditors justifiably relied under § 523(a)(2)(A). The Chapter 7 debtor had been hired to build a vacation home, and the creditors justifiably relied on the builder's false representation that he would work exclusively on their vacation home, devoting all of particular payments to winterize the home. The bankruptcy court's holding that a portion of the construction payments was excepted from discharge was affirmed. *Falcone v. Ragonese (In re Ragonese),* 505 B.R. 605 (BAP 1st Cir. 2014).

Imputing agent's fraud requires that debtor knew or should have known of agent's fraud. When record did not establish that debtor knew or had reason to know of sales agent's misrepresentation to judgment creditor, agent's fraud was not imputed to debtor/principal. Decisions from the Supreme Court, including *Bullock v. BankChampaign, N.A.,* 133 S.Ct. 1754 (2013), "appear to cut strongly against applying imputed fraud under § 523(a)(2)(A) to except a debt from discharge in the absence of showing of culpability on the part of the debtor." *Sachan v. Huh (In re Huh),* 506 B.R. 257 (BAP 9th Cir. 2014).

Debt to county for supporting incarcerated child was domestic support obligation. Affirming, the county probation office did not violate discharge injunction when it attempted collection from the debtor, because the debt was nondischargeable domestic support obligation. The debt arose from the county's expenses in providing the debtor's minor son with necessary food, clothing, personal supplies and medical care while the son was incarcerated for almost two years. A California statute provides that a parent is liable for reasonable costs of support of a minor child who is incarcerated pursuant to an order of the juvenile court, with a statutory limit of $30 per day. The county continued collection efforts after the debtor received Chapter 7 discharge. At the first hearing, the bankruptcy court issued a tentative ruling, concluding that the debt was not covered by §§ 523(a)(5) and 101(14A), but after further briefing by the parties and

prior to second hearing that court issued another tentative ruling reversing its conclusion. The bankruptcy court did not err in considering additional authority or requesting further briefing. The debt to the county fell within § 101(14A)'s definition of domestic support obligation, as a prepetition debt owed to a governmental unit, incurred for the support of the debtor's child as "assistance provided by a governmental unit," and the debt was established prebankruptcy by an order of a state court. The debt had not been assigned to the government for collection. BAPCPA broadened categories of creditors protected from discharge by § 523(a)(5), and the debt to county was excepted from discharge. *Rivera v. Orange County Probation Dept. (In re Rivera),* 511 B.R. 643 (BAP 9th Cir. 2014).

Debt owed to husband's ex-wife and her attorney was not domestic support obligation. In prebankruptcy litigation, the Chapter 7 debtor and her husband had judgment against them jointly for $280,000 attorney fees related to fraudulent transfer action filed by husband's former wife. The fraudulent transfer action was part of the husband's marital dissolution proceedings. The debtor filed the adversary proceeding, seeking determination that the debt owed to the husband's former wife and her divorce attorney was not excepted from discharge. In both §§ 523(a)(5) and (15), the phrase "'spouse, former spouse, or child' on its face appears to specify to whom the debt must be owed for nondischargeability to apply." The Panel acknowledged that some courts had construed the phrase by "choosing to focus on the 'nature' of the underlying debt as determining the applicability of the statute. . . .One thing is clear from all of these [cited] cases. Even when the debt was not directly payable or owed to the spouse, former spouse or child of the debtor, the bounty of that debt had flowed to one of those family members explicitly covered by the statute, or that discharge of the debt would have adversely impacted the finances of one of those explicitly-covered family members." Here, the debtor's obligation to her husband's ex-wife and her divorce attorney was not related to a familial relationship—it was not owed to the debtor's former spouse. Even though the state court had joined the debtor as a party in the fraudulent transfer action, which gave rise to the judgment, that did not mean that the debt was covered by §§ 523(a)(5) or (15). *Bendettti v. Gunness (In re Gunness),* 505 B.R. 1 (BAP 9th Cir. 2014).

Failure to comply with divorce obligations was willful and malicious injury. Chapter 7 debtor's repeated refusal to comply with divorce decree's requirement for him to transfer marital assets to his ex-wife was a willful and malicious injury for purposes of § 523(a)(6). There was an objective substantial certainty of harm to the former spouse by the debtor's failures. *Shankle v. Shankle (In re Shankle),* 554 Fed.Appx. 264 (5th Cir. 2014).

Sale of counterfeit watches was willful and malicious injury to trademark owner. Debtor's sale of hundreds of watches that bore counterfeit Rolex trademarks was willful and malicious injury to owner of trademark. *Goaz v. Rolex Watch U.S.A., Inc. (In re Goaz),* 559 Fed.Appx. 377 (5th Cir. 2014).

Landlords committed willful and malicious injury by eviction. After the state court announced oral ruling of judgment for tenant in forcible entry and detainer action, and landlords were in courtroom at ruling, the landlords committed willful and malicious injury to tenant when

they proceeded with eviction. The state court had determined $104,000 damages, including tenant's attorney fees. *Brown v. Ausley (In re Ausley),* 507 B.R. 234 (Bankr. W.D. Tenn. 2014).

"Intervention fees" imposed by State Department of Corrections not covered by § 523(a)(7). The pro se Chapter 7 debtor reopened discharged case to determine if the Missouri Department of Corrections violated the discharge injunction, and the issue was whether $90 withheld from the debtor/prisoner's inmate fund account was excepted from discharge as a fine, penalty or forfeiture. The $90 was an intervention fee that was authorized under state law to fund the State's Probation and Parole Board's community corrections and intervention services for offenders, including services related to transition from prison to society. Although the fee was payable to and for the benefit of a governmental entity, it was not imposed as a part of the debtor's criminal sentence. The court focused on the nature of fines, penalties and forfeitures "as in essence takings grounded in wrongful acts and effectuating a punishment therefor,'" quoting *In re Soileau,* 488 F.3d 302, 310-11 (5th Cir. 2007). This intervention fee was not for the purpose of punishment but for transition assistance; as such, the fee was not penal in nature and was not a debt excepted from discharge under § 523(a)(7). Although the collection violated the discharge injunction, the remedy was to restore the $90 to the debtor's account, with no further sanction. *In re Miller,* 511 B.R. 621 (Bankr. W.D. Mo. 2014).

Eighth Circuit affirms remand to determine discharge of each student loan. The Bankruptcy Appellate Panel had remanded for the bankruptcy court to determine undue hardship on loan-by-loan basis, and the Eighth Circuit affirmed. There were fifteen different student loans, and partial discharge was not an available remedy for the totality of the student loans, but the remand was not an abuse of discretion. *Conway v. Nat'l Collegiate Trust (In re Conway),* 559 Fed.Appx. 610 (8th Cir. 2014).

Highly educated 63-year old debtor did not prove undue hardship. Affirming the bankruptcy court, although the debtor had been unemployed since 2002, last working as president of a corporation, the debtor was highly educated and was not burdened with other significant debt. Although close to retirement age, the prolonged unemployment did not support discharge, since the debtor still had significant time left to work in potential high-income jobs. The court did not consider the debtor's failure to participate in the Ford Income Contingent Repayment program to be a factor of great significance. The court used the totality-of-circumstances test for undue hardship, commenting that the differences between that test and the *Brunner* test were "modest." *Murphy v. Educational Credit Management Corp.,* 511 B.R. 1 (D. Mass. 2014).

Debt to individual co-signer was nondischargeable for "funds received as an educational benefit." An individual cosigned student loan for Chapter 7 debtor, and after debtor's default, the individual paid the lender. Discussing the expansion of § 523(a)(8)(A)(ii) to cover "an obligation to repay funds received as an educational benefit," the dispute did not involve undue hardship, but whether the obligation was an "educational benefit." The loan itself clearly fell within that term, and the court discussed whether the plaintiff was a coborrower, guarantor or accommodation party under applicable Ohio law, concluding that the plaintiff was at least an accommodation party on the credit agreement. As an accommodation party, the plaintiff had the

right of subrogation, stepping into the shoes of the original lender. Under § 523(a)(8)(A)(ii), there is no requirement that the obligation be related to a governmental unit or a nonprofit institution. Citing *Benson v. Corbin (In re Corbin),* 506 B.R. 287 (Bankr. W.D. Wash, 2014), a case with similar facts, the court concluded that the focus of § 523(a)(8)(A)(ii) is not on the original lender, but on whether the obligation is to "repay funds received as an educational benefit." The obligation to the cosigner fell within the statute's broad reach for exception to discharge. *Brown v. Rust (In re Rust),* 510 B.R. 562 (Bankr. E.D. Ky. 2014).

Obligation to private university was dischargeable. Also considering the 2005 expansion of § 523(a)(8)(A)(ii) to cover "an obligation to repay funds received as an educational benefit, scholarship, or stipend," the court examined case law under that section, concluding that the obligation at issue was not excepted from discharge. The Chapter 7 debtor had signed promissory notes to a private university, in exchange for tuition credits—this was university's way of allowing the debtor to take classes. But, no funds changed hands; therefore, the court concluded that the obligation did not fall within § 523(a)(8)(ii)'s requirement of "an obligation to repay funds." *Institute of Imaginal Studies v. Christoff (In re Christoff),* 510 B.R. 876 (Bankr. N.D. Cal. 2014).

Marital settlement agreement's obligation to hold spouse harmless from credit card debt gave rise to implied indemnity right for purposes of § 523(a)(15). Under California law, the Chapter 7 debtor's promise in marital settlement agreement to pay credit card debt and hold wife harmless was enforceable, even though the agreement did not include indemnification language. Section 523(a)(15) does not require that the obligation be paid directly to the former spouse, and under California law, the debtor's obligation was an implied indemnification claim. The former spouse had paid the credit card debt upon the debtor's failure to do so, resulting in damages. *Francis v. Wallace (In re Francis),* 505 B.R. 914 (BAP 9th Cir. 2014).

Fee awards under § 523(d) and "special circumstances." The debtor had successfully defended a fraud-based compliant dealing with a consumer debt, and the bankruptcy court found that the plaintiff was not substantially justified in pursuing the § 523(a)(2) complaint, but the requested fees were reduced under a determination of "special circumstances." The Bankruptcy Appellate Panel held that § 523(d)'s "special circumstances" required complete disallowance, not reduction, of fees, and complete disallowance was not justified on the record in this case. The bankruptcy court had found that the requested fees were reasonable, and with that finding there was no authority to reduce the fees. *Daecharkhorn v. Waugh Real Estate Holdings, LLC (In re Daecharkhom),* 505 B.R. 898 (BAP 9th Cir. 2014).

Transfer by attorneys of partnership assets was with intent to hinder, delay or defraud. Affirming, the Eleventh Circuit agreed with the findings that two attorneys could not discharge in Chapter 7 their debt to another law firm. The evidence supported findings that the attorneys entered into a secret settlement that forced another law firm out of bad faith litigation, knowing that their conduct would harm the other law firm by depriving it of compensation. This action was a willful and malicious injury. Also, the two attorneys transferred assets from their partnership, which had filed unsuccessful Chapter 11, less than one year before they filed individual Chapter 7 cases. These transfers were by insiders, with intent to hinder, delay or

defraud creditors of the insiders, constituting cause for discharge denial under §§ 727(a)(2) and (a)(7). *Kane v. Stewart, Tilghman Fox & Bianchi PA (In re Kane),* ___ F.3d ___, 2014 WL 2884603 (11th Cir. June 26, 2014).

Failure to keep records justified denial of discharge. The plaintiffs were investors and received two checks signed and negotiated by the debtor, which checks were returned for insufficient funds, giving the plaintiffs standing as creditors to object to discharge. The bankruptcy court did not err in finding that the debtor failed to maintain and preserve adequate financial records and that the discharge would be denied under § 727(a)(3). *Hussain v. Malik (In re Hussain),* 508 B.R. 417 (BAP 9th Cir. 2014).

Stipulation by debtor and creditor to extension of time for discharge complaint not effective. The pro se Chapter 7 debtor agreed with a creditor to extend the time to file a § 727 complaint, and the complaint was filed within the agreed extension. However, the agreement did not comply with Rule 4004(a)(1)'s provision that the court may for cause extend the time, on motion filed before the original time expired. No motion was filed in this case and the Ninth Circuit had interpreted rules regarding a debtor's discharge strictly. The creditor could not rely on the debtor's agreement, when an extension was dependent on compliance with the Rule and the court's grant of an extension. The complaint was properly dismissed. *Shahrestani v. Alazzeh (In re Alazzeh),* 509 B.R. 689 (BAP 9th Cir. 2014).

One-year lookback in § 727(a)(2)(A) is not subject to equitable tolling. In issue of first impression in Ninth Circuit, the Bankruptcy Appellate Panel held that § 727(a)(2)(A)'s one-year lookback period is a statute of repose, not subject to equitable tolling. The Chapter 7 debtor was a former dentist, and a medical malpractice judgment had been entered against him. Before that judgment, the debtor had executed a revocable living trust, with the res consisting of real property that the debtor had owned for years, but the debtor did not execute a quitclaim deed to the trust for a couple of years. The debtor then filed two Chapter 13 cases, which were dismissed, and the quitclaim deed was recorded two days before the first Chapter 13 was dismissed. The debtor's third bankruptcy was this Chapter 7, and the judgment creditor filed a § 727(a) complaint, alleging that the transfer to the trust was fraudulent. The BAP found that the language of § 727(a)(2)(A) did not expressly provide for tolling, unlike some Bankruptcy Code sections, such as §§ 108 and 523(a)(8)(A). The Panel then discussed the difference in statutes of repose and limitations, with equitable tolling applicable only to limitations periods. The Panel also held that the doctrine of "continuing concealment" did not apply here, since the debtor did not attempt to conceal any "interest" in the property into the year before filing his Chapter 7 case. The Panel distinguished concealment of an "interest" in the property from concealment of the transfer to the trust. *DeNoce v. Neff (In re Neff),* 505 B.R. 255 (BAP 9th Cir. 2014).

Discharge Injunction

Assignee debt collector willfully violated discharge injunction. Several debts had been assigned for collection prebankruptcy, including a debt to a county, which was asserted to be for fines associated with criminal charges. The assignee continued collection efforts after the Chapter 7 discharge, with five garnishment writs served on the debtor's employer. Section

523(a)(7) did not cover this debt collector, which had obtained prebankruptcy judgment in its name; therefore, the debt arising from fines was not a debt payable to a governmental unit, nor was it for the benefit of a governmental unit. The proof established that the debtor had personally paid all but $150 of the fines before the debt collector obtained its judgment. The collector willfully violated the discharge injunction, for which it was held in contempt. The debtor's actual damages and reasonable attorney fees were awarded. *In re Dickerson,* 510 B.R. 289 (Bankr. D. Idaho 2014). *See also Gecy v. Bank of the Ozarks (In re Gecy),* 510 B.R. 510 (Bankr. D. S.C. 2014) (Mortgagee willfully violated discharge injunction by moving for summary judgment on Chapter 7 debtor's guaranty of mortgage debt owed by debtor's wholly-owned LLC, with minimal actual damages and $5,000 attorney fees to debtor.).

Discharge denied for refusal to comply with court order. The debtor willfully failed to comply with court's order to allow trustee, auctioneer and real estate broker to have reasonable access to residence for review of exempt and nonexempt property. Discharge was properly denied under § 727(a)(6). *Moore v. Robbins,* ___ F.Supp.2d ___, 2014 WL 930852 (D. D.C. March 11, 2014).

Post-discharge complaint violated discharge injunction. Creditors violated the discharge injunction by filing a complaint against the debtor, who had been a contractor, even though the plaintiffs were seeking restitution from Minnesota Contractors Recovery Fund (MCRF). The complaint exposed the debtor to potential personal liability, since it sought determination that the debtor was accountable for the underlying debt and it asked for damages in excess of the restitution cap under the MCRF—the debtor could have had an excess judgment against him. The plaintiffs should have asked the bankruptcy court for leave to file the complaint, allowing the bankruptcy court to determine in advance whether the complaint would violate the discharge injunction and to structure the appropriate relief. *Bradley v. Fina (In re Fina),* 550 Fed.Appx. 150 (4th Cir. 2014).

Waiver of Discharge

Interests of creditors not considered in waiver of discharge. Considering the requirements under § 727(a)(10) for waiver of discharge and the split of authority on whether the court should consider the interests of creditors and other parties in interest, the court found it significant that the statute had no language suggesting such consideration. This debtor filed a written and signed waiver, and the debtor testified that his waiver was made knowingly, with assistance of counsel. The waiver was approved, which rendered moot complaints to deny discharge. *In re Akbarian,* 505 B.R. 326 (Bankr. D. Utah. 2014). Compare *Wank v. Gordon (In re Wank),* 505 B.R. 878 (BAP 9th Cir. 2014) (Debtor's declaration amounted to prepetition waiver of discharge.).

Conversion

Earnings of individual Chapter 11 debtor revert to debtor on conversion to Chapter 7. The case was converted from Chapter 7 to 11 and then reconverted to 7, and the individual debtor received a bonus from personal services that was property of the Chapter 11 estate. Disagreeing with courts deciding otherwise, on reconversion to Chapter 7, the Bankruptcy Appellate Panel concluded that "there is no reason to treat chapter 11 debtors differently than chapter 13 debtors

in this context." The bonus that would have been property of estate if case stayed in Chapter 11 reverted to the debtor on conversion to Chapter 7. *Wu v. Markosian (In re Markosian),* 506 B.R. 273 (BAP 9th Cir. 2014).

Conversion denied for bad faith failure to disclose asset. The Chapter 7 trustee successfully objected to the debtors' conversion to Chapter 13. Applying *Marrama*, bad faith was found in failure for two years to disclose one debtor's interest in realty that he owned with his father. Debtors were also denied amendment of exemptions to claim that interest as exempt. *In re Hale,* 511 B.R. 870 (Bankr. W.D. Mich. 2014).

Dismissal

High income doctor's case not filed in bad faith. The creditor's motion to dismiss on grounds of bad faith, or to convert to Chapter 11, was denied. The debtor was a medical doctor, age 63, currently earning $290,000 per year, and the creditor, a physician's group that formerly employed the debtor, had obtained a prebankruptcy judgment for $170,854. The debtor had a 401K account, worth about $120,000, and the debtor credibly testified that he was worried about retirement and ability to save enough. The debtor owned no real estate and no non-exempt property, except for his wife's jewelry that could be community property (the debtor paid $30,000 to the trustee to settle any claim of estate to jewelry). Agreeing with the narrow approach to bad faith as a factor for dismissal under § 707(a), bad faith could be cause for dismissal but is limited to extreme cases. Under totality of circumstances, the debtor's ability to pay creditors is not enough to support bad faith finding. The only unsecured creditor relied on the debtor's high income and failure to try to pay or settle, but high income itself is not enough to support bad faith. Although the creditor had judgment, it was by default in another state and the debtor could not afford at the time to defend it. Filing bankruptcy rather than pay a disputed debt is not in itself bad faith. "With his retirement looming and only $120,000 saved, the Debtor's decision to file a Chapter 7 case so he could save for retirement rather than pay Movant was not bad faith." *In re Snyder,* 509 B.R. 945 (Bankr. D. N.M. 2014).

Reopening

Reopening closed Chapter 7 not prerequisite to creditor's filing dischargeability complaint. The bankruptcy court had ordered the clerk to reject a complaint when the plaintiff/creditor had not moved to reopen the closed case, but the Bankruptcy Appellate Panel concluded that reopening a case to initiate the dischargeability proceeding is a managerial act, with no immediate impact of any substance on the underlying case. Filing of the adversary proceeding is a new docket entry, and reopening the closed case is not a prerequisite to filing the dischargeability complaint. Even if the complaint is untimely, reaching the merits on a motion is dismiss is not appropriate, unless the complaint is "completely lacking in merit." The bankruptcy court's refusal to allow filing of the complaint was reversed. *Goldstein v. Diamond (In re Diamond),* 509 B.R. 219 (BAP 8th Cir. 2014). *See also In re Steward,* 509 B.R. 123 (Bankr. W.D. Mich. 2014) (Cause for reopening to allow § 523(a)(3) determination of scope of discharge.); *In re Wilson,* 511 B.R. 103 (Bankr. E.D. Mich. 2014) (Reopening granted to allow scheduling of omitted creditor and for that creditor to file § 523(a)(3) complaint.).

Chapter 13 Issues

Eligibility

Same sex debtors legally married in one state were eligible spouses. Debtors who were legally married in a state that recognized validity of same-sex marriages were deemed to be "spouses" for filing in a state that did not recognize such marriages. Under *United States v. Windsor,* 133 S.Ct. 2675 (2013), DOMA's requirement that the word "spouse" referred only to opposite-sex couples was invalidated. Therefore, for purposes of federal law, the debtors who were legally married under the laws of Iowa were eligible to file as spouses in Wisconsin, even though Wisconsin did not recognize same-sex marriages. *In re Matson,* 509 B.R. 860 (Bankr. E.D. Wis. 2014).

Debt limits are not jurisdictional and are subject to waiver. In a case filed in 2010, then dismissed for failure to file a plan but reinstated, the bankruptcy court heard evidence in 2012 on a creditor's motion to dismiss for lack of eligibility. By the time the creditor filed its motion to dismiss, asserting that the debtors exceeded the unsecured limit, the debtors had maintained plan payments for two years, and the creditor had not moved to dismiss when it filed its plan objection. Finding that a majority of courts had concluded that § 109(e) debt limits are not jurisdictional, the district court agreed, holding that a creditor may waive the debt limit eligibility by not raising it timely. The case and confirmation had been heavily litigated for two years before the creditor moved to dismiss on § 109(e) grounds, with the doctrine of laches applying. The court also affirmed the bankruptcy court's finding of the debtors' good faith in filing the case and proposing a plan. *General Lending Corp. v. Cancio,* 505 B.R. 63 (S.D. Fla. 2014).

Debtor ineligible when credit counseling completed after petition filed. Although completed on the same day as the petition filing, the debtor did not complete the required credit counseling before filing. Discussing the split of authority on the meaning of "date of filing" in § 109(h)(1), as well as the status of a "debtor" under that statute, the court concluded that "[i]f a person must qualify as a 'debtor' to file a case, then someone who has not yet received a credit counseling briefing—and so may not be a debtor—cannot properly file." Section 109(h)(1)'s "present perfect tense ['has received'] does not indicate continuing activity. Rather, the tense is used in a phrase or sentence to set out an action, completed in the past, that has a present effect." The debtor's motion to vacate dismissal was denied. *In re Arkuszewski,* 507 B.R. 242 (Bankr. N.D. Ill. 2014).

Curing Defaults

Tax purchaser's claim could be paid through plan. Under Illinois law, a tax purchaser who paid Chapter 13 debtor's real property taxes but had not received title to the property held a secured claim that could be treated in the plan. The bankruptcy court correctly denied the purchaser stay relief to acquire a tax deed. The debtor still retained a right of redemption, and the purchaser's secured claim was subject to modification and payment by installments in the plan, rejecting the purchaser's argument that the redemption must be in lump sum before the redemption deadline. "The plan is treating the secured claim, *not* formally redeeming the property." *In re LaMont,* 740 F.3d 397 (7th Cir. 2014).

Foreclosure sale was complete prepetition. Applying New Hampshire law, mortgage foreclosure was complete when the auctioneer's hammer fell, ending the mortgagor's equity of redemption. Under § 1322(c)(1), even though legal title had not passed and a deed had not been recorded, the foreclosure was complete, and the property was not part of the bankruptcy estate. The debtor had no rights in the property and could not cure default. *TD Bank, N.A. v. LaPointe (In re LaPointe),* 505 B.R. 589 (BAP 1st Cir. 2014).

Debtor's right to cure is governed by § 1322(b) rather than § 108(b). The debtors had entered into a land contract, which contained a provision that on default of payments for thirty days, the entire balance was due on written notice from the seller. The debtors failed to make a prepetition balloon payment, and the sellers obtained a strict foreclosure judgment, which established a redemption period (Under applicable Wisconsin law, the strict foreclosure judgment was not a "sale."). The Chapter 13 case was filed and the proposed plan provided for redemption over a period of sixty months. Under Wisconsin law, the seller holds legal title and the buyer under a land sales contract holds equitable title. The seller argued that § 108(b) established that redemption must be complete within sixty days of the time set by the strict foreclosure judgment. Section 1322(b)(5) provides for curing of defaults within a reasonable time, and the court found the decision of *In re Frazier,* 377 B.R. 621 (BAP 9th Cir. 2007), to be persuasive. The power to cure defaults in Chapter 13 is not restricted by § 108(b); rather, § 1322(b) is the more specific statute that controls. The debtors could propose to cure defaults within a reasonable time in their plan. *In re Johnson,* ___ B.R. ___, 2014 WL 3346471 (Bankr. W.D. Wis. July 8, 2014).

Postpetition Property of Estate

Inheritance received more than 180 days postpetition included in property of estate. Section 1306(a)(1) broadens § 541(a)'s definition of property of the estate, to include all property acquired after commencement of the case, not limited by § 541(a)(5)'s 180-day postpetition limit, agreeing with *Carroll v. Logan,* 735 F.3d 147 (4th Cir. 2013). The inheritance must be turned over, unless the debtors modified their plan to increase distribution to unsecured creditors. *Dale v. Maney (In re Dale),* 505 B.R. 8 (BAP 9th Cir. 2014).

Life insurance proceeds received by debtor on wife's postpetition death not included in property of estate. Discussing the split of authority, the court held that § 1306(a)(1) does not include property that § 541(a)(5) does not include—"the specific date restriction set forth in § 541(a)(5) controls and § 1306(a)(1) does not eliminate that restriction." The debtor/husband received $250,000 from life insurance on his debtor/wife, who died two years after the Chapter 13 was filed. The husband disclosed this in an amendment to schedules and claimed it as exempt. The debtor then proposed modification of the confirmed plan to pay $15,000 from the proceeds to unsecured creditors, and the trustee objected, asserting that the insurance proceeds would pay all claims in full. The effect of § 348, in the event of conversion to Chapter 7, would be that the postpetition insurance proceeds would not be property of the estate; therefore, in the

absence of bad faith conversion, the proceeds would not be included in a hypothetical Chapter 7 liquidation, and the best interests of creditors test does not come into play. The court agreed with others who have held that the disposable income test does not apply to postconfirmation modification, since after BAPCPA, "a debtor's receipt of a postconfirmation asset cannot possibly be 'disposable income' under its statutory definition because the debtor did not receive it during the six months preceding the filing of the petition." The proposed modification did not run afoul of the projected disposable income test; however, the "ability to pay" test still applies to post-BAPCPA modifications, requiring consideration of a debtor's postconfirmation property that materially changes ability to pay debts. Nevertheless, under Eleventh Circuit authority, in the absence of a sustained objection to a claim of exemption, exempt property could not be disposable income. Under the facts of this case, the ability to pay test led to finding that the debtor could not use all insurance proceeds to pay creditors in full without impairing his future needs and fresh start. The debtor's modification was approved. *In re McAllister,* 510 B.R. 409 (Bankr. N.D. Ga. 2014).

Applicable Commitment Period

Fourth Circuit holds that above-median debtor must maintain 60-month plan. The above-median debtors, who had negative disposable income, proposed a plan that contained early termination language permitting completion in 55 months, but that would not pay unsecured creditors in full. The bankruptcy court denied confirmation and direct appeal to the Fourth Circuit resulted in holding that the applicable commitment period is a temporal requirement. Such debtors must either maintain a full 60-month plan or pay unsecured creditors in full. In dicta, the court also stated that § 1329 "expressly incorporates the applicable commitment period as a temporal limit for purposes of plan modification. . . .In other words, for purposes of plan modification, the applicable commitment period appears to serve as a measure of plan duration wholly unrelated to debtors' disposable income." *Pliler v. Stearns,* 747 F.3d 260 (4th Cir. 2014).

Self-employed debtor could not deduct business expense in determining applicable commitment period. The debtors proposed a three-year plan, in which unsecured creditors would not be paid in full, and the trustee objected, with the court concluding that § 1325(b)(4) does not mention "ordinary and necessary business expenses." And, § 101(10A)'s definition of current monthly income does not mention those expenses; although Form 22C does allow subtraction of those expenses to arrive at current monthly income. Section 1325(b)(2)(B) does provide for deduction of business expenses in arriving at disposable income, but the court agreed with other courts, holding that a self-employed debtor may not deduct business expenses in calculating current monthly income for purposes of determining the applicable commitment period. *In re Hoffman,* 511 B.R. 128 (Bankr. D. Minn. 2014). *See also In re Kuwik,* 511 B.R. 696 (Bankr. N.D. Ga. 2014) (For purposes of applicable commitment period, above median self-employed debtor and his spouse could not deduct allowable business expenses, but must use self-employed debtor's gross business income, with the court discussing the conflicting views of the gross receipts approach.).

Disposable Income

Stripped off junior mortgage not deductible for projected disposable income. Applying *Lanning's* forward-looking approach, when it was known that the debtors would be stripping off wholly unsecured junior lien, those payments could not be deducted in the projected disposable income calculation. *Kramer v. Bankowski (In re Kramer),* 505 B.R. 614 (BAP 1st Cir. 2014).

Debtors' voluntary contribution of Social Security benefits did not require dedication of all benefits, but deduction for long-term care insurance was denied. Under the Eighth Circuit's *In re Carpenter,* 614 F.3d 930 (8th Cir. 2010) and *In re Thompson,* 439 B.R. 140 (BAP 8th Cir. 2010), there is no forced inclusion of Social Security benefits in a plan. Therefore, the debtors are in control of whether and how much of their Social Security benefits they devote to a plan. In the absence of other indicia of bad faith, the debtors' voluntary contribution of only part of those benefits is not grounds to deny confirmation. However, when the debtors failed to justify a deduction for long-term care insurance premiums and that type of expense was not listed in § 707(b)(2) as "other necessary expense," and when the plan did not provide for payment in full of unsecured claims, confirmation was denied. *In re Melander,* 506 B.R. 855 (Bankr. D. Minn. 2014). See also *In re Worthington,* 507 B.R. 276 (Bankr. S.D. Ind. 2014) (Social Security benefits were not included in definition of current monthly income, and debtor's failure to dedicate all of those benefits to plan was not lack of good faith; debtor had voluntarily devoted part of benefits to plan.).

Cash surrender value of whole life insurance not disposable income when debtors did not deduct premiums. The above-median income debtor had whole life insurance, with cash surrender value that would increase over the plan life. Form B22C provides for deduction from disposable net income of the premiums on term life insurance, but not whole life, when calculating necessary expenses. The debtors deducted term life premiums but did not deduct from their means test their whole life premiums. The issue before the court was not the necessity or reasonableness of the premium expense, but 'whether the increase in value postpetition must be paid to unsecured creditors." The trustee argued that the *Lanning* "forward-looking" approach required the increasing value to be included in disposable income. The court looked to the IRS Manual for actual expenses under its "Other Necessary Expenses" category, finding that one of those IRS expenses was for term life insurance premiums, as well as premiums on whole life, "to the extent that it does not increase its cash value." Here, the debtors did not attempt to adjust their means test by deducting the whole life premiums, and the court found that these debtors satisfied the requirements of § 1325(b)'s projected disposable income. "As a general rule, debtors need not commit any more funds to payment of unsecured creditors than those required by the 'projected disposable income' test, in order to meet the requirements for confirmation." *In re Uhlig,* 504 B.R. 916 (Bankr. E.D. Wis. 2014).

Single economic unit approach for "household" adopted. Reviewing the undefined term "household" in § 1325(b)(4) and the judicial interpretations, the bankruptcy court rejected the "heads-on-bed" and "IRS dependent" approaches, in favor of the "economic unit" approach. The "heads-on-bed" approach "depends solely on the number of residents in a structure and is unconcerned with the presence of a familial or economic relationship between the individuals. . . .The 'IRS dependent' definition is narrow, as it only allows individuals that can satisfy each

requirement of the IRS test to be included within a debtor's 'household.'. . .The 'economic unit' definition realizes that there may be individuals who have a significant impact on a debtor's financial reality that do not qualify as a dependent for IRS purposes, or that an individual can live with the debtor without affecting his ability to pay creditors." The court then discussed the evidentiary burden for the debtor, adopting a rebuttable presumption: "If an individual is listed as a dependent on the debtor's or the debtor's non-filing spouse's most recent income tax return, that individual is presumed to be a member of the debtor's bankruptcy 'household.'. . .If an individual is not listed as a dependent on the debtor's or the debtor's non-filing spouse's most recent income tax return, that individual is rebuttably presumed to not be a member of the debtor's bankruptcy 'household.'. .The party desiring a different conclusion has the initial burden of providing evidence showing that the individual satisfied the 'economic unit' definition. . . [T]he burden then shifts to the opposing party to provide countervailing evidence." In the present case, there were part-time children residing in the residence, with both spouses having children from prior marriages, and the court discussed the difficulty of accounting for such living arrangements. *In re Skiles,* 504 B.R. 871 (Bankr. N.D. Ohio 2014).

Above-median debtor could not deduct $200 for old car expense. Operating expenses that are deductible for purposes of determining projected disposable income are governed by § 707(b)(2), which does not include a deduction for an "old car." That deduction is found in the IRS Manual that aids agents in offers to compromise, but not in the part of Manual that identifies Local and National Standards used in the disposable income calculation. Also, the debtor may not deduct ownership costs of a vehicle when those costs are for a loan unrelated to purchase or lease of the vehicle. The debtor attempted to deduct as ownership cost monthly payments on a non-purchase money loan. *In re Sires,* 511 B.R. 719 (Bankr. S.D. Ga. 2014). *See also Drummond v. Luedtke (In re Luedtke),* 508 B.R. 408 (BAP 9th Cir. Apr. 9, 2014) ($200 monthly older vehicle operating expense was not included in Local or National Standards for deduction in calculating projected disposable income, adopting plain meaning to § 707(b)(2)(A)(ii)(I). *Ransom* does not support such a deduction, nor does *Lanning.).*

Best Interests of Creditors Test

Postpetition domestic support obligation was not allowed claim and best interests test failed. Although the Code defines domestic support obligation to include pre- and postpetition obligations, and the debtor may deduct postpetition domestic support obligations in the projected disposable income calculation, § 502(b)(5) disallows a claim to the extent it is for a debt unmatured at petition date, while the debt is excepted from discharge under § 523(a)(5). Only the prepetition DSO claim is an "allowed claim," notwithstanding other Code requirements that the debtor pay postpetition domestic support obligations. Since the former spouse's postpetition DSO is not an allowed claim, that debt and its proposed payment in the plan may not be deducted in the best interests calculation. The debtor was attempting this in order to avoid liquidation of otherwise nonexempt assets. In addition, this above-median debtor could not deduct as a business expense the mortgage payments on an office building, since there was lack of proof that the building was suitable for or used regularly as an office. *McKinney v. McKinney (In re McKinney),* 507 B.R. 534 (Bankr. W.D. Pa. 2014).

Cure and Maintain

Direct payments to mortgagee were part of cure and maintain plan. Under the confirmed plan, debtors were to pay directly the ongoing, postpetition mortgage payments, and those payments were "under the plan" for purposes of § 1322(b)(5), citing Fifth Circuit authority. The debtors' failure to make those payments was a material default under the plan and prevented entry of discharge. Rather than deny discharge, the trustee's motion to dismiss the case was granted, subject to the debtors having time to convert the case to Chapter 7. *In re Heinzle,* 511 B.R. 69 (Bankr. W.D. Tex. 2014).

Secured Claims

Replacement value applied when debtor surrenders collateral. The plan provided for surrender of a vehicle to satisfy the secured claim, and the bankruptcy court and Eleventh Circuit held that § 506(a)(2)'s valuation standard applied. The bankruptcy court conducted a valuation hearing, finding that the replacement value was at least equal to the debt and that the surrender had satisfied the secured claim. The creditor disputed that § 506(a)(2) applied to surrendered collateral. The Circuit Court held that by its plain terms the section applied, rejecting the argument that replacement value only applied when the debtor retained collateral. Although § 506(a)(2) has been described as a codification of *Rash,* its scope is not limited to retention. *Santander Consumer USA, Inc. v. Brown (In re Brown),* 746 F.3d 1236 (11th Cir. 2014).

Oversecured creditor subject to *Till* rate after confirmation. Interpreting Fifth Circuit precedent, *In re Smithwick,* 121 F.3d 211 (5th Cir. 1997), the court concluded that an oversecured creditor was entitled to postpetition contract interest of 27.84% only until confirmation, but after confirmation, *Till v. SCS Credit Corp.,* 541 U.S. 465 (2004) controlled interest to ensure present value of payments. Locally accepted *Till* rate of 7% was appropriate. *In re Stringer,* 508 B.R. 668 (Bankr. N.D. Miss. 2014).

Lien Stripping

Eleventh Circuit agrees that discharge-ineligible debtor may strip wholly unsecured junior lien. BAPCPA's amendments did not alter the ability of a debtor to use §§ 506(a) and 1322(b)(2) to strip off in a plan the wholly unsecured junior mortgage, despite the debtor's inability to obtain discharge because of her recent Chapter 7 discharge. The opinion found the majority view more persuasive. Section 1325(a) was not involved and the debtor's ineligibility for discharge was irrelevant in a Chapter 20 case. BAPCPA did not amend §§ 506(a) or 1322(b)(2), as they affect such lien stripping. *Wells Fargo Bank, N.A. v. Scantling (In re Scantling),* 754 F.3d 1323 (11th Cir. 2014). *See also Monroe v. Seaway Bank & Trust (In re Monroe),* 509 B.R. 613 (Bankr. E.D. Wis. 2014) (Although debtors could not avoid wholly unsecured lien under § 506(d), they could strip the lien in a plan under §§ 506(a) and 1322(b)(2), and no Code provisions restrict this right to debtors eligible for discharge. If the creditor does not hold a secured claim, § 1325(a)(5)(B)(i) is not applicable. If the plan is fully performed, the lien may be stripped.).

Sixth Circuit BAP allows lien stripping in Chapter 20. A debtor who was ineligible for discharge because of a prior Chapter 7 discharge within four years was not prevented from stripping a wholly unsecured junior mortgage in the plan. The confirmed plan contained a provision for "avoiding" that mortgage, but the bankruptcy court denied the debtor's postconfirmation motion to avoid based on §§ 1325(a)(5) and 1328(f). The bankruptcy appellate panel reviewed the split of authority and followed the "growing consensus of courts" that inability to receive discharge did not prevent application of §§ 506(a) and 1322(b)(2). *In re Cain,* ___ B.R. ___, 2014 WL 3397702 (BAP 6th Cir. July 14, 2014).

Antimodification provision in Code protected due-on-sale clause. The debtors had quit-claimed residential property to their son, so that he would obtain a mortgage loan, for which the parents did not qualify, and then reconvey the property to the parents. The loan had a due-on-sale provision, accelerating the loan in the event of transfer, and the debtors could not modify that clause because of § 1322(b)(2). The mortgagee had not waived its right to assert default. *In re Espanol,* 509 B.R. 422 (Bankr. D. Conn. 2014).

Condominium association's liens could be stripped. The debtor owned two condominium units, and after the debtor's failure to pay obligations under the condominium documents, the association obtained state court receiver and judgment for foreclosure. The receiver had collected and was holding rental funds. These units were not the debtor's residence and the association's liens were not protected by § 1322(b)(2). The association was wholly unsecured, except as to the money being held by the receiver, but the amount of its secured claim was to be determined, and the association was bound by its agreement with the debtor that it would not file a claim for more than $50,000. *In re Forde,* 507 B.R. 509 (Bankr. S.D. N.Y. 2014).

Surrender

Creditor not required to accept surrendered property. The confirmed plan provided for surrender of a residence to SBA and granted stay relief for the creditor to foreclose its mortgage, but after a year the creditor had taken no foreclosure steps. Section 1325(a)(5)(C) does not serve to pass ownership to the secured creditor, nor does it require the creditor to foreclose. Most courts have found nothing in the Bankruptcy Code that construes "surrender" as requiring the creditor to take control of the property; rather, the creditor remains in control of its remedies under applicable law. "Vesting" under § 1322(b)(9) also does not require a creditor to accept title to the surrendered property. Applicable Florida law does not permit a debtor to simply deed the property over to the secured creditor, although a debtor may quitclaim the property to the creditor, provided the creditor does not object—the creditor may avoid taking title by simply objecting to the conveyance. Section 105 is not authority for the court to compel substantive action by the creditor. *In re Rose,* ___ B.R. ___, 2014 WL 3339612 (Bankr. W.D. N.C. July 8, 2014).

Unfair Discrimination

Plan unfairly discriminated in payment of non-priority taxes. Plan treated non-priority, nondischargeable tax debt at 100%, with nothing to other unsecured creditors, and when bankruptcy court rejected that plan, debtors amended but then objected to confirmation of plan

with that classification removed. Applying test of *In re Lesser,* 939 F.2d 669 (8th Cir. 1991), the separate classification was not justified by the nondischargeability of the taxes. Proposing a plan that would pay those taxes in full, with nothing to other creditors was not in good faith. "In short, they propose to 'protect' those creditors least in need of protection, at the expense of the most vulnerable." *Copeland v. Fink (In re Copeland),* 742 F.3d 811 (8th Cir. 2014).

Modification

Modified plan failed to satisfy best interests of creditors test. Debtors had sold their Texas homestead but failed to reinvest the proceeds within six months in another homestead, as required by Texas exemption for proceeds. The proposed modified plan sought to allow the debtors to retain those proceeds, but the trustee objected on grounds that the modification violated the best interests test and was not proposed in good faith. Citing *In re Frost,* 744 F.3d 384 (5th Cir. 2014), for holding that failure of Chapter 13 debtor to reinvest sale proceeds in a new homestead within six months results in loss of exemption in proceeds, the bankruptcy court's denial of the plan modification was affirmed, finding that the modification would not distribute to unsecured creditors what they would receive in Chapter 7. *Garcia v. Bassel,* 507 B.R. 907 (N.D. Tex. 2014). *See also In re McAllister,* 510 B.R. 409 (Bankr. N.D. Ga. 2014), under Postpetition Property of Estate, for substantial discussion of modification when debtor received postpetition life insurance proceeds.

Projected disposable income requirement not applicable to modification. The trustee sought modification to increase payments due to the increase in debtors' income, and the dispute was whether § 1325(b) was applicable to determine the amount of the plan increase. Discussing the split of authority over whether § 1325(b)'s projected disposable income test applies to postconfirmation modifications, the court concluded that it did not apply. The court concluded that it was not likely that the Fourth Circuit would apply § 1325(b) to a proposed plan modification, and "a review of *Hamilton v. Lanning, . . .*leads to the conclusion that the Supreme Court would also recognize the impracticality of applying the strict standards imposed by § 1325(b) to plan modifications after BAPCPA, particularly given the absence of a clear intent on the part of Congress." These debtors had filed an amended Schedules I and J, reflecting substantial increase in average monthly income and expenses since confirmation, and those Schedules established the feasible amount of increase in plan payments for the balance of the plan term, as proposed by the debtors. *In re Swain,* 509 B.R. 22 (Bankr. E.D. Va. 2014). *See also In re McAllister,* 510 B.R. 409 (Bankr. N.D. Ga. 2014), under Postpetition Property of Estate, for conclusion that disposable income test does not apply to postconfirmation modification.

Decision certified to Fifth Circuit on whether above-median debtor may receive discharge prior to completion of 60-month plan. With no controlling decision from Fifth Circuit, the bankruptcy court approved the confirmed debtors' ability to obtain discharge without paying unsecured creditors 100%, when they had made a lump sum payment that, combined with regular payments, exceeded the plan base. Trustee had moved to modify the plan to increase the plan base and appealed denial of that motion, citing four circuits' opinions that above-median debtors are bound by 60-month applicable commitment period, unless unsecured creditors are

paid 100%. The bankruptcy court found certification of the appeal to the Fifth Circuit to be appropriate. *In re Ruth,* 505 B.R. 804 (Bankr. S.D. Tex. 2014).

Postconfirmation modified plan not required to comply with projected disposable income test. After confirmation of above-median debtor's plan, debtor's income decreased and he moved to modify to reduce term of plan and distribution to unsecured creditors. The court concluded that § 1329(a)(2) permits shortening of plan term and that § 1325(b)'s projected disposable income is not enumerated in § 1329(b)(1)'s modification requirements. The split of authority on the issue was discussed, concluding that "the inclusion of section 1325(b) in the requirements for modifying a plan under section 1329(b) is too oblique and tenuous to be what the modification statute is intended to provide. Congress included certain statutory references in section 1329 and left out this one. Dragging in the requirement for unmodifiable duration indirectly, when other requirements are addressed directly is not appropriate." *In re Barnes,* 506 B.R. 777 (Bankr. E.D. Wis. 2014). See also *In re Pasley,* 507 B.R. 312 (Bankr. E.D. Cal. 2014) (Although below-median debtor's plan was confirmed with good cause for 60 months, to allow amortization of mortgage arrearage, debtors did not waive right to modify plan to 44 months. Code does not provide for forcing below-median debtors to remain in plan longer than 36 months, rejecting trustee's objection to modification.).

Effect of Conversion

Fifth Circuit gives undistributed money to creditors. On conversion of a confirmed case to Chapter 7, the undistributed funds held by the Chapter 13 trustee should go to creditors, except for $1,200 assigned by the debtor for payment of unpaid attorney fees. The circuit panel discussed the split of authority on what passes to the Chapter 7 estate on conversion, prior to the 1994 amendment to § 348, as well as the absence of a statute that explictly states what happens to undistributed money on conversion after the 1994 amendment. No statutory authority supports an interpretation that a confirmed plan is retroactively undone, and conversion does not eliminate the Chapter 13 trustee's duty to wrap up the Chapter 13 estate, including the distribution of funds in the trustee's hands that were paid while the plan was in force. While rejecting the trustee's arguments that creditors were "vested" in postconfirmation funds, or that § 1327(a) bound the parties after conversion, the panel also rejected the Third Circuit's reliance on § 1327(b), noting that the plan may provide otherwise than the funds revesting in the debtor at conversion. "If the plan requires the debtor to make payments to the trustee that will be distributed to creditors, the debtor certainly does not retain possession of those payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee." Finding little guidance in the Code, the panel relied on policy and equity, seeing congressional intent to encourage repayment through Chapter 13. "Wages paid to the trustee pursuant to the Chapter 13 plan should be distinguished from the debtor's other property acquired after the date of filing. . . .We conclude that returning undistributed funds to the debtor is not justified by the policy of encouraging debtors to proceed through Chapter 13 rather than Chapter 7. Additionally, distribution of the funds to creditors is supported by strong considerations of fairness." Although payments under the confirmed plan don't give creditors vested rights to payment, the claims of creditors to undistributed funds is

superior to the claims of the debtor. *Viegelahn v. Harris (In re Harris),* ___ F.3d ____, 2014 WL 3057095 (5th Cir. July 7, 2014).

Undistributed money under confirmed plan must be paid to creditors on conversion to Chapter 7. The debtors moved to convert their case to Chapter 7, and the trustee had $1,683.46 on hand. The debtors sought to have those funds refunded to them, but the court found a local rule and the confirmation order to be controlling. The local rule provides that after confirmation, any funds received by the trustee before dismissal or conversion would be disbursed to creditors pursuant to the plan's terms, and the confirmation order had a similar provision. Conversion terminates the Chapter 13 estate, but it does not revoke what the confirmed plan lawfully ordered. Further, the court found that § 1326(a)(2) dictated that the funds be disbursed to creditors. The court held that undistributed money did not vest in the debtors, with the effect of confirmation dictating otherwise in this case. *In re Smith,* 511 B.R. 612 (Bankr. W.D. Mo. 2014).

Undistributed funds in confirmed case are property of creditors. Reviewing split of judicial authority, the court distinguished *In re Michael,* 699 F.3d 305 (3d Cir. 2012), in part on the basis that it involved a plan in which re-vesting occurred on confirmation. Here, the confirmed plan provided that property did not re-vest in debtors until plan completion. The court concluded that whether the debtors or creditors received undistributed funds upon conversion to Chapter 7 was a question of law, and nothing in the Code, including § 348, indicated that conversion acted to vacate the effect of confirmation. Further, under that section, the undistributed funds were no longer property of the estate, but the debtors had no property interest in them. The binding effect of confirmation meant that the undistributed funds must go to the Chapter 13 creditors. *In re Markham,* 504 B.R. 1 (Bankr. D. Mass. 2013).

Attorney for former Chapter 7 trustee had standing to object to confirmation and join motion to reconvert. After the Chapter 7 case had been converted post-discharge to Chapter 13, former Chapter 7 trustee and attorney for that trustee moved for reconsideration and then objected to confirmation. The attorney had standing as the holder of an administrative claim to participate in the confirmation process. Finding that the debtors violated court orders related to production of all bank statements for accounts opened postpetition and accounting of certain funds, there was cause to reconvert the case to Chapter 7. Further, the court found that the debtor's motion to convert to Chapter 13 was filed in bad faith, as well as their second amended plan. The court found cause to reconsider its prior denial of the former Chapter 7 trustee's motion to reconvert, citing Tenth Circuit interpretation of Rule 60(b). *In re McDonald,* 508 B.R. 187 (Bankr. D. Colo. 2014).

Dismissal

Attorney-fee case in bad faith. The Eleventh Circuit held that the bankruptcy court did not clearly err in dismissing a Chapter 13 case filed for the purpose of paying attorney fees by installment. The bankruptcy court found that the debtor clearly would be better served by a Chapter 7 case and discharge. The debtor scheduled $16,000 in unsecured claims, but only three creditors filed claims, totally $1,355. The plan proposed to pay administrative claims, including

$2,000 attorney fees, over a seventeen month period. Acknowledging that under *Lamie v. U.S. Trustee,* 540 U.S. 526 (2004), the debtor's Chapter 7 attorney could not be paid from estate funds, and without deciding whether "attorney-fee-centric" plans were ever confirmable, the bankruptcy court did not clearly err in finding that the case was filed and plan proposed in bad faith. Such determinations are necessarily case-by-case. *Brown v. Gore*, 742 F.3d 1309 (11th Cir. 2014).

Case properly dismissed for bad faith. Bankruptcy court properly considered prior bankruptcy filings and timing of current case that was filed on morning of sheriff's sale of commercial property, after state court had denied numerous attempts to stop sale. Debtor's mother had also filed Chapter 13 to stay sale of jointly owned property. Court found no legitimate reason for debtor's filing and no prospect of reorganization. Case was dismissed for bad faith, and bankruptcy court did not abuse discretion in sanctioning debtor for judgment creditor's and trustee's costs. *In re Mondelli,* 558 Fed.Appx. 260 (3d Cir. 2014).

Case properly dismissed for failure to comply with credit counseling. Assuming the debtor's alleged lack of funds to pay for credit counseling could be an exigent circumstance, the debtor did not demonstrate that he had applied for credit counseling and had been unable to obtain it within the required seven days. The requirements of § 109(h)(3) were not satisfied, and the case was properly dismissed. *Taal v. Sumski (In re Taal),* 504 B.R. 682 (BAP 1st Cir. 2014).

Undistributed money under confirmed plan must be returned to debtors on dismissal. Affirming, the district court considered the interplay of §§ 349(b)(3) and 1326, concluding that § 1326 was no longer applicable upon dismissal, since the confirmed plan was no longer enforceable. Section 349 controlled, with § 349(b)(3) revesting property of the estate in the debtor. The trustee was required to return undistributed funds to the debtors upon their voluntary dismissal. *Williams v. Marshall,* ___ B.R. ___, 2014 WL 1457828 (N.D. Ill. Apr. 11, 2014).

Fraud not required for bad faith finding. Under a totality of circumstances examination of good faith, while fraud is a factor, it is not necessary to a bad faith finding. The debtor exhibited a pattern of deliberately misleading the court and trustee by misrepresentations of tax returns and financial affairs. Finding cause to dismiss, the dismissal was with bar to refiling for 365 days. *LaBarge v. Rotellini (In re Rotellini),* 510 B.R. 241 (Bankr. E.D. Mo. 2014).

Deduction of secured debt on surrendered collateral cause for dismissal. On the United States trustee's motion to dismiss case as abusive, the court reviewed the two lines of authority on whether a secured debt for collateral that the debtor intends to surrender should be scheduled as "contractually due" and deducted for purposes of § 707(b)(2)(A)'s means test. There was no controlling precedent in the Fifth Circuit, and the court adopted the forward-looking approach. As a result, "phantom expenses" for secured debt that will not be paid in the plan are not to be deducted, and the presumption of abuse was not rebutted when the debtors did deduct such payments in their means test calculation. The case was dismissed. *In re White,* ___ B.R. ___, 2014 WL 2960428 (Bankr. N.D. Miss. July 2, 2014).

Attorneys and Fees

Court had authority under Rule 9011. Bankruptcy court had inherent authority under Rule 9011 to sanction Chapter 13 debtor's attorney, on finding that attorney violated Rule throughout case, including amendment of schedules and plan to treat postpetition alimony as prepetition debt, when attorney knew that debtor had failed to make postpetition DSO payments. Sanctions included suspension from practice in bankruptcy court for six months, $1,000 fine and CLE requirement, and these were affirmed. However, further sanction for attorney's misrepresentation in testimony at the show cause hearing was remanded, because the attorney did not have notice of potential sanctions flowing from that hearing. *Young v. Young (In re Young),* 507 B.R. 286 (BAP 8th Cir. 2014).

Debtor did not require court approval of special counsel. Under §§ 1303 and 1306(b), the Chapter 13 debtor had possession of state-law cause of action against a creditor for wrongful repossession. The debtor and the Chapter 13 trustee have concurrent authority over estate property, subject to § 363's exclusive authority to the debtor to use, sell or lease property. A debtor is not a "trustee" for purposes of § 327, and the debtor was not required to seek court approval of employment of special counsel; however, such counsel must comply with §§ 329 and 330 concerning compensation. Any recovery from the cause of action would be property of the estate, for the benefit of creditors. *In re Jones,* 505 B.R. 229 (Bankr. E.D. Wis. 2014).

Discharge and Exceptions

Section 1328(f)'s phrase "in a case filed under" interpreted. The court construed § 1328(f)'s phrase "in a case filed under" to refer to the bankruptcy chapter under which the case was initially filed, rather to the chapter to which a case was subsequently converted. A case was initially filed under Chapter 13 and then converted before entry of a Chapter 7 discharge. The debtors subsequently filed their new Chapter 13. The trustee objected to discharge in the current case, arguing that "it is the Bankruptcy Code chapter under which the Debtors ultimately received a discharge and not the chapter under which the Debtors filed their prior bankruptcy that determines the discharge eligibility waiting period under § 1328(f)." The court concluded otherwise, under § 348's provision that conversion does not constitute a new case nor change the petition date. The chapter under which the prior case was filed determined the lookback period under § 1328(f), disagreeing with *In re Finney,* 486 B.R. 177 (BAP 9th Cir. 2013). Since the first case was initially filed under Chapter 13, the two-year look-back applied, and the debtors were eligible for Chapter 13 discharge in the current case. *In re Wilkinson,* 507 B.R. 742 (Bankr. D. Kan. 2014).

Debtor's willful failure to deliver insurance proceeds was exception from discharge. The children and former wife of decedent sought determination that Chapter 13 debtor, the widow of decedent, had failed to pay them life insurance proceeds as ordered by the state court, and that failure was found to be nondischargeable debt under § 523(a)(2)(A). The decedent had been ordered in a divorce and settlement with his former wife to maintain their children as beneficiaries of his life insurance policies, but he changed the beneficiary to his second wife, the Chapter 13 debtor. At the time of his death, the life insurance proceeds were paid to the debtor. The state court ordered turnover of the proceeds, after the debtor misrepresented that the proceeds would be held in escrow. In contempt of the state court's order, the debtor invaded the

proceeds, transferring some to her daughter and spending some. The debtor's deceptive behavior continued in her bankruptcy case. The debt resulting from the state court judgment was excepted from discharge under § 523(a)(2)(A), plus the plaintiffs were entitled to nondischargeable judgment for attorney fees related to the debtor's contemptuous conduct in state court. In addition, under Rule 9011(c), the plaintiffs' postpetition attorney fees were awarded. The Chapter 13 was dismissed with prejudice to refiling for two years. *Henri v. Wheeler (In re Wheeler),* 511 B.R. 240 (Bankr. N.D. N.Y. 2014).

Claims

Non-debtor spouse has claim for equitable distribution of marital property when parties were in prepetition divorce proceeding. On a direct appeal, the Third Circuit decided the issue of whether a non-debtor spouse has an allowable claim for equitable distribution of marital property in a divorce proceeding that was pending at the time the other spouse filed Chapter 7. Stating that the issue had divided courts in the Circuit, the court looked to the definition of a "claim" under § 101(5)(A), with the spouse's interest, "at the least, unliquidated and contingent on a final decree apportioning marital property." Citing its decision, *In re Grossman's,* 607 F.3d 114 (3d Cir. 2010), in which an asbestos-tort claim arose when the claimant was exposed to a product or conduct prepetition, the Circuit's earlier "accrual test" had been overruled. The focus is not on when the claim accrues, but "whether a claim exists," and the contingent nature of the spouse's claim did not change the fact that she had a claim for equitable distribution. *In re Ruitenberg,* 745 F.3d 647 (3d Cir. 2014).

Chapter 13 debtor was not "prevailing party" under California law for purposes of recovering attorney fees for claim objection. The Chapter 13 debtor filed an objection to the proof of claim for mortgagee, disputing $425 attorney fees in the claim. The claimant amended its proof of claim, deleting the attorney fees, and the debtor than sought her own attorney fees and costs of $5,265, under a California statute, but the bankruptcy court correctly concluded that the debtor was not a "prevailing party" under that statute. The claimant voluntarily amended its proof of claim, before the bankruptcy court was required to make any disposition on the claim or its objection. *Brosio v. Deutsche Bank Nat'l Trust Co. (In re Brosio),* 505 B.R. 903 (BAP 9th Cir. 2014).

Obligation to former wife for one-half of second mortgage was domestic support. Affirming, the Bankruptcy Appellate Panel found no clear error in the findings of domestic support obligations. The debtor and his former wife were married and divorced twice. In the first consent divorce decree, the wife agreed to hold the husband harmless on a first and second mortgage, but in the second consent decree, the husband agreed, in return for reduction of child support from the first decree, to pay one-half of the second mortgage. Upon the sale of the home, any deficiency was to be divided equally, but if there was a net recovery, it would go to the wife. The property was sold, and the former wife filed a priority claim in the Chapter 13 case for one-half of the second mortgage and for a judgment lien that had to be satisfied at sale. The bankruptcy court applied the Sixth Circuit's test of *In re Calhoun,* 715 F.2d 1103 (6th Cir. 1983), for determination of whether a debt is support in nature, and the husband's agreement to pay one-half of the second mortgage was intended as support, since, among other factors, it protected

the children's home. Also, the wife had insufficient income at the time of the decree to cover both mortgages. As to the judgment lien, since the former wife's receipt of proceeds for the sale would be support for the children, its satisfaction reduced the amount of support, and case law supports that a debt to a third party may qualify as support. *In re Thomas,* 511 B.R. 89 (BAP 6th Cir. 2014). *See also In re Gambale,* 512 B.R. 117 (Bankr. D. N.H. 2014) (Obligation to contribute $900 for replacement of furnace was domestic support obligation, serving function of support for ex-wife and children, but contribution of $400 every two weeks to ex-wife toward joint marital debt was not actually in nature of support and was not priority claim. Court discusses multi-factor test for whether an obligation is in nature of support.).

Chapter 7 debtors were not creditors and ineligible to file claims. In settlement of the Chapter 7 trustee's objection to their homestead claim to 80 acres, the debtors sold 20 acres of the property, with those funds going to the estate. The debtors then filed a proof of claim for delinquent real estate taxes on the entire acreage, for attorney fees related to litigating the trustee's objection, and for satisfaction of judgment liens against the property. The claim was late, but on a substantive basis, the claim was disallowed. The debtors were not "governmental units" for purposes of filing a priority tax claim, and the debtors were not eligible to receive priority status. The judgment creditor did not file a claim related to its lien. The attorney fees were for services directly to the debtors, not on behalf of the estate, and the debtors were not eligible to file a proof of claim, since they were not creditors—the Code offers no basis on which a debtor may file a proof of claim against himself or herself. *In re Oliver,* 511 B.R. 556 (Bankr. W.D. Wis. 2014).

Chapter 7 debtor had standing to object to claim but objection overruled. In a case with expected surplus after all claims were paid, the debtor had standing to file a claim objection, and the trustee had standing to respond to and object to the claim even though the creditor did not respond to the debtor's objection. The debtor's claim objection was defective, due to improper service. *In re Quintero,* ___ B.R. ___, 2014 WL 2781141 (Bankr. D. N.M. June 19, 2014).

90-day deadline for claims did not apply to secured creditor seeking to participate in Chapter 13 distribution, but did apply to that creditor's deficiency claim. On the Chapter 13 debtor's objection to untimely claims filed by mortgage lender, the court held that the creditor was not required to file a proof of claim in order preserve lien rights but must file a claim if it wished to participate in distribution under the plan. As long as the secured creditor's claim is filed before confirmation, even though after Rule 3002(c)'s 90-day deadline, it may be allowed, applying Seventh Circuit authority. However, as to any deficiency unsecured claim, the proof of claim must be filed within that 90 days, or an objection based on untimeliness will be sustained. The lender's response to the debtor's prior motion to extend the stay did not serve as an informal proof of claim. *In re Pajian,* 508 U.S. 708 (Bankr. N.D. Ill. 2014).

Fair Debt Collection Practices Act

Filing stale proof of claim violated Fair Debt Collection Practices Act. The Eleventh Circuit held that just as filing a lawsuit on a stale claim in state court would be a violation, so was the filing of a proof of claim a violation. The FDCPA's broad language included the debt buyer's

filing of a proof of claim in a Chapter 13 case for a stale claim, one barred from collection under Alabama's three-year statute of limitations. The debtor filed a counterclaim, albeit four years after allowance of the claim, alleging that the debt buyer routinely filed stale claims, but the bankruptcy and district courts dismissed the debtor's claims. The Circuit reversed, applying the "least-sophisticated consumer" standard to evaluate whether the collector's actions were "deceptive, misleading, unconscionable or unfair" under the FDCPA. In the absence of an objection to its proof of claim, the defendant collector's proof of claim would be automatically allowed, requiring the Chapter 13 debtor to pay, notwithstanding the fact that the claim was time-barred under state law and otherwise unenforceable. In this case, the claim was allowed and some payments made by the trustee, and the defendant admitted that had it pursued collection in state court, its action would have violated the FDCPA. The Circuit panel found no reason to treat the proof of claim differently; "a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt." The panel rejected the argument that a proof of claim is not a collection activity; "Filing a proof of claim is the first step in collecting a debt in bankruptcy and is, at the very least, an 'indirect' means of collecting a debt," falling within 15 U.S.C. §§ 1692a(6), 1692e, and 1692f. The panel declined to address the issue of whether the Bankruptcy Code preempts the FDCPA. *Crawford v. LVNV Funding, LLC,* ___ F.3d ___, 2014 WL 3361226 (11th Cir. July 10, 2014).

CONSUMER LAW UPDATE

Cases reported from July 1, 2014 through September 30, 2014

Prepared for Federal Judicial Center

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Chapter 13 Issues

Cure of Defaults

Debtor's right to cure is governed by § 1322(b) rather than § 108(b). The debtors had entered into a land contract, which contained a provision that on default of payments for thirty days, the entire balance was due on written notice from the seller. The debtors failed to make a prepetition balloon payment, and the sellers obtained a strict foreclosure judgment, which established a redemption period (Under applicable Wisconsin law, the strict foreclosure judgment was not a "sale."). The Chapter 13 case was filed and the proposed plan provided for redemption over a period of sixty months. Under Wisconsin law, the seller holds legal title and the buyer under a land sales contract holds equitable title. The seller argued that § 108(b) established that redemption must be complete within sixty days of the time set by the strict foreclosure judgment. Section 1322(b)(5) provides for curing of defaults within a reasonable time, and the court found the decision of *In re Frazier,* 377 B.R. 621 (BAP 9th Cir. 2007), to be persuasive. The power to cure defaults in Chapter 13 is not restricted by § 108(b); rather, § 1322(b) is the more specific statute that controls. The debtors could propose to cure defaults within a reasonable time in their plan. *In re Johnson,* ___ B.R. ___, 2014 WL 3346471 (Bankr. W.D. Wis. July 8, 2014).

Lien Stripping

Sixth Circuit BAP allows lien stripping in Chapter 20. A debtor who was ineligible for discharge because of a prior Chapter 7 discharge within four years was not prevented from stripping a wholly unsecured junior mortgage in the plan. The confirmed plan contained a provision for "avoiding" that mortgage, but the bankruptcy court denied the debtor's postconfirmation motion to avoid based on §§ 1325(a)(5) and 1328(f). The bankruptcy appellate panel reviewed the split of authority and followed the "growing consensus of courts" that inability to receive discharge did not prevent application of §§ 506(a) and 1322(b)(2). *In re Cain,* 513 B.R. 316 (BAP 6th Cir. 2014).

Surrender

Creditor not required to accept surrendered property. The confirmed plan provided for surrender of a residence to SBA and granted stay relief for the creditor to foreclose its mortgage, but after a year the creditor had taken no foreclosure steps. Section 1325(a)(5)(C) does not serve to pass ownership to the secured creditor, nor does it require the creditor to foreclose. Most courts have found nothing in the Bankruptcy Code that construes "surrender" as requiring the creditor to take control of the property; rather, the creditor remains in control of its remedies under applicable law. "Vesting" under § 1322(b)(9) also does not require a creditor to accept title to the surrendered property. Applicable Florida law does not permit a debtor to simply deed the property over to the secured creditor, although a debtor may quitclaim the property to the creditor, provided the creditor does not object—the creditor may avoid taking title by simply objecting to the conveyance. Section 105 is not authority for the court to compel

substantive action by the creditor. *In re Rose,* ___ B.R. ___, 2014 WL 3339612 (Bankr. W.D. N.C. July 8, 2014).

Conversion and Dismissal

Fifth Circuit gives undistributed money to creditors. On conversion of a confirmed case to Chapter 7, the undistributed funds held by the Chapter 13 trustee should go to creditors, except for $1,200 assigned by the debtor for payment of unpaid attorney fees. The circuit panel discussed the split of authority on what passes to the Chapter 7 estate on conversion, prior to the 1994 amendment to § 348, as well as the absence of a statute that explictly states what happens to undistributed money on conversion after the 1994 amendment. No statutory authority supports an interpretation that a confirmed plan is retroactively undone, and conversion does not eliminate the Chapter 13 trustee's duty to wrap up the Chapter 13 estate, including the distribution of funds in the trustee's hands that were paid while the plan was in force. While rejecting the trustee's arguments that creditors were "vested" in postconfirmation funds, or that § 1327(a) bound the parties after conversion, the panel also rejected the Third Circuit's reliance on § 1327(b), noting that the plan may provide otherwise than the funds revesting in the debtor at conversion. "If the plan requires the debtor to make payments to the trustee that will be distributed to creditors, the debtor certainly does not retain possession of those payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee." Finding little guidance in the Code, the panel relied on policy and equity, seeing congressional intent to encourage repayment through Chapter 13. "Wages paid to the trustee pursuant to the Chapter 13 plan should be distinguished from the debtor's other property acquired after the date of filing. . . .We conclude that returning undistributed funds to the debtor is not justified by the policy of encouraging debtors to proceed through Chapter 13 rather than Chapter 7. Additionally, distribution of the funds to creditors is supported by strong considerations of fairness." Although payments under the confirmed plan don't give creditors vested rights to payment, the claims of creditors to undistributed funds is superior to the claims of the debtor. *Viegelahn v. Harris (In re Harris),* 757 F.3d 468 (5th Cir. 2014).

Fair Debt Collection Practices Act

Filing stale proof of claim violated Fair Debt Collection Practices Act. The Eleventh Circuit held that just as filing a lawsuit on a stale claim in state court would be a violation, so was the filing of a proof of claim a violation. The FDCPA's broad language included the debt buyer's filing of a proof of claim in a Chapter 13 case for a stale claim, one barred from collection under Alabama's three-year statute of limitations. The debtor filed a counterclaim, albeit four years after allowance of the claim, alleging that the debt buyer routinely filed stale claims, but the bankruptcy and district courts

dismissed the debtor's claims. The Circuit reversed, applying the "least-sophisticated consumer" standard to evaluate whether the collector's actions were "deceptive, misleading, unconscionable or unfair" under the FDCPA. In the absence of an objection to its proof of claim, the defendant collector's proof of claim would be automatically allowed, requiring the Chapter 13 debtor to pay, notwithstanding the fact that the claim was time-barred under state law and otherwise unenforceable. In this case, the claim was allowed and some payments made by the trustee, and the defendant admitted that had it pursued collection in state court, its action would have violated the FDCPA. The Circuit panel found no reason to treat the proof of claim differently; "a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt." The panel rejected the argument that a proof of claim is not a collection activity; "Filing a proof of claim is the first step in collecting a debt in bankruptcy and is, at the very least, an 'indirect' means of collecting a debt," falling within 15 U.S.C. §§ 1692a(6), 1692e, and 1692f. The panel declined to address the issue of whether the Bankruptcy Code preempts the FDCPA. *Crawford v. LVNV Funding, LLC,* ___ F.3d ___, 2014 WL 3361226 (11th Cir. July 10, 2014).

CONSUMER LAW UPDATE

Cases reported from October 1, 2014 through December 31, 2014

Prepared for Federal Judicial Center

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Supreme Court's Certiorari

The Supreme Court has granted certiorari on six bankruptcy issues, some of which directly arise from consumer cases, and all of which will have impact on consumer cases. In *Wellness Int'l Network, Ltd. V. Sharif,* No. 13-935, 134 S.Ct. 2901, the Court granted certiorari on July 1, 2014, on two issues: (1) whether the presence of a subsidiary state law property issue in a § 541 action deprives the bankruptcy court of constitutional authority to enter final judgment; and (2) whether Article III permits a bankruptcy court to have authority as a result of a litigant's consent, and if so, whether implied consent is sufficient.

In *Bank of America v. Toledo-Cardona,* No. 14-163, 2014 WL 3965212, the Court granted certiorari on November 17, 2014, from the Eleventh Circuit, on the issue of whether, under § 506(d), a Chapter 7 debtor may strip off a wholly unsecured junior mortgage lien. The same issue is the subject of another grant of certiorari, on October 1, 2014, in *Bank of America v. Caulkett,* No. 13-1421, 2014 WL 2207208, also from the Eleventh Circuit. The Eleventh Circuit is the only Circuit specifically allowing a Chapter 7 debtor to strip such liens. See, e.g., *Cole v. First Third Bank, Inc. (In re Cole),* ___ B.R. ___, 2014 WL 6455376 (Bankr. N.D. Ga. Nov. 14, 2014) (applying the Eleventh Circuit's authority in a Chapter 7 case reopened for the purpose of stripping the lien).

In *Harris v. Viegelahn,* No. 14-400, 2014 WL 3057095, the Court granted certiorari on December 12, 2014, from the Fifth Circuit, on the issue of whether on conversion to a Chapter 7 in good faith and after confirmation, undistributed funds held by the Chapter 13 trustee are refunded to the debtor (as held by the Third Circuit in *In re Michael,* 699 F.3d 305 (3d Cir. 2012) or distributed to creditors (as held by the Fifth Circuit).

In *Bullard v. Hyde Park Savings Bank,* No. 14-116, 2014 WL 3817549, the Court granted certiorari on December 17, 2014, from the First Circuit, on the issue of whether an order denying confirmation of a Chapter 13 plan is appealable.

In *Baker Botts L.L.P. v. Asarco, L.L.C.*, 123 S.Ct. 44, 2014 WL 3795992, the Court granted certiorari on October 2, 2014, from the Fifth Circuit's determination, at 751 F.3d 291, that § 330(a) does not permit compensation to the attorney for the fees and costs incurred in defending an objection to fee applications.

The Court also granted certiorari in *Jesinoski v. Countrywide Home Loans, Inc.,* No. 13-684, 2014 WL 1659857, from the Eighth Circuit, on the issue whether the Truth in Lending Act's rescission provision, 15 U.S.C. § 1635(a) requires filling a lawsuit within three years of consummation of the transaction or whether written notice to the lender within three years is sufficient. There is a division among the circuits, with the Third, Fourth and Eleventh holding that written notification satisfies the statute, and the First, Sixth, Eighth, Ninth and Tenth requiring timely filing of a suit.

Automatic Stay

Landlord violated stay by premature eviction. Following the landlords' motion for stay relief and continuances of the hearing, the parties consented to a stay modification to be effective 14 days after entry of the order. The order specifically stated that stay termination would not be effective for 14 days, under Bankruptcy Rule 4001(a)(3); however, the landlords did not wait to change the locks and remove the debtor's personal property. The landlords argued that the stay terminated 60 days after their motion was filed under § 362(e)(2), but the Bankruptcy Appellate Panel held that the landlords waived this protection by not objecting to continuances of the hearing on the motion and by negotiating for a consensual order. The landlords' conduct indicated belief that the stay was in effect. The stay violation and award of actual damages were affirmed; however, a punitive damage award was reversed for lack of specific findings of egregious, intentional misconduct. *Bugg v. Gray (In re Gray),* 519 B.R. 767 (BAP 8th Cir. 2014).

Entry of discharge mooted appeal from stay relief order, but no in rem relief to purchaser from foreclosing creditor. The Chapter 7 debtor's appeal from an order granting stay relief was dismissed for mootness, since the entry of discharge subsequent to the stay relief had the effect of terminating the automatic stay under § 362(c)(2)(C). The debtor had filed five Chapter 7 and 13 cases; however, the Bankruptcy Appellate Panel reversed a grant of in rem relief, since the party moving for stay relief had purchased the property from a foreclosing mortgage creditor. Although the purchaser had received an assignment of the mortgage creditor's interest, he was not a creditor holding a claim secured by a deed of trust, as required for in rem relief under § 362(d)(4). *Ellis v. Ju (In re Ellis),* ___ B.R. ___, 2014 WL 6473251 (BAP 9th Cir. Nov. 19, 2014).

Continuance of foreclosure sale did not violate stay. A prepetition foreclosure sale had been scheduled after default, and the Bankruptcy Appellate Panel observed that "'overwhelming weight of authority' holds that continuing a foreclosure sale date in the manner provided by state law during the pendency of the automatic stay does not violate the automatic stay." The Panel held that "'continuation,' as used in § 326(a)(1) connotes an advancement of an action or proceeding. Continuing the foreclosure sale date from month to month in the manner prescribed by Rhode Island law, without more, does not advance the foreclosure process. It merely maintains the status quo." The Panel also reaffirmed its prior position in *In re Jumpp,* 356 B.R. 789 (BAP 1st Cir. 2006), that § 362(c)(3)(B)'s phrase "with respect to the debtor," refers to stay termination only with respect to the debtor and property of the debtor. Here, the debtors' home was property of the estate and the stay still applied, despite the current case being filed less than one year after an order dismissing a prior case. *Witkowski v. Knight (In re Witkowski),* ___ B.R. ___, 2014 WL 5933862 (BAP 1st Cir. Nov. 13, 2014).

Administrative freeze violated stay. When the Chapter 7 debtors filed their petition they had four deposit accounts, the balances of which were claimed as exempt under § 522(d)(5). Five days later, the bank placed an administrative freeze on the accounts, and before having notice of the freeze, the debtors had written checks that bounced. The bank notified the trustee of the freeze and asked for direction on what to do with the account funds, and the trustee advised release to the debtors, but the bank did not release the funds. Consequently, the bank exercised control over the accounts that were property of the estate, violating the stay. The bank's policy had been to place a freeze on accounts having a balance of $5,000 or more, and while the bank could have paid the account balances to the trustee, under § 542(b), it did not do so. The bank also could have sought direction from the court by filing a stay relief motion, but it did not do that. Distinguishing *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16 (1995), this bank was not a creditor of the debtors and had no right of setoff. The court further held that Chapter 7 debtors had constitutional and statutory standing to pursue damages under § 362(k). *In re Weidenbenner,* ___ B.R. ___, 2014 WL 7139994 (Bankr. S.D. N.Y. Dec. 12, 2014).

Stay applies to property interest acquired post-confirmation. The confirmation order provided that property remained in the estate until plan completion; therefore, the debtor's vehicle purchased post-confirmation became property of the estate, despite the debtor's misrepresentation to the seller that she was not in a bankruptcy case. The debtor subsequently amended schedules and notified the seller of the bankruptcy. Therefore, repossession of the vehicle was a willful violation of the automatic stay. The seller's knowledge of the bankruptcy prior to the repossession subjected it to actual damages, but punitive damages were denied, in part because of the debtor's misrepresentation of no bankruptcy at the time of the sale. *Banks v. Kam's Auto Sales (In re Banks),* ___ B.R. ___, 2014 WL 5320539 (Bankr. M.D. Ga. Oct. 17, 2014).

Property of Estate and Exemptions

Disallowance of exemptions based on bad faith. The Bankruptcy Appellate Panel vacated and remanded an order sustaining the Chapter 7 trustee's objection to the debtors' amended exemption claim, when the objection was based on the debtors' bad faith. The debtors claimed exemption under Arizona law in prepaid rent and a security deposit, and the trustee argued that failure to disclose the asset was ground for denial of the exemption. Holding that *Law v. Siegel,* 134 S.Ct. 1188 (2014), discredited the use of equitable principles as a basis for disallowance of exemptions, the Panel held that but for the allegation of bad faith, the amended exemption claim was presumptively valid, with debtors allowed up to $900 exemption under Arizona statute. Arizona is an opt out state. "*Law v. Siegel* mandates the conclusion that the bankruptcy court is without federal authority to disallow the Amended Exemption or to deny leave to amend exemptions based on Debtors' bad faith." *Gray v. Warfield (In re Gray),* ___ B.R. ___, 2014 WL 6972522 (BAP 9th Cir. Dec. 9, 2014).

A similar decision is found in *Elliott v. Weil (In re Elliott),* ___ B.R. ___, 2014 WL 6972472 (BAP 9th Cir. Dec. 10, 2014). In *Elliott,* the Chapter 7 trustee's objection to the debtor's claimed homestead exemption had been sustained on the basis of bad faith, when the debtor had not scheduled any real property interest or debt secured by real property. After the petition filing, property was conveyed to the debtor by a corporation controlled by the debtor. The case was reopened, and one year later the debtor claimed homestead and the trustee objected. Applying *Law v. Siegel,* 134 S.Ct. 1188 (2014), which was decided while this appeal was pending, the Panel held that the Supreme Court's decision overruled authority of the bankruptcy court to deny the exemption based on bad faith. A debtor's bad faith is not a statutory exception to the exemption claim but is instead a judge-made exemption under prior Ninth Circuit authority. The Panel then examined whether a statutory basis for the exemption or its objection existed under applicable California law, and remand was required to determine if the debtor satisfied California's continuous residency requirement. Also, § 522(g)(1) appeared to be applicable, because of the debtor's prepetition voluntary transfer of the property; therefore, if the debtor is entitled to the California homestead, that statute must be considered on remand.

Compare In re Woolner, Case No. 13-572690-wsd, 2014 WL 7184042 (Bankr. E.D. Mich. Dec. 15, 2014), in which the court held that Bankruptcy Rule 4003(b)(2) provided authority for sustaining an objection to exemption "at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption." The court pointed out that the Supreme Court approved this Rule, effective December 1, 2008, commenting that "Courts should be able to fairly assume that a procedural rule is premised on the existence of authority of the Court involved to decide the substantive issue raised in accordance with the procedure prescribed in that rule." The court also noted a material difference in authority to surcharge, the issue in *Law v. Siegel,* and authority to disallow an exemption because it was claimed fraudulently or in bad faith.

S*ee also In re Baker,* 514 B.R. 860 (E.D. Mich. 2014), holding that *Law v. Siegel* abrogated the basis for objection to an exemption based on bad faith. In *Baker,* the trustee had reopened the case due to undisclosed causes of action and the debtors then amended their exemption claims. It appears that *Baker* in on appeal to the Sixth Circuit by the trustee.

Debtors not barred from claiming further exemption. The court had approved a settlement under the Chapter 7 debtors' uninsured motorist coverage, including $15,000 exemption under a state exemption for personal bodily injury. Tenn. Code Ann. § 26-2-111-(2)(B). The trustee did not object to that exemption, and the debtors then amended Schedule C to claim further exemption in the settlement proceeds, under a Tennessee statute for general personal property exemption and under Tennessee's exemption for benefits paid under contracts of accident, health or disability insurance related to accidental personal injury. Tenn. Code Ann. § 26-2-110. The court held that the prior order approving the settlement and the $15,000 exemption did not prevent the debtors'

amendment of their exemption claims, and the court rejected the trustee's argument that § 26-2-110 did not encompass benefits from uninsured motorist insurance coverage. *In re Reeves,* ___ B.R. ___, 2014 WL 6698415 (Bankr. E.D. Tenn. Nov. 26, 2014).

No stay relief to execute on inherited IRA when no objection had been filed to exemption. Creditors holding judgment for nondischargeability moved for stay relief to execute on assets, including an IRA inherited from the debtor's father, arguing that *Clark v. Rameker* held that such an IRA was not exempt under § 522(d)(12) as claimed by the debtor. However, there had been no objection to the allowance of the exemption; "thus, whether or not the exemption was permissible, even when initially claimed, is inconsequential to an exemption's finality where the applicable objection period has passed." Under § 522(c), the exempt asset was protected, since the nondischargeable debt did not fall within the exceptions found in § 522(c)(1)-(4). Stay relief was granted to permit collection efforts against any non-exempt assets of the debtor. *Bricker v. Scalera (In re Scalera),* ___ B.R. ___, 2014 WL 6607571 (Bankr. W.D. Pa. Nov. 19, 2014).

Property interests defined by state law. Under Kentucky law, a prebankruptcy divorce decree had vested equitable title to the former marital home in the debtor alone. The former wife was a creditor, holding a claim for the amount ordered paid by the state court for her prior interest in the property. She was not a co-owner of the property, and she could not use § 363(h) to force a sale of the property. *In re Ripberger,* ___ B.R. ___, 2014 WL 5474057 (Bankr. E.D. Ky. Oct. 28, 2014).

Trustee's objection sustained to exemption in equitable distribution from spouse's 401(k) plan. The Chapter 7 debtor claimed exemption in an equitable distribution related to the non-debtor spouse's 401(k) under §§ 522(b)(3)(C), (d)(12) and (d)(10)(E). The trustee objected on the basis that at the time of the bankruptcy filing the debtor did not have an interest in the pension fund, only an interest in her claim for equitable distribution made in a pending divorce action. The debtor's right to an equitable distribution had not been resolved by the divorce court at the time of Chapter 7 filing. Under applicable Pennsylvania law, the debtor's interest in equitable distribution must be included in the bankruptcy estate, since a marital interest in property vests immediately upon initiation of the divorce action. Since the 401(k) had anti-alienation provisions under ERISA, the equitable distribution rights could not be fixed until a qualified domestic relations order (QDRO) was entered. The trustee's objection to the exemption claim was affirmed, as was the bankruptcy court's approval of settlement by the trustee with the debtor's spouse, under which the trustee was named in a QDRO as the direct payee. *Urmann v. Walsh,* ___ B.R. ___, 2014 WL 5440736 (W.D. Pa. Oct. 24, 2014).

Compare In re Swarup, ___ B.R. ___, 2014 WL 7146358 (Bankr. M.D. Fla. Dec. 15, 2014), in which a Florida statute was basis for exemption claim to "any interest of any owner, participant, or beneficiary in, a fund or account" that is a tax-preferred

account enumerated in the statute. The debtor had received, in a prebankruptcy divorce, interests in her former spouse's tax-preferred accounts. Those interests became property of the bankruptcy estate, but the trustee objected to the exemption claim on the basis that the interests were inchoate, insufficient to permit exemption. The court held that if the interests were sufficient to be property of the estate, they were sufficient to be exempt, and even if the debtor's interests were contingent or equitable, they were exemptible under the Florida statute.

Former Chapter 7 debtor was not real party in interest to pursue prepetition employment discrimination claim. The former Chapter 7 debtor failed to schedule a prepetition cause of action for employment discrimination, and the Chapter 7 case was dismissed, without entry of discharge, for failure of the debtor to submit required documents. The defendant's motion to dismiss was granted on the basis of lack of standing of the former debtor. The former debtor was not the real party in interest, with the court holding that the cause of action became property of the bankruptcy estate. Dismissal of the suit was granted, rather than substituting the Chapter 7 trustee, but the statute of limitations would not bar the trustee from bringing the action. *Barefield v. Hanover Insurance Co.,* ___ B.R. ___, 2014 WL 5473079 (E.D. Mich. Oct. 27, 2014). *See also Yelverton v. District of Columbia,* ___ B.R. ___, 2014 WL 5002101 (D. D.C. Oct. 7, 2014) (After bankruptcy court had dismissed Chapter 7 debtor's cause of action for lack of standing, merely scheduling interest in prepetition cause of action and claiming it as exempt did not retroactively confer standing, when property had not been abandoned by trustee.).

Under Mississippi homestead, married debtors holding title as tenants by entirety may not double exemption. Acknowledging that state laws vary on homestead exemption, Mississippi's statute is silent on whether married debtors may each claim, essentially doubling, the homestead, and the court concluded that the statute does not provide for more than one homestead exemption for a single residence. The joint Chapter 7 debtors may not double the exemption. Also, any non-exempt equity may only be administered by the trustee to the extent of joint claims against the debtors, since the property is owned as tenants by entirety. *In re Pace,* ___ B.R. ___, 2014 WL 5100103 (Bankr. N.D. Miss. Oct. 10, 2014).

Chapter 7 Issues

Lien avoidance

Case reopened to allow filing of motion to avoid judicial lien. Prior to the Chapter 7 filing, a judicial lienholder had commenced state court foreclosure action, and a decree of foreclosure had been issued and sale date set. The Chapter 7 filing stopped the sale, but the debtor did not file a lien avoidance action before the discharge was entered and case closed. The creditor then reactivated its foreclosure action and the debtor moved to reopen the case to file a § 522(f) motion. Citing judicial authority that avoidance of a judicial lien is cause for reopening, the court granted the reopening, but

conditioned it on the debtor paying the attorney fees and costs incurred by the lienholder in reactivating the state court lien foreclosure proceeding and in a related adversary proceeding filed by the debtor. The court found that the failure to file a lien avoidance motion while the case was open, coupled with the delay subsequent to case closing, was prejudicial to that creditor. *In re Oglesby,* 519 B.R. 699 (Bankr. N.D. Ohio 2014).

Discharge and Dischargeability

Creditor's untimely motion to extend time for dischargeability complaint was properly denied. One day after the deadline for filing a § 523(c) complaint, an attorney filed a motion to extend the time, alleging that an automobile accident injury and hiring a new paralegal caused the attorney to overlook the deadline. Although the deadline is subject to equitable tolling, the Bankruptcy Appellate Panel found that the appellant failed to substantiate that the accident or other factors prevented a timely filing. The bankruptcy court did not abuse discretion in denying the extension. *In re Doyne,* ___ B.R. ___, 2014 WL 6805296 (BAP 6th Cir. Dec. 4, 2014).

Arbitration denied in dischargeability action. The Chapter 7 debtor, a former shareholder and officer of a law firm, moved to compel arbitration of the firm's prepetition suit alleging intentional breach of fiduciary duty, and the lawsuit was removed to bankruptcy court. The court examined the statutory clash between the Federal Arbitration Act and the Bankruptcy Code, as well as judicial authority, concluding that the firm's claim of intentional breach was inextricably intertwined with a dischargeability cause of action, resulting in exercise of discretion not to enforce the parties' arbitration agreement. *Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade (In re Wade),* ___ B.R. ___, 2014 WL 7174271 (Bankr. W.D. Tenn. Dec. 16, 2014).

Untimely 1040 form, filed after IRS assessed tax liability, was not "return" for purposes of discharge exception. In matter of first impression for the Tenth Circuit, the panel found the language of § 523(a) to be plain, holding that taxpayers' form 1040s were not returns for purposes of that section, with their tax liabilities excepted from the discharges under § 523(a)(1). The hanging paragraph added to § 523(a) by the 2005 Act defined "return," referring to nonbankruptcy law, including § 6020(a) of the Internal Revenue Code or similar state or local law. The panel stated that the majority rule was that tax forms filed by a taxpayer after the IRS had assessed tax liability were not "returns," citing the four element test found in *Beard v. Commissioner,* 793 F.2d 139 (6th Cir. 1986). The hanging paragraph refers to "applicable filing requirements," and those requirements include deadlines; therefore, it "plainly excludes late-filed Form 1040s from the definition of a return." *Mallo v. IRS (In re Mallo),* ___ F.3d ___, 2014 WL 7360130 (10th Cir. Dec. 29, 2014).

Business license and occupational tax charges are "taxes" for 523(a)(1) purposes. City business license and occupational tax charges were "excise taxes" under §§ 507(a)(8)(E) and 523(a)(1)(A). The debtor was a physician, whose former

medical practice involved transactions such as receiving payment for care and treatment of patients, and the term "excise tax" includes a tax imposed on engaging in an occupation. The physician was required by the city to purchase a business license and withhold occupational taxes from the wages paid to employees. The taxes were excepted from discharge and the city did not violate the stay by attempting collection. *Perry v. City of Birmingham (In re Perry),* ___ B.R. ___, 2014 WL 5871083 (Bankr. N.D. Ala. Oct. 30, 2014).

Pending appeal from state court's divorce awards did not prevent determination of discharge issues. The Chapter 7 debtor's former wife sought determination of nondischargeability of obligations arising out of divorce decree, and the court held that an appeal pending from the state court's divorce decree did not prevent the bankruptcy court's determination of dischargeability. The appeal alleged an incorrect valuation of marital property and error in the calculation of alimony and child support. Since this is a Chapter 7 case and the debts were incurred in a separation agreement, divorce decree or other order of a court of record, whether the obligations fall under § 523(a)(5) or (a)(15), they are excepted from discharge, regardless of the outcome of the appeal. *Garner v. Garner (In re Garner),* ___ B.R. ___, 2014 WL 5306544 (Bankr. E.D. Tenn. Oct. 15, 2014).

Department of Education's claim for repayment was not compulsory counterclaim to debtor's § 523(a)(8) complaint. The Seventh Circuit considered what is required to make a counterclaim compulsory. The Court had previously rejected the Chapter 7 debtors' appeal of an order denying that the Department of Education should cancel their student loan debt as an undue hardship, in *In re Greene,* 310 Fed.Appx. 17 (7th Cir. 2009). In that opinion, the Court had noted that the Department had not counterclaimed. The Department subsequently began to garnish wages and the debtor sued to enjoin collection, to which the Department responded with a counterclaim for judgment requiring repayment of the debt, and that counterclaim was not barred as one that must have been asserted in the original action filed by the debtor. Also, the argument that the counterclaim was barred by res judicata or collateral estoppel was rejected; "the 'compulsion' of a compulsory counterclaim is a procedural implementation of the doctrine of res judicata." *Greene v. U.S. Dep't of Education,* 770 F.3d 667 (7th Cir. 2014).

Under totality-of-circumstances test, debtor failed to prove undue hardship. Under the Eighth Circuit's test for undue hardship, the bankruptcy court did not err in concluding that, although the family's budget was tight, they were able to maintain a sufficient standard of living. And, consideration of whether an Income Contingent Repayment Program was available is proper under the totality-of-circumstances analysis, applying Eighth Circuit authority. *Nielsen v. ACS, Inc. (In re Nielsen),* 518 B.R. 529 (BAP 8th Cir. 2014).

Failure to timely disclose expert witnesses supported exclusion. The debtor failed to sustain burden on undue hardship, and the debtor's failure to disclose expert

witnesses by the deadline established was cause for the bankruptcy court to exclude a forensic psychologist and vocational counselor. The deadline had been extended three times, and the bankruptcy court found lack of good faith effort to "work up to [the debtor's] ability and to pay his loans." *Tetzlaff v. Educational Credit Management Corp.,* ___ B.R. ___, 2014 WL 6834455 (E.D. Wis. Dec. 3, 2014).

Failure to minimize expenses prevented satisfaction of first prong of *Brunner.* Commenting that perhaps the clearest evidence of the first prong of the *Brunner* test of a minimal standard of living is a debtor's minimization of expenses, this Chapter 7 debtor, who was an attorney, failed to meet that prong, when the debtor/borrower and his spouse paid $508 monthly for private school tuition for two children, for whom no special needs were shown and for whom public school was available and adequate. The parents also paid $600 monthly for phones and cable service, and $800 monthly for house cleaning, yard work and child care. The borrower/debtor testified that his current private practice grossed $22,640 in 2013 and his wife earned $85,000 annually. The student loan debt was for law school, from which the debtor graduated in 1992, and the debtor had paid $52,246.62, but with interest $41,967.70 remained. The borrower/debtor also failed to satisfy the second *Brunner* prong, by failing to prove that he could not find employment at a law firm or other source. *Sexton v. PHEAA (In re Sexton),* ___ B.R. ___, 2014 WL 6674975 (Bankr. W.D. Ky. Nov. 24, 2014). *Compare College Assist v. Gubrath (In re Gubrath),* ___ B.R. ___, 2014 WL 6990123 (D. Colo. Dec. 10, 2014) (Debtors met *Brunner* test, with facts including $295,000 student loan debt accruing $15,000 interest annually, and minor child suffered from medical conditions requiring special diet and specialized school program.).

Postpetition assessment of arbitration costs was postpetition claim and not discharged under § 707(b). Fraud-based claims had been excepted from the debtor's discharge, and the Chapter 7 debtor then agreed to arbitration, with the arbitration panel ruling that, as a result of other settlements, the claimant had no remaining compensation claims. However, the panel ordered the debtor to pay the fees and expenses of the arbitration, which totaled $171,504.54. The Seventh Circuit held that, although the arbitration arose out of the creditor's prepetition claims against the debtor, the arbitration award was a postpetition debt and was not discharged. *In re Ruben,* ___ F.3d ___, 2014 WL 7273935 (7th Cir. Dec. 23, 2014).

Advice-of-counsel defense rejected in § 727(a)(2)(A) and (a)(4)(A) complaint. The advice-of-counsel defense requires (a) full disclosure of pertinent facts to counsel, and (2) good faith reliance on that counsel's advice, and the debtor did not disclose all pertinent facts to his attorney. Also, even if all facts had been disclosed, other evidence established that the debtor acted in bad faith, allowing the court to find fraudulent intent. *Eifler v. Wilson & Muir Bank & Trust Co.,* ___ Fed.Appx. ___, 2014 WL 6888484 (6th Cir. Dec. 8, 2014).

Failure to schedule creditors, jointly-owned property and alimony were material false oaths. The debtor admitted deliberate omission of four creditors, who were

friends and family members, from her schedules, and she did not schedule property that she jointly owned with her ex-husband or alimony payments as income. These omissions were material and supported denial of discharge under § 727(A)(4)(A). *Skavysh v. Katsman (In re Katsman),* 771 F.3d 1048 (7th Cir. 2014).

Dismissal

Debt to former employer not consumer debt. The Chapter 7 debtor's employer had provided, as part of compensation package, a second mortgage loan to assist in purchase of home, with a guaranteed annual bonus to offset interest on the loan. The employment ended and the employer's loan was not repaid, and when the Chapter 7 was filed, the debtors proposed to surrender the home. The former employer moved to dismiss the case under § 707(b)(1), contending that the debtors had sufficient projected disposable income to pay all creditors in full in Chapter 13. The debtors then amended their petition to assert that their debts were primarily business and that § 707(b)(1) did not apply. The bankruptcy court denied the motion to dismiss, and the Bankruptcy Appellate Panel first held that an order denying § 707(b) dismissal was final for purposes of appeal. Distinguishing *In re Kelly,* 841 F.2d 908 (9th Cir. 1988), the Panel concluded that the bankruptcy court did not clearly err in finding that the debtor offered sufficient evidence that he obtained the loan for a business purpose with respect to employment. *Aspen Skiing Co. v. Gherrett (In re Cherrett),* ___ B.R. ___, 2014 WL 5843769 (BAP 9th Cir. Nov. 18, 2014).

Current monthly income includes all income received in look-back period. On the issue of whether § 101(10A)'s current monthly income must be both earned and received within the six-month look-back period, the Bankruptcy Appellate Panel affirmed dismissal of the Chapter 7 case, holding that the statute's "derived during the 6-month period" has a plain meaning of "income received during the look-back period." The Panel observed that it was the first appellate court to consider the meaning of this language, and it pointed out divided case law among bankruptcy courts. The Panel concluded that current monthly income includes all income that a debtor receives during the look-back period, regardless of when that income was actually earned. *Miller v. United States Trustee (In re Miller),* 519 B.R. 819 (BAP 10th Cir. 2014).

Presumption of abuse did not apply when debts were primarily business. In making a determination of abuse under § 707(b), debts existing at the time of the petition filing were primarily business debts, making the presumption of abuse inapplicable to a motion to dismiss. Moreover, the moving creditor failed to prove cause for dismissal under § 707(a). Applying the factors for a bad faith determination, found in *In re Lombardo,* 370 B.R. 56 (Bankr. E.D. N.Y. 2007), the court found that the case was not filed in bad faith. *In re Gutierrez,* ___ B.R. ___, 2014 WL 5689755 (Bankr. D. Vt. Nov. 4, 2014).

Ability to pay and nondisclosures supported dismissal. After debtors surrendered rental property, they had ability to pay substantial amount of debts, and ability to pay is

a primary factor under § 707(b)(3)(B). Debtors had also over-withheld income taxes, giving them additional disposable income, and the totality-of- circumstances test of *In re Green,* 934 F.2d 568 (4th Cir. 1991), supported finding of abuse. The case was also filed in bad faith, under § 707(b)(3)(A), with case dismissed. *In re Fox,* ___B.R. ___, 2014 WL 6066120 (Bankr. D. Md. Nov. 12, 2014). *See also In re Gaulden,* ___ B.R. ___, 2014 WL 5823277 (Bankr. E.D. Mich. Nov. 10, 2014) (Failure to amend schedules to more accurately reflect financial condition was case for dismissal under § 707(a), finding the failure to amend to constitute unreasonable delay prejudicial to creditors.).

Older-vehicle operating expense not deduction in above-median Chapter 7 case. Noting that the Ninth Circuit Bankruptcy Appellate Panel had held in *In re Luedtke,* 508 B.R. 408 (BAP 9th Cir. 2014), that the $200 older-vehicle operating expense was not available as deduction from disposable income in Chapter 13, the court held, for the same reasons stated in *Luedtke,* this was not an allowable deduction in Chapter 7. As a result, the debtors had sufficient income to trigger the presumption of abuse. If the case is not converted, it would be dismissed under § 707(b)(2)(A)(i)(II).). *In re Willingham,* 520 B.R. 818 (Bankr. E.D. Cal. 2014).

Discharge Injunction

Recoupment of prepetition overpayments of unemployment benefits did not violate discharge injunction. The debtor had been overpaid unemployment benefits prior to filing Chapter 7, and the Kansas Department of Labor did not violate the discharge injunction when it attempted to recoup the overpayments by withholding ongoing unemployment benefits. The facts met the "single integrated transaction" test set forth in *In re Terry,* 687 F.3d 961 (8th Cir. 2012), for purposes of recoupment. *Meyer v. Kansas Department of Labor,* ___ B.R. ___, 2014 WL 6871958 (Bankr. W.D. Mo. Dec. 3, 2014).

Monthly mortgage statements and notice of change in interest rate were not violations of discharge injunction, but § 524(j) did not protect lender and servicer. Chapter 7 debtors alleged violations of the discharge injunction by the mortgage servicer and creditor. Monthly statements sent to the debtors post-discharge stated that they were for informational purposes and were not attempts to collect a debt, even though they contained a payment coupon. The statements provided that the coupons could be used if the debtors chose to make voluntary payments, but the statements contained clear disclaimers acknowledging that the borrowers were in bankruptcy and that the statements were informational only. Similarly, notices of change in interest rate contained no demand for payment. Another communication related to hazard insurance did contain a plausible claim for violation of the discharge injunction, since its disclaimer was in smaller type and contained conflicting mandatory language indicating that action was required by the borrowers. Section 524(j)'s safe harbor did not protect the defendants as to the last communication, since the debtors had abandoned their former home more than one year before the alleged violation, and the statute refers to a creditor holding a security interest in real property that is the debtor's principal

residence. *Lemieux v. America's Servicing Co. (In re Memieux),* ___ B.R. ___, 2014 WL 6474036 (Bankr. D. Mass. Nov. 18, 2014).

Judgment creditors did not violate discharge injunction. Prior to a Chapter 7 filing, a mortgage creditor had foreclosed on the debtors' home, and the debtors had used the former equity in the home to cover expense of their clothing stores. Judgment had been entered in favor of creditors extending such credit, and the judgment had been recorded. A Chapter 7 discharge was entered in 2010, and two years later, the debtors learned that the judgment lien was still on record. The debtors requested removal of the lien, but the debtors did not inform the creditors that the property had been foreclosed. The creditors negotiated for payment in return for a release of the lien, and the debtors then reopened the bankruptcy case and sought contempt sanctions for violation of the discharge injunction. The district court affirmed that the debtors had not shown that at the time judgment creditors negotiated for release of the lien the creditors knew the property had been foreclosed or that the creditors were doing anything but negotiating for release of an *in rem* lien in the belief that the debtors still owned the property. *Cesar v. Charter Adjustments Corp.,* 519 B.R. 792 (E.D. Cal. 2014).

Chapter 13 Issues

Eligibility

Mortgage servicer had standing to contest eligibility. Status as a mortgage servicer gave the servicer a pecuniary interest and standing to move to dismiss the case and present proof on eligibility. The debtor contended that the debt on his real property was disputed and unliquidated, but the court held that the debtor's obligations were sufficiently determinable to constitute liquidated debt. The court cited *In re Adams,* 373 B.R. 116 (BAP 10th Cir. 2007), for the key factor in determining whether a debt is liquidated or unliquidated being that the debt is subject to a simple mathematical computation or ascertainable by reference to an agreement. *Cannon v. PNC Bank, N.A. (In re Cannon),* ___ B.R. ___, 2014 WL 5392990 (D. Utah Oct. 23, 2014).

Wholly unsecured mortgage was included in unsecured debt for eligibility. Citing a majority of courts holding that the interplay of §§ 506 and 109(e) requires that wholly unsecured junior liens are counted as unsecured debt for eligibility purposes, the court concluded that this view was correct. "Unsecured claim," as referred to in § 506 should be considered an "unsecured debt" under § 109(e). The court stated that it was not bound by the characterization of a claim in the debtor's schedules. The case was dismissed for ineligibility, based on the amount of unsecured debt. *In re Garcia,* ___ B.R. ___, 2014 WL 4961162 (Bankr. D. N.M. Oct. 3, 2014). *Compare In re Rosa,* ___ B.R. ___, 2014 WL 6999380 (Bankr. N.D. Cal. Dec. 10, 2014), under Plan Confirmation, holding that a valueless second mortgage was not a claim for purposes of payment in the plan.

Debtor's Standing

Debtors can pursue non-bankruptcy cause of action. Distinguishing Chapter 7 and 13 cases, the Chapter 13 debtors could pursue a prepetition cause of action on behalf of the bankruptcy estate, since the debtors remained in possession of property of the estate under § 1303. However, the debtors' cause of action under the Fair Debt Collection Practices Act was subject to summary judgment; the defendant's repossession efforts as to a truck did not violate 15 U.S.C. § 1692f(6). *Hayes v. Find Track Locate, Inc.,* ___ F.Supp.3d ___, 2014 WL 5111587 (D. Kan. Oct. 12, 2014). *Compare Rugiero v. Nationstar Mortgage, LLC,* ___ Fed.Appx. ___, 2014 WL 4549003 (6th Cir. Sept. 15, 2014) (Chapter 13 debtor's cause of action contesting foreclosure was futile, since under applicable state law, his redemption time had expired, and the debtor lacked standing anyway; any cause of action belonged to the trustee.).

Postpetition Property

Inheritances received post-confirmation are property of estate. In both Chapter 13 cases, the debtors received inheritances more than 180 days after the petition filings, with the court holding that "§ 1306(a) governs the general provision of § 541(a)(5), and the 180-day language of § 541(a)(5) does not apply in a Chapter 13 case." The court found *In re Vannordstrand,* 2007 WL 283076 (BAP 10th Cir. Jan. 31, 2007) persuasive in its reasoning that § 1306(a) broadens the definition of estate property. The court then considered the interplay of § 1306(a) and 1327(b), and in both cases, the confirmation orders did not address when vesting occurred. The court disagreed with the estate preservation and estate transformation approaches to what remains in the bankruptcy estate, concluding instead that "the modified estate preservation approach provides the most harmonious reading of §§ 1306(a) and 1327(b). Under this approach, upon confirmation, unless otherwise provided for in the plan, the property of the Chapter 13 estate vests in the debtor free and clear of any liens pursuant to § 1327(b) and (c). This vesting, however, does not extinguish the Chapter 13 estate. Pursuant to § 1306(a), the Chapter 13 estate continues and is augmented by property acquired after confirmation until the closure, dismissal, or conversion of the case." In the case of one debtor, plan payments had not been completed, and there were sufficient assets to pay creditors 100% with the addition of the inheritance. In the other case, plan payments had been completed; therefore, the trustee's motion to modify, in order to capture the inheritance, was too late, with modification denied. In the latter case, the court held that § 1329(a) must be construed to refer to actual plan payments and not to when the trustee submitted a notice of completed plan payments. *In re Zisumbo,* 519 B.R. 851 (Bankr. D. Utah 2014).

Plan Confirmation

Second mortgage creditor did not hold unsecured claim in Chapter 20 case. The debtor had received a Chapter 7 discharge and within one year filed a Chapter 13, in

which she filed a motion to value her residence, resulting in an order that the second mortgage had no value to support it and that the lien would be avoided on completion of plan payments. The debtor was not eligible for Chapter 13 discharge, but her amended plan proposed to pay the second mortgage nothing. The debtor then objected to the second mortgage proof of claim, arguing that the prior Chapter 7 discharge eliminated her *in personam* liability and that the valuation motion had determined that the *in rem* claim had no value. The court concluded that there could be no liability of the Chapter 13 estate when the debtor had no liability. The creditor held no allowable secured claim, nor an allowable unsecured claim to be paid through the plan. Congress knew how to turn nonrecourse liability into recourse, in § 1111(b), but no such provision is in Chapter 13 nor in § 506(a)1). *In re Rosa,* ___ B.R. ___, 2014 WL 6999380 (Bankr. N.D. Cal. Dec. 10, 2014). *Compare In re Garcia,* ___ B.R. ___, 2014 WL 4961162 (Bankr. D. N.M. Oct. 3, 2014), under Eligibility, holding that the wholly unsecured mortgage counted as unsecured debt for purposes of eligibility.

Separate classification of municipal court fines. In two cases in which below-median debtors had proposed to separately classify and pay in full municipal court fines, while paying other unsecured creditors nothing, the court held that the separate classification was unfairly discriminatory. Assuming that the justification was in part due to potential incarceration for nonpayment of the fines, and noting that § 523(a)(7) debts are not exceptions from Chapter 13 discharge, the court held that the potential for incarceration was not enough to justify the discriminatory treatment. The court suggested that the debtors might pay the fines pro rata with other unsecured debts for 36 months, thereby satisfying § 1325(b)(1)(B), and then extend the plan for additional time to pay the fines in full, thereby potentially obtaining confirmation. "Simply put, as a result of his or her compliance with Section 1325(b)(1)(B), a debtor can discriminate after the expiration of the applicable commitment period as long as there is a reasonable basis to do so." *In re Osorio,* ___ B.R. ___, 2014 WL 6959918 (Bankr. D. N.J. Dec. 8, 2014).

Best interests test included debtor's contingent interest in per capita tribal payments. One debtor was a member of the Prairie Band Potawatomi Nation Indian Tribe, entitled to a contingent interest in per capita payments due tribal members from gaming revenues, and that contingent interest was property of the Chapter 13 estate. The interest was not subject to exemption under applicable Kansas law, and the debtors failed to satisfy the best interests of creditors test for confirmation. *In re McDonald,* 519 B.R. 324 (Bankr. D. Kan. 2014).

Confirmation denied for bad faith. Although the debtor's divorce-related obligation to pay one-half of children's college education was not a domestic support obligation, the plan was not proposed in good faith and confirmation was denied. The debtor filed Chapter 13 after the state court had orally ruled that he must pay $32,160.55, representing 50% of the oldest child's college education to date. This was debtor's third bankruptcy case in three years, with the debtor ineligible for discharge due to a prior

Chapter 7 discharge. There were few creditors, other than the former spouse's and child's claim. The court found that the proposed plan was an improper attempt to prevent the former spouse's collection effort over the life of the plan, while proposing de minimus payments. *In re Larson-Asplund,* 519 B.R. 682 (Bankr. E.D. Mich. 2014).

Plan Modification

Change of circumstances required for post-confirmation modification. Reviewing issues concerning the requirements for modification of confirmed plans, the court noted first that § 1329 provides for the court's discretion in whether to approve modification, and that there was a split of authority on whether a change in circumstances is required as a threshold. The court held that in considering motions to modify, it would consider whether the proposed modification fits within the statutory grounds of § 1329, whether the circumstances giving rise to the proposed modification were unknown or not virtually certain at the time of confirmation, and whether the circumstances otherwise warrant modification. Next, the court observed a split in authority about the point in time at which the best interests of creditors test should be applied—as of the original petition date or as of the modification date. The court agreed with the majority view that the test is to be applied and recalculated as of the date the modified plan is filed. *In re Nachon-Torres,* ___ B.R. ___, 2014 WL 6686530 (Bankr. S.D. Fla. Nov. 24, 2014).

Modification denied to recapture past additional income but plan was modified to require turnover of future tax refunds. The trustee moved to modify a confirmed plan after the debtor's monthly income increased due to working extra shifts as a registered nurse. The debtor testified that she was no longer getting extra shifts and did not expect that for the foreseeable future. As to the question of whether § 1329(b)'s disposable income test applies to postconfirmation modifications, the court reviewed conflicting authority and found persuasive the analysis in *In re Grutsch,* 453 B.R. 420 (Bankr. D. Kan. 2011). Although, as concluded by *Grutsch,* § 1325(b)(1) is not found in § 1329, that does not end the inquiry, since plan modifications must be proposed in good faith. The court found that the debtor's failure to report additional earnings and resulting tax refunds was not good faith. Even though the trustee did not specifically request tax returns that "does not allow a debtor to use undisclosed income for her own means." The court could not "wind the clock back to recover income that has been spent or dissipated," and a modification could not be retroactive, but the debtor was required to turn over to the trustee future tax refunds during the pendency of the case. *In re Pautin,* ___ B.R. ___, 2014 WL 6686630 (Bankr. W.D. Tex. Nov. 25, 2014).

Amended plan proposed to pay real property tax as priority. In a case filed on April 30, 2013, the issue was whether property taxes which were last payable on December 31, 2013 were prepetition or postpetition obligations. Under applicable Missouri statute, the owner of real property becomes "liable" for the tax on January 1; therefore, the tax debt was "incurred" on that date. The 2013 property tax was a potential priority, prepetition claim under § 507(a)(8), rather than an administrative, postpetition claim under § 503(b)(1)(B). As such, the debtors may propose to amend their confirmed plan

to treat the 2013 tax as a priority claim. If the tax collector did not file a proof of claim, the debtors were permitted to file one on its behalf. *In re Donahue,* ___ B.R. ___, 2014 WL 5463891 (Bankr. W.D. Mo. Oct. 27, 2014).

Motion to modify too late. In a case in which plan payments had been completed the trustee's motion to modify, in order to capture a postpetition inheritance, was too late, with modification denied. The court held that § 1329(a) must be construed to refer to when actual plan payments were completed, rather than to when the trustee submitted a notice of completed plan payments. *In re Zisumbo,* 519 B.R. 851 (Bankr. D. Utah 2014).

Priority Claims

Periodic alimony is domestic support obligation. The debtor filed an adversary proceeding contesting that his obligations under a divorce settlement were domestic support obligations. The portion of the obligation that was called periodic alimony was a domestic support obligation, which the debtor had treated as alimony deductions on tax returns. Moreover, that obligation met the factors, beyond merely the label in the settlement agreement, found in *In re Benson,* 441 Fed.Appx. 650 (11th Cir. 2011), and that obligation was a priority claim. However, another obligation to pay the former spouse a fixed amount from the debtor's retirement account was a property division, under the *Benson* factors. *Coon v. Henderson (In re Coon),* ___ B.R. ___, 2014 WL 6674753 (Bankr. M.D. Ala. Nov. 24, 2014).

Claim for reimbursement of maintenance overpayments was not domestic support obligation. In a prebankruptcy divorce, the former spouse was ordered to pay the debtor $700 per week in maintenance, a clear domestic support obligation, but the state court subsequently retroactively terminated the maintenance award, ordering the debtor to reimburse her former husband $28,581.15 in maintenance payments that had been deducted from his wages. The former husband filed a priority claim for the unpaid reimbursement and for delinquent child support. Although some courts had construed obligations to reimburse overpayments of support as also being support obligations, the court found that the reimbursement was not in the nature of support. The state court's termination of the former husband's maintenance obligation and order for reimbursement was based on an Illinois statute providing that the debtor's cohabitation with her boyfriend was cause; the reimbursement was not based on disparity of income or the debtor's lack of need for maintenance, and the former husband failed to show that the reimbursement was in the nature of support. The portion of the claim related to reimbursement was not a priority claim, but the portion of the claim for child support arrearage was a priority claim. *In re Alewelt,* ___ B.R. ___, 2014 WL 5502474 (Bankr. C.D. Ill. Oct. 30, 2014).

Attorney fees awarded by state court in child custody litigation were domestic support obligation. After a six-day trial on child custody, the prebankruptcy state court awarded almost $100,000 attorney fees to be paid by the Chapter 13 debtor, and those

fees were in the nature of support; therefore, they were nondischargeable and must be paid as priority claim. Fifth Circuit authority, *In re Dvorak,* 986 F.2d 940 (5th Cir. 1993), holds "that court-ordered attorneys' fees incurred during a custody suit between debtor and debtor's ex-spouse are not dischargeable under § 523(a)(5). . . . BAPCA did nothing to change the determination of whether a debt is in the nature of support." *In re Beacham,* ___ B.R. ___, 2014 WL 5426646 (Bankr. S.D. Tex. Oct. 22, 2014).

Surrender

Surrender of secured property does not divest ownership, but a plan may propose to vest property in another entity. Under § 1325(a)(5)(C), a plan proposal to surrender property securing a claim establishes that the debtor will not oppose the creditor taking action to transfer title to the property, but the surrender itself does not divest the debtor of ownership or obligations related to the property. Section 1322(b)(9)'s provision that a plan may provide for vesting in the debtor or another does not require the creditor's consent, and a plan providing for vesting in a secured lender may be confirmed over the lender's objection, assuming that there is no bad faith. Under § 1325(a)(3), "confirmation could be denied if a debtor attempts to use § 1322(b)(9) to transfer property to a third party in order to relieve himself or herself of responsibility for nuisance or environmental problems associated with it." Here, there was no such bad faith, and the plan providing for vesting in the lender was confirmed. *In re Watt,* ___ B.R. ___, 2014 WL 5304703 (Bankr. D. Or. Oct. 15, 2014).

Conversion

Bad faith filing justified conversion of case to Chapter 7. In determinations of whether cause exists for conversion, the totality-of-circumstances test applies, under *In re Leavitt,* 171 F.3d 1219 (9th Cir. 1999), and the bankruptcy court did not abuse its discretion in finding that the debtors' bad faith filing was cause for conversion. The Chapter 13 filing was intended to frustrate conclusion of a state court action, and the debtors failed to candidly and completely provide financial information. *Khan v. Barton (In re Khan),* ___ B.R. ___, 2014 WL 6972785 (BAP 9th Cir. Dec. 9, 2014).

Dismissal

Failure to timely commence plan payments was cause for dismissal. Pro se debtor's failure to commence plan payments within 30 days from the order for relief, as required by § 1326(a)(1), was itself cause for dismissal under § 1307(c)(4). The debtor had been given an opportunity at a hearing to provide an excuse, but none was given. The debtor also failed to attend the § 341 meeting of creditors. *Witkowski v. Boyajian (In re Witkowski),* ___ B.R. ___, 2014 WL 5933979 (BAP 1st Cir. Nov. 13, 2014). For other dismissal decisions, *see In re Blanco,* ___ B.R. ___, 2014 WL 5488375 (Bankr. E.D. Pa. Oct. 29, 2014) (Plan was facially infeasible, based on income and expenses, and lack of feasibility supported dismissal for unreasonable delay that was prejudicial to creditors.); *In re Page,* 519 B.R. 908 (Bankr. M.D. N.C. 2014) (Under totality of circumstances, case was filed in bad faith, justifying dismissal. Filing was attempt to

stay state court contempt order for failure of one debtor to pay former spouse's attorney fees.); *In re Merhi,* 518 B.R. 705 (Bankr. E.D. N.Y. 2014) (Inability to propose confirmable plan was cause for dismissal, with debtor having insufficient income to pay short-term mortgage.).

Notwithstanding serial filings, dismissal denied. Applying the totality-of-circumstances test, although one spouse had filed three Chapter 13 cases in two and one-half years, the moving mortgage creditor failed to show bad faith sufficient for dismissal of the case or for in rem stay relief in a case filed by the other spouse. There were mistakes made in the schedules but "finding bad faith requires more than simple mistakes." The mistakes did not relate to a scheme to prevent foreclosure. "Unlike the typical husband-wife 'tag team' cases, where each case is filed immediately preceding a foreclosure," none of the serial filer's cases were filed when foreclosure had been scheduled, and the current debtor had been making payments on the mortgage while her spouse had been a debtor in prior Chapter 13 cases. *In re Taal,* ___ B.R. ___, 2014 WL 5152580 (Bankr. D. N.H. Oct. 14, 2014).

Party in interest standing to file motion to dismiss, despite no allowed claim. Under § 1306(c), the moving party had standing as a party in interest to move for case dismissal, despite the fact that it had not filed a proof of claim and the bar date for claims had passed, with the court applying *In re Torres Martinez,* 397 B.R. 158 (BAP 1st Cir. 2008). The moving creditor still had a sufficient pecuniary interest in the case, since dismissal before entry of discharge would permit the claim to continue unaffected. Under the Third Circuit's totality-of-circumstances test, found in *In re Lilley,* 91 F.3d 491 (3d Cir. 1996), the debtor met his burden of showing that the case was filed in good faith. *G6 Hospitality Franchising, LLC v. Zaver (In re Zaver),* ___ B.R. ___, 2014 WL 5304864 (Bankr. M.D. Pa. Oct. 15, 2014).

Dismissal did not deprive court of sanction authority. The Chapter 13 case was dismissed after the debtor's testimony that he had not received regular monthly financial assistance from his partner, as had been stated in the schedules, and a creditor subsequently filed a motion for sanctions against the debtor and debtor's attorney. The court held that the case dismissal did not deprive the court of authority to consider an award of sanctions. The debtor was never eligible for Chapter 13 relief, since he lacked regular income, and after dismissal, the debtor and counsel pursued frivolous motions for reconsideration. With the assistance of counsel, the debtor prepared a petition and schedules that were factually inaccurate, and they demonstrated lack of good faith in pursuing reconsideration when the case should never have been filed. Monetary sanctions were awarded against both the attorney and debtor in favor of two creditors to partially compensate for the creditors' attorney fees. *In re Turner,* 519 B.R. 354 (Bankr. S.D. Fla. 2014).

Mortgage Issues

Lacking authority to enforce the mortgage note, the creditor must refund payments to the debtors. The court had previously disallowed the mortgage proof of claim, finding that neither Wells Fargo nor its mortgage servicers had standing to file a proof of claim, after a title search revealed that Wells Fargo did not hold title to the mortgage. The district court had affirmed that decision. The debtors then moved for a refund of the payments made on the mortgage during the Chapter 13 case. Since Wells Fargo lacked legal authority to enforce the note, the debtors' payments were made under mistake, and the equities favored refund; however, the creditor was entitled to deduct from the refund real property tax payments made on debtors' behalf. The refund to the debtors was of the amounts paid directly by the pro se debtors, but payments made on the mortgage by the trustee were to be returned to the trustee for distribution to other creditors with allowed claims. The court cited judicial recognition of the implicit authority for the trustee to recoup improperly distributed funds. *In re Thompson,* ___ B.R. ___, 2014 WL 5335738 (Bankr. E.D. Wis. Oct. 21, 2014).

Debtor's Attorney

Attorney violated debt-relief and certification requirements. Chapter 7 debtor's attorney violated § 526(a)(2) debt-relief agency provision by advising the debtor to omit from schedules a $3,000 prepeitition payment to her mother, and violated § 707(b)(4)(C) and (D)'s certification requirements, by failing to schedule horses owned by the debtor. Disgorgement of $1,411 fees was affirmed. *Bisges v. U.S. Trustee (In re Clink),* 770 F.3d 719 (8th Cir. 2014).

Postpetition divorce attorney did not properly disclose fees. The Chapter 13 debtor employed an attorney to represent him in a divorce action filed by his spouse postpetition, and the debtor informed the attorney that he was in bankruptcy. The attorney was paid $7,150 retainer for the divorce representation, but the debtor later moved for disgorgement of those fees. The postpetition divorce was so intertwined with property of the estate issues that the attorney's employment must be deemed to be "in connection with the case," for purposes of § 329(a) disclosure. The court found that a $500 disgorgement was an appropriate sanction and the attorney must file an application for approval of the balance of the fees. *In re Gorski,* 519 B.R. 67 (Bankr. S.D. N.Y. 2014).

Claims

Widow's family allowance claims. The former Chapter 11 debtor died while domiciled in Florida, leaving seven wills and naming various individuals as executors. No probate had begun on any will. Prior to the death, the case was transferred to the Southern District of Texas, where the debtor had been a successful surgeon, and it was converted after the death to Chapter 7. The debtor's widow filed claims against both the bankruptcy and probate estates for domestic support obligations and family allowance. In a unique and interesting factual setting, the opinion discusses the bankruptcy court's jurisdiction and authority, concluding that under Fifth Circuit authority, the court could

adjudicate the widow's claims against the probate estate, since no probate had been initiated, but the court lacked constitutional authority to enter a final order. A recommended decision was entered for the district court's consideration, recommending that Florida probate law controlled the amount of the widow's family allowance claim against the probate estate, with the maximum being $18,000. There was no Florida statute providing for family allowances "in lieu of" personal or real property. The claim for a domestic support obligation was disallowed against the bankruptcy estate, since there had been no order of a court of record to satisfy § 101(14)(A)'s definition. *In re Brown,* ___ B.R. ___, 2014 WL 5320634 (Bankr. S.D. Tex. Oct. 17, 2014).