AMERICAN BANKRUPTCY INSTITUTE

2023 Rocky Mountain Bankruptcy Conference

# Consumer Case Law Update


**Stephen E. Berken, Moderator**
Berken Cloyes, PC | Denver

**Lon A. Jenkins**
Office of Standing Chapter 13 Trustee | Salt Lake City

**Tara G. Salinas**
Salinas Law Group LLC | Denver


CONCURRENT SESSION

2023

# *ROCKY MOUNTAIN BANKRUPTCY CONFERENCE*
# *JANUARY 26-27, 2023*
# *SALT LAKE CITY, UTAH*

## Consumer Case Law Update

**FRIDAY, JANUARY 27, 2023**
**9:30 am to 10:30 am MST**

**Panelists**

**Stephen Berken, Esq. Moderator**
**Lon A. Jenkins, Chapter 13 Trustee, (Salt Lake City, UT)**
**Tara G. Salinas, Esq. (Denver, Colorado)**[1]

[1] The moderator and presenters acknowledge the thoughtful contributions to the materials by Hon. William Houston Brown (ret.), and Bill Rochelle, *Rochelle's Daily Wire.*

## Appeals

**Motion denied staying preliminary injunction pending appeal.** Considering the factors for stay pending appeal, including public interest, the Court denied Navient's motion to stay the preliminary injunction pending its appeal. The Court had granted the injunction against Navient's continued collection of Tuition Answer Loans to the extent the loans exceeded the costs of attendance, in *In re Homaidan*, 640 B.R. 810 (Bankr. E.D. N.Y. Nov. 1, 2022), Judge Strong.

## Abstention

**Personal injury tort was not core, with permissive abstention appropriate.** Dischargeability complaint alleging sexual assault under California law constituted personal injury tort that was not core proceeding, with permissive abstention and stay relief appropriate to allow liquidation of claim in pending Federal court litigation. *In re Gordon*, ___ B.R. ___, 2022 WL 16857098 (Bankr. D. Idaho, Nov. 10, 2022), Judge Hillen.

## Attorney Fees

**Procedure for no-look fee to debtor's attorney.** Finding that a "de facto no look fee agreement" had been implemented between the Chapter 13 trustee and debtors' counsel, the Court had "sole responsibility" to determine reasonable attorney fees; therefore, the Court adopted rules and procedures for a "presumptively reasonable fee," with requested fees beyond that amount requiring a fee request and hearing. Finding the "utility of presumptively reasonable fees persuasive," the presumptive fee would be $5,500, which was the basic fee currently being charged in the district in Chapter 13 cases. Mortgage loss mitigation had become the focus of local Chapter 13 cases, and the Court determined that it would no longer "entertain motions for loss mitigation in Chapter 7 or 13 cases," finding that "loss mitigation had morphed into an institutionalized process not supported by the Bankruptcy Code. It now seemingly exists not for the purpose originally intended but for the benefit of professionals, trustees, and institutions, often to the detriment of the creditors." Although encouraging debtors and secured creditors to reach consensual agreements, that process is voluntary, not one to be forced on creditors through a loss-mitigation process. The need for such a process had abated due to changes in interest rates, legislation addressing mortgage defaults and other factors. The Court found that it "has no legal authority under the Bankruptcy Code to enforce the loss mitigation program," including under § 105(a)." While parties could continue to submit motions to approve consensual mortgage modifications and consensual mediation, "this Court will no longer entertain loss mitigation motions in Chapter 13 [or 7] cases." The fee requested in the case before the Court involved loss mitigation work by the debtors' attorney. *In re Tcherneva*, 2022 WL 598324 (Bankr. E.D. N.Y. Feb. 28, 2022), Judge Grossman.

**Nunc pro tunc employment of personal injury attorney.** When the personal injury attorney for one of the joint debtors failed to seek timely employment and then settled the cause of action and disbursed funds without court approval, the Court considered whether nunc pro tunc employment was appropriate. Although finding that such employment may be permissible, with the *Acevedo* decision not a complete bar, there was no showing of excusable neglect to justify such employment in this case. The Court then addressed whether the personal injury attorney must disgorge fees received in the unauthorized settlement, with post-confirmation settlement proceeds being property of the Chapter 13 estate. Courts have split on whether § 327(e) applies

to employment of an attorney by the debtor, and this Court found that it applied only to trustees' employment of attorneys, but personal injury attorneys have obligations under § 329(a) to seek approval of compensation because special counsel's representation in a post-petition matter is sufficiently connected to the bankruptcy case. Because this attorney disbursed settlement funds, including attorney fees, without disclosure and approval, the fees must be disgorged. Other issues about turnover of the funds disbursed to the debtor were not resolved in this opinion. *In re Smith*, ___ B.R. ___, 2022 WL 540016 (Bankr. S.D. Ga. Feb. 23, 2022), Judge Coleman. *See also In re Mallinckrodt PLC*, 2022 WL 906462 (D. Del. Mar, 28, 2022) (Rejected interpretation that *Acevedo* deprives courts of authority to approve professional retention retroactively.), District Judge Stark.

**Unlawful practice of law.** In an examination of the business model of Upright Law and whether it engaged in the unlawful practice of law in the Middle District of Alabama, the Court made extensive findings, including that Upright permitted non-attorney staff in Chicago to engage in the unauthorized practice of law in Alabama. The Court also found that attorneys in Alabama were not partners or regular associates in Upright when they worked on bankruptcy cases that were prepared by Upright and filed in Alabama. Findings were made that Upright and the Alabama attorneys did not provide competent representation or otherwise comply with Alabama Rules of Professional Conduct. Sanctions included disgorgement of all fees paid in 87 consumer cases because of improper fee sharing and fee disclosures, and counsel for the Bankruptcy Administrator and Chapter 13 and 7 trustees were awarded attorney fees. Upright and its successor were enjoined from further practice of law in the Court unless specific conditions were met and a motion to lift the injunction was granted. The Alabama attorneys who had worked with Upright were required to complete 15 hours of continuing legal education in consumer bankruptcy law. *In re Deighan Law LLC*, ___ B.R. ___, 2022 WL 630892 (Bankr. M.D. Ala. Mar. 4, 2022), Judge Sawyer.

**United States Trustee Guidelines for Enforcement Related to Bifurcated Chapter 7 Fee Agreements.** On June 10, 2022, the Acting Director of the Executive Office for United States Trustee announced Guidelines for Enforcement Related to Bifurcated Chapter 7 Fee Agreements. The Guidelines acknowledge that final determination of whether such agreements are in compliance with the Bankruptcy Code and Rules is a matter for each Court.

**Bifurcated fees disapproved by Bankruptcy Courts.** The Bankruptcy Court in Colorado first examined the reasonableness of bifurcated fees charged by attorneys for Chapter 7 debtors and then finding the pre-petition and post-petition fee agreements before the Court "both contain misrepresentations and are misleading since, among other things, they did not accurately disclose counsel's obligations under the Bankruptcy Code and Local Rules. Thus, the Pre-petition Agreement and the Post-Petition Agreement are void under Section 526." *In re Suazo*, 2022 WL 1468083, at *1 (Bankr. D. Colo. 2022). The attorneys had financing and payment management services for their consumer practice through Fresh Start Funding, LLC. The pre-petition agreement "contemplates only an admittedly deficient 'bare-bones' or 'skeletal' submission containing the minimum necessary to start a bankruptcy case," and the Court found that part of the agreement "misleading because it omits explanation of all the numerous additional filings which are required to be made pursuant to Section 521(a)(1)(B) and Fed. R. Bankr. P. 1007(b) and (c) within 14 days after the Petition Date." *Id.,* at * 16. The Pre-petition Agreement was also

defective because it did not offer an option for debtors to continue representation by the attorneys without regard to whether the debtors entered into a post-petition fee contract. The Post-petition Agreement was also defective because it failed to explain that the attorneys had a legal obligation under Code section 526 and Local Bankruptcy Rule 9010-1(c) "to file all documents required by Section 521(a)(1)(B) and Fed. R. Bankr. P. 1007(b) and (c) and perform all the Basic Services." *Id.,* at * 18. In addition, the fee agreements in *Suazo* provided that the attorney would advance the case filing fee, which violated Code section 526(a)(4). *Id.,* citing *In re Brown*, 631 B.R. 77, 102-03 (Bankr. S.D. Fla. 2021). Finding the proposed bifurcated fee agreements to be void, all payments made by the debtors must be refunded. The *Suazo* Court declined to decide "whether bifurcated fees agreements are *per se* prohibited in every case and makes no such determination. And, the Court will not endorse a new framework for what types of bifurcated fee agreements might be good policy. That would seem best left to the Legislative Branch." *In re Suazo*, 2022 WL 1468083, at * 21. The Court only decided that the bifurcated fee agreements before it were void, in violation of the Bankruptcy Code and Local Rules.

The Bankruptcy Court in Minnesota, *In re Siegle,* 2022 WL 1589381 (Bankr. D. Minn. 2022), also disapproved attempts at bifurcation of fees. Under the bifurcated structure, the parties entered into two fee agreements, with the Court finding the agreements violated sections 526(a)(2) – (3) because they contained "untrue and misleading [statements about the attorney's services terminating at filing under the pre-petition agreement,] and they affirmatively misrepresent well-settled law about withdrawal and the scope of services in bankruptcy cases." *In re Siegle,* 2022 WL 1589381, at * 3. The Court also found misrepresentation in the agreements by omission of the services required by the attorney. The agreements also violated section 528(a)(1), "which requires that the explanation of services be stated 'clearly and conspicuously.'" *Id.,* at * 4. Under § 526(c)(1) agreements were void and unenforceable.

**Bifurcated fees approved by District Court as not violating local bankruptcy rule on continued representation.** In Chapter 7 cases in the District of South Carolina the debtors' attorney offered two payment options: prepayment of fees before filing the case or bifurcated fee agreements. Under the later, the engagement was split between pre-petition and post-petition services, with the clients then having the option to enter into post-filing fee agreements within ten days after the case was filed. The debtors were given other options of representing themselves post-filing or engaging other counsel if they chose not to enter into the post-filing agreements. The fee agreements specified pre-filing and post-filing services. If the debtor chose to pay in full before filing, the fixed fee was $2,350, including filing fee, but with potential hourly rates post-petition for specific services. If the debtor chose the bifurcated agreement, financing was through a third party, which charged fee for the service. The United States Trustee asserted that the bifurcated fee arrangements violated a local rule, and the Bankruptcy Court agreed. On appeal the District Court referred to the Eighth Circuit Bankruptcy Appellate Panel's comment that bifurcated fee agreements "are designed to change the attorney's fees into a post-petition, non-dischargeable debt that can be collected from the client without violating either the automatic stay or the discharge injunction," citing *In re Allen,* 628 B.R. 641, 644 (B.A.P. 8th Circ. 2021). Such bifurcated fee agreements require adequate disclosure about payments, and they must comply with state rules of professional conduct and any relevant local rules. The Bankruptcy Court had determined that its local rule required continued representation by the attorney throughout the case, and such a requirement did not permit bifurcated fee agreements

that could lead to the filing attorney's withdrawal after filing. The District Court reviewed recent opinions from other courts and found no binding authority that bifurcated fee agreements were prohibited as a matter of law. Then, the Court found that such agreements did not violate that District's local bankruptcy rule, with the debtors' attorney agreeing that he was the attorney of record until the Bankruptcy Court allowed withdrawal. In the cases on appeal, the filing attorney did not attempt withdrawal, and the debtors were satisfied with the attorney's services and with the bifurcated fee arrangements. The Bankruptcy Court had not made findings on the reasonableness of the attorney fees or other related matters; therefore, those issues were not before the District Court, which reversed on the basis that the fee agreements were not violative of the local rule but remanded for other determinations. *In re Prophet, et al.*, 2022 WL 766390 (D. S.C. March 14, 2022).

**Examination of bifurcated fees, financing and settlement with U.S. Trustee.** In an extensive examination of issues underlying "nontraditional methods" of attorney payment for Chapter 7 cases, the Court considered whether to approve settlement between debtors' attorneys, the U.S. Trustee and intervening interested parties. The opinion discusses financing and bifurcated fee structures, unbundled legal services, requirements for full disclosure, the district's requirement for execution of a Rights and Responsibilities Agreement between attorneys and bankruptcy clients, as well as factors for consideration in evaluating whether to approve a settlement that would provide guidance to attorneys before entering into "nontraditional methods to get paid." The proposed settlement included disgorgement and self-reporting to disciplinary authorities, as well as other admissions and representations going forward. *In re Rosema*, 641 B.R. 896 (Bankr. W.D. Mo. 2022), Judge Norton.

**Finance charges and failure to disclose bifurcated fee agreements.** Reviewing the Court's Chapter 7 bifurcated fee standards, the attorney had duty to disclose third-party factoring payments and failure to disclose the bifurcated fee agreements required fee disgorgement of $150 to each debtor. In four cases financed by third party the finance fee must be returned to debtors. *In re Shepherd*, 644 B.R. 130 (Bankr. W.D. Pa. 2022), Judge Agresti.

## Automatic Stay

**Denial of stay relief was final and appealable, although it was "without prejudice."** Deciding an issue not addressed in *Ritzen Grp., Inc. v. Jackson Masonry, LLC,* 140 S.Ct. 582 (2020), the Ninth Circuit concluded that the bankruptcy court's order denying stay relief was final and appealable, despite its "without prejudice" language, because the bankruptcy court's denial "conclusively resolved the request for stay relief." The record in this case "makes it clear that the court 'unreservedly denied relief,'" and the "bankruptcy court's statement that the denial of stay relief was without prejudice indicates that the court was willing to consider stay relief if sought for a different purpose, but not for the purpose of resolving" the state court litigation at issue in the motion that was denied. *Harrington v. Mayer (In re Mayer),* 28 F.4th 67 (9th Cir. 2022).

**Automatic stay and domestic support obligations.**
A post-petition hearing in the Family Court that modified and established an additional family support obligation was not a violation of the stay, falling under § 362(b)(2)(A)(ii)'s exception, but the Family Court's judgment of civil contempt had the purpose of compelling the debtor to

pay pre-petition child support arrearages under threat of sanction, and that contempt judgment was a stay violation and void. The interception of state and federal tax refunds for payment of child support arrearages was not a stay violation, falling within § 362(b)(2)(F)'s exception. *In re Dougherty-Kelsay*, ___ B.R. ___, 2022 WL 830907 (B.A.P. 6th Cir. Mar. 21, 2022).

**Omitted creditor willfully violated stay be sending second invoice after learning of the bankruptcy filing.** Chapter 13 debtor had inadvertently omitted a medical creditor from schedules, but when the debtor received an invoice, debtor's counsel notified the creditor of the bankruptcy, with the schedules and plan amended to add the creditor. Although a second invoice was sent because of human or computer error, the creditor willfully violated the stay. After amendments of schedules, the creditor was receiving notices about the bankruptcy case, and it had the burden to ensure that it did not violate the stay. Section 362(k) does not contain a specific intent requirement, and the violation was willful. The actual damages were small, but the debtor was entitled to reasonable attorney fees, with the $17,500 requested fee reduced to $2,500. Punitive damages were not appropriate. *In re Defeo*, ___ B.R. ___, 2022 WL 154489 (Bankr. D. S.C. Jan. 14, 2022), Judge Waites.

**Damages for stay violation against Indian tribe and waiver of sovereign immunity.** The First Circuit held on direct appeal that § 106 unequivocally abrogates tribal sovereign immunity, even though the Code section does not mention Indian tribes. The Code's reference to "governmental unit" was sufficient to include tribes within the definition found in § 101(27). The stay violation occurred in a Chapter 13 case, with the debtor having obtained a payday loan from a wholly owned subsidiary of the defendant Band of Lake Superior Chippewa Indians. *In re Coughlin*, 33 F.4th 600 (1st Cir. 2022).

**Section 362(c)(3)(A) stay terminates only as to debtor.** The Chapter 13 debtor had one prior case dismissed within the year of commencement of current case, and the Court reviewed case and other authority on the extent to which the automatic stay terminated on the 30th day in the current case. Under the Bankruptcy Code, there can be various property that never becomes property of the estate but remains property of the debtor, and section 362(c)(3)(A) provides for termination of the stay "with respect to the debtor," but does not provide for stay termination as to property of the bankruptcy estate. *In re Madsen*, ___ B.R. ___, 2022 WL 1272583 (Bankr. E.D. Cal. Apr. 27, 2022), Judge Sargis.

**No stay under § 362(c)(4).** The debtor was a repeat filer engaged in attempts to prevent foreclosure of property located in Texas, and under § 362(c)(4)(A), no automatic stay went into effect upon this Chapter 13 filing in New York. Based on a finding of the debtor's bad faith, any stay would be annulled nunc pro tunc to the date of filing. *In re Thomas*, ___ B.R. ___, 2022 WL 1272145 (Bankr. S.D. N.Y. Apr. 28, 2022), Judge Morris.

**Foreclosure sale violated stay as to debtor's possessory interest.** The Chapter 7 debtor filed her petition four days before the foreclosure sale of her residence, which was owned by an LLC, of which the debtor held 99% interest. In the foreclosure suit, the LLC and debtor had been named as defendants. The lender received notice of the individual debtor's Chapter 7 filing but proceeded with sale, taking the position that the LLC was owner and that it had not filed bankruptcy. The Second Circuit adopted a "bright line rule: If the debtor is a named party in a

proceeding or action, then the automatic stay imposed by [sections 362(a)(1) and 362(a)(2)] applies to the continuation of such proceeding or action." It was undisputed that the debtor held a possessory interest in the residence at time of her Chapter 7 filing, and that interest was part of her bankruptcy estate protected by the automatic stay. The lender willfully violated the stay by proceeding with foreclosure sale while knowing that a named defendant in the foreclosure action had filed bankruptcy. The lender should have sought stay relief. *In re Fogarty*, 39 F.4th 62 (2d Cir. 2022).

**Stay not violated by state court action against former spouse's interest in property.** The Chapter 13 debtor and her husband had divorced pre-bankruptcy, becoming tenants in common in former marital residence, and the terms of property settlement agreement had not been consummated to remove former husband from mortgage. The mortgage lender and its attorney did not violate stay in Chapter 13 by proceeding against former spouse's interest in the property. The lender and its attorney were not aware of the debtor's Chapter 13 filing, and demand against the former husband for payment of the mortgage was not an attempt to collect from the debtor or from the estate's interest in the property. There also was no violation of the discharge injunction, applying the *Taggart* standard. re Busby, ___ B.R. ___, 2022 WL 3030971 (Bankr. E.D. Pa. Aug. 1, 2022), Judge Chan.

**Absence of automatic stay when debtor did not have equitable or legal interest at filing.** The Chapter 13 debtor did not own any legal or equitable interest under applicable Michigan law in the real property foreclosed by homeowners' association; therefore, there was no automatic stay in effect upon debtor's filing. The property was titled only in the debtor's husband's name, and debtor did not acquire interest in marital property because the parties had not filed divorce action that could create such interest. Debtor's contributions to mortgage payments had not created constructive trust interest in the property. The opinion also notes that the debtor unreasonably withheld notice of her Chapter 13 filing from the homeowners' association, and the association would be prejudiced by imposing a stay, citing *Easley v. Pettibone Michigan Corp.,* 990 F.2d 905 (6th Cir. 1993). *In re Wright*, 642 B.R. 172 (Bankr. E.D. Mich. 2022), Judge Tucker.

**Mortgage creditor violated stay.** The Chapter 13 debtor was beneficiary under her deceased father's spendthrift trust, having acquired her interest in residence prior to Chapter 13 filing. Mortgage creditor's servicer was aware of filing and willfully violated stay by foreclosure. District Court affirmed. *In re Hoover*, 645 B.R. 656 (W.D. Wash. 2022), District Judge Lasnik. *See also In re Giles-Flores*, ___ B.R. ___, 2022 WL 12025689 (Bankr. S.D. Tex. Oct. 20, 2022), Judge Isgur. Homeowners' association willfully violated stay by foreclosure of property that was arguably property of Chapter 13 estate. Fifth Circuit authority only required arguably property of estate. *See also In re Hamby*, ___ B.R. ___, 2022 WL 17428947 (Bankr. N.D. Ga. Nov. 29, 2022), Judge Bonapfel. Car creditor violated stay by postpetition repossession of vehicle, retention and collection attempt.

**Mortgage creditor did not violate stay by postponing foreclosure.** Citing other judicial holdings, mortgage creditor's postponement of sheriff's sale and its property inspections did not violate automatic stay. The inspections were not for purpose of harassment or coercion to pay. *In re Nyamusevya*, 644 B.R. 375 (Bankr. S.D. Ohio 2022), Judge Hoffman. Compare *In re Tavera*,

645 B.R. 299 (Bankr. M.D. Fla. 2022), Judge Vaughan. Landlord violated stay by posting notice that demanded payment and by offering to drop criminal charges in return for possession.

**Stay relief granted to allow probate litigation.** Considering factors for granting stay relief and abstention, the Court granted stay relief in Chapter 13 case to allow pending state-court probate action to continue but did not grant relief for purposes of collection of any judgment against debtor that may result. *In re Cattron*, ___ B.R. ___, 2022 WL 17861742 (Bankr. E.D. Mich. Dec. 22, 2022), Judge Tucker.

**Section 362(b)(2).** In reopened Chapter 7, debtor objected to claim filed by former spouse, and no stay was in effect under § 362(b)(2) as to collection of domestic support obligations from property that is not property of bankruptcy estate, but there were some debts omitted from divorce decree on which determination was required by state court. Stay relief was granted to allow parties to return to state court. Opinion also discusses ability of bankruptcy court to reconsider a claim that was deemed allowed before the case had been closed and reopened, citing Rule 3008; however, because no order had been entered allowing claim before closing, Court did not need to rely on that Rule. *In re Jardins*, ___ B.R.___, 2022 WL 16579457 (Bankr. D. Idaho Nov. 1, 2022), Judge Meier.

**Sheriff violated stay but no actual damages shown.** The sheriff's office violated the automatic stay by enforcing writ of possession after having notice of the Chapter 13 filing, and the sheriff was not entitled to quasi-judicial immunity or protection of sovereign immunity; however, § 362(k) requires proof of "injury," and the debtor did not establish any legally cognizable injury to allow recovery of attorney fees. *In re Toppin*, ___ B.R. ___, 2022 WL 16696068 (E.D. Pa. Nov. 3, 2022). See also *In re Schneorson*, 645 B.R. 146 (Bankr. E.D. N.Y. 2022), Judge Mazer-Marino. Chapter 7 debtor did not establish damages against spouse and her attorneys for actions in divorce court, and those actions were excepted from stay by § 362(b)(2).

**In rem relief.** In Chapter 7 case, the mortgage servicer moved for in rem relief under § 362(d)(4), and the trustee moved to dismiss the case. The debtor's multiple filings on the eve of foreclosure sale presented rebuttable presumption of scheme to hinder, delay, or defraud the creditor, supporting in rem relief, and the Court had jurisdiction to grant such relief, even though the case may be subject to dismissal under § 521(i). Automatic dismissal under that section is not "absolute," because § 349 permits that court to "order otherwise" and retain jurisdiction to grant in rem relief. re Merlo, ___ B.R. ___, 2022 WL 16857102 (Bankr. E.D. N.Y. Nov. 10, 2022), Judge Grossman.

## Avoidance

**Court approves use of 10-year statute of limitation when IRS is triggering creditor.** An individual debtor filed a chapter 7 petition in 2019. The IRS had an unsecured claim for more than $20,000 in unpaid federal taxes. The trustee filed suit alleging that the debtor had denuded himself of his principal assets by making a string of fraudulent transfers going back 10 years. The trustee asserted that he could step into the shoes of the IRS and enjoy the 10-year statute of limitations for fraudulent transfer claims afforded to the IRS. The defendants filed a motion to dismiss, contending that the trustee was limited to the four-year statute of limitations under Kansas law for fraudulent transfers. In a lengthy opinion, Judge Somers lays out the decisions on

both sides of the issue, noting that interpretation of Section 544(b) determines the outcome. In many cases, applicable law under 544(b) is state fraudulent transfer law. However, when the "triggering creditor has avoidance rights under federal law, the trustee likewise has such rights." The Trustee points to 26 U.S.C. §6502 for the proposition that he could employ a 10-year lookback afforded to the IRS. Following the majority opinion, and breaking with the 5th Circuit, Judge Somers denied the motion to dismiss and allowed the Trustee to proceed under 26 U.S.C. §6502 and the FDCPA's six-year statute of limitations. The parties filed unsuccessful cross motions for interlocutory appeals to the BAP, requiring Judge Somers to rule on the merits before the Section 544(b) question is considered by the BAP or the 10th Circuit. *Williamson v. Smith (In re Smith)*, 22-07002 (Bankr. D. Kan. June 2, 2022)

**Tax lien sale did not provide reasonably equivalent value and debtors had standing to avoid sale.** Debtors sought to avoid a tax lien foreclosure of their home as a fraudulent transfer under section 548, contending the foreclosing county was not entitled to a presumption that the foreclosure constituted a transfer for "reasonably equivalent value." Debtors' home was owned free and clear of mortgages and was burdened by a $1,290 tax lien in favor of the county. New York Real Property Tax law provided for a strict foreclosure proceeding comprised of a court-ordered deadline for homeowner to pay the delinquent tax. If not paid, the court entered an order transferring title and possession of the property to the county. Debtor did not pay timely and title transferred to the county. There was no foreclosure sale; however, subsequently the county sold the property for $22,000 – and retained the excess proceeds. Subsequently, debtors filed chapter 13 and proposed in their plan to pay the county's lien with 12% interest over the life of the plan. The Second Circuit affirmed the district court in holding that the U.S. Supreme Court decision in *BFP v. Resolution Trust Corp*. did not control. While BFP did hold that a mortgage foreclosure sale conducted in accordance with state law was entitled to a presumption that the transfer was in exchange for "reasonably equivalent value," in the present case there was no auction sale and no opportunity for the market to set the value of the property. Instead, although occurring in accordance with state law, the foreclosure/transfer took place by court order without a sale and only subsequently did the county sell the property. Moreover, the county "pocketed" the excess proceeds and thereby obtained a windfall at the expense of the estate, creditors and the debtor. The court concluded that "Common sense dictates that receipt of $1,290 for a property that was sold for $22,000 fails the 'reasonably equivalent value' test." *County of Ontario v Gunsalus*, 37 F.4th 859 (2nd Cir. 2022)

**City of Chicago's lien for unpaid parking tickets was avoidable judicial lien.** The City of Chicago had possessory lien on vehicle impounded because of unpaid tickets, and the issue before the Circuit was whether that lien was statutory or judicial in nature. The City's Municipal Code provided for the lien, but the Circuit held that the lien did not arise "solely by force of a statute," as defined in § 101(53). "Classification of a lien depends on the events, if any, that must occur before the lien attaches," and the Circuit found that "quasi-judicial proceedings [were] needed for the City to obtain an impoundment lien." The opinion describes the full process under the City's Code, and "without the judicial or quasi-judicial procedures needed for final determinations of each traffic violation and without the quasi-judicial impoundment procedures, the City could not impose a lien on the indebted driver's vehicle. While the lien is authorized by and defined by statute, the City's possessory lien does not arise 'solely' by statute." For purposes of bankruptcy, the lien was judicial. *Matter of Mance*, 31 F.4th 1014 (7th Cir. 2022).

**Judgment lien for overpayment of workers' compensation benefits was avoidable judicial lien.** Discussing the distinction between statutory and judicial liens, the "focus is on the manner in which the lien arose, not the manner by which it is enforced." With no controlling law in the Ninth Circuit, the Court examined case authority from other Circuits, including *Matter of Mance,* 31 F.th 1014 (7th Cir. 2022), which concluded that a judicial or administrative process was a prerequisite of a judicial lien. In the current case, under Washington law a process occurs before a lien arises, and that process included the opportunity to appeal to an industrial appeal judge and the opportunity to present evidence at such appeals hearing, as well as an opportunity to seek judicial review. The Court determined that this lien was judicial in nature and impaired the debtors' homestead exemption; therefore, the lien was avoidable. *In re Shippy*, 2022 WL 14146881 (Bankr. W.D. Wash. Oct. 24, 2022), Judge Heston.

**Chapter 13 debtors had standing to pursue action on behalf of estate against attorneys involved in foreclosure sale and eviction.** Without clear, controlling authority in the Sixth Circuit on whether only the Chapter 13 trustee has standing to bring avoidance and other causes of action on behalf of the Chapter 13 estate, or whether the debtor has concurrent standing with the trustee, at least six other circuits "appear to have come down on the side of concurrent standing for a Chapter 13 debtor to pursue causes of action on behalf of the estate," citing those Circuit opinions. The Court did not need to address the issue in this case, because the confirmation order provided for the debtor's standing to pursue the claims at issue. And *In re Isaacs,* 895 F.3d 904 (6th Cir. 2018), "makes it clear that standing can be approved by the court, even after the fact, to allow a debtor to pursue a claim for the benefit of the estate." However, most allegations in the complaint failed to support claims under applicable Tennessee law, with only the alleged state trespass claim surviving motion to dismiss. *In re Connor*, ___ B.R. ___, 2022 WL 108356 (Bankr. M.D. Tenn. Jan. 4, 2022), Judge Mashburn.

**In avoidance of judicial lien, debtor's lay opinion on value was allowed.** The Chapter 7 debtor moved to avoid judicial lien impairing exemption, and the Court allowed the debtor's lay opinion. Under Fed. R. Evidence 701, a property owner may testify about value of her property, with the basis of the opinion affecting weight but not admissibility, when the opinion is based upon personal knowledge or experience. The debtor had personal knowledge of sale amounts for similar properties in neighborhood. *In re Liss*, 641 B.R. 384 (Bankr. N.D. Ill. 2022), Judge Cox. *Compare In re Badolato,* 641 B.R. 806 (Bankr. E.D. Pa. 2022), Judge Chan (Chapter 13 debtor was not qualified to give expert testimony about condition of foundation of property but could testify about existence of cracks.).

**Fraudulent transfer between former spouses.** The Chapter 7 debtor transferred three properties to his ex-wife, after he had consulted with bankruptcy attorney and was advised that the properties were at risk. The debtor told the ex-wife that he needed to put the properties in her name to protect them during the bankruptcy case, establishing evidence of direct intent under § 548(a)(1)(A). Avoidance and turnover were ordered, subject to the trustee obtaining relief from the automatic stay in the case now filed by the ex-wife. *In re Taylor*, ___B.R. ___, 2022 WL 3363683 (Bankr. W.D. Ark. Aug. 15, 2022), Judge Rucker.

**Real estate tax sales—Avoidable?** Without deciding the direct question of whether a tax sale was avoidable as a fraudulent transfer, when the homes were more valuable than the taxes, county's refusal to compensate homeowners for their equity amounted to an unconstitutional taking of properties in violation of the Fifth Amendment. The first plaintiff's home was worth $300,000 and was sold for $22,000 tax debt, with no refund to the plaintiff of her substantial equity. *Hall v. Meisner*, 51 4th 185 (6th Cir. 2022). *See also In re Riendeau*, 645 B.R. 321 (Bankr. D. Maine, 2022), Judge Cary. Real property tax lien foreclosure did not, as matter of law, establish reasonable equivalent value, but successful bidder was immediate transferee who took for value, in good faith and without knowledge of voidability.

**Chapter 7 trustee may not avoid tax penalty lien on exempt property.** Deciding matter of first impression, the Ninth Circuit held, with a dissent, that the Chapter 7 trustee could not use §§ 724(a) and 551 to avoid a tax penalty lien on the debtor's exempt homestead or preserve that lien for the benefit of the bankruptcy estate. The debtor could claim the homestead exemption, but it would be subject to the lien. Although the Arizona homestead exemption did not provide a reduction of the exemption for tax liens, § 552(c)(2)(B) provides an exception from allowed exemptions for filed tax liens. Once the debtor's claimed exemption was allowed, the property was no longer property of the estate; therefore, § 724(a) would no longer apply. *In re Tillman*, 53 F.4th 1160 (9th Cir. 2022).

**Judgment lien avoidance determined based on homestead exemption in effect on bankruptcy filing date, not date of judgment lien.** The Ninth Circuit held that for purposes of lien avoidance under § 522, the amount of the exemption to which the debtor would be entitled in absence of the judgment lien is determined by the exemption amount as of the bankruptcy petition filing date, rather than the earlier date the judgment lien was recorded. *In re Barclay*, 52 F.4th 1172 (9th Cir. 2022).

## Chapter 7 Issues

***Attorney Fees***

**Upon dismissal of Chapter 7 case for cause, pending adversary proceeding also dismissed.** Finding cause on creditor's motion to dismiss the Chapter 7 case, the Court also dismissed the creditor's pending dischargeability adversary proceeding. Section 349 permits the Court to find cause to retain a pending proceeding, but dismissal of the case eliminates the creditor's standing to seek § 523(a) determinations because case dismissal meant that the debt was not discharged. *In re Le Fande*, 641 B.R. 430 (Bankr. S.D. Fla. 2022), Judge Russin.

**Trustee's attorney may only be compensated for legal services under § 330.** The Chapter 7 debtor appealed from order requiring debtor to compensate trustee's law firm for services performed on behalf of the trustee, and Fifth Circuit held that § 330(a) only allowed attorney compensation for services that required legal expertise and not for administrative services that were ordinarily performed by the trustee without attorney assistance. The law firm failed to carry the burden of showing that all its services were justified under the Code. *In Matter of Sylvester*, 23 F.4th 543 (5th Cir. 2022).

*Reopening Closed Case*

**Approaches to amending schedules after reopening.** The Chapter 7 debtor moved to reopen closed case to amend Schedule C exemptions and avoid judicial liens under § 522(f), and the Court explored whether there was "cause" to reopen under § 350(b) and amend schedules after a case has been closed. The United States Trustee argued that the doctrine of laches should apply because this case had been closed for eight years. First, the court found that § 350(b) provided "broad discretion to determine whether a movant has demonstrated 'good cause' to reopen a case." Such cause could include a need to amend schedules, and neither the Code section nor Rule 5010 "prescribe a period by which a motion to reopen must be brought." Although legislative history "suggests a defense based upon the equitable doctrine of laches may be asserted against a motion to reopen," the Court found no showing of prejudice to the two lienholders who would be impacted by reopening. Those lienholders had not objected to the motion, but they might still object to avoidance. Section 522(f) also has no time limitation for seeking avoidance relief, and the debtor would need to amend exemptions before seeking lien avoidance. Under the circumstances of this case, laches did not bar reopening. As to amendment of Schedule C, the Court identified three approaches to applying Rule 1009(a) to amendments when cases had been closed: (1) the strict absolute bar on certain amendments, which was found to be a minority approach; (2) the middle approach of applying the standard of excusable neglect in Rule 9006(b)(1); and (3) the broadest approach of applying Rule 1009(a) "equally to open or reopened cases." This is the approach adopted by *In re Mendoza,* 595 B.R. 849 (B.A.P. 10th Cir. 2019), concluding that Rule 9006(b)(1) did not apply to Rule 1009, with no difference for amendment purposes between an open and reopened case. The motion to reopen was granted, and upon the debtor's filing of an exemption amendment and motion to avoid judicial liens, objections to the amendment and avoidance could be asserted based on the merits. *In re Paduch*, 636 B.R. 340 (Bankr. D. Conn. 2022), Judge Nevins.

**Reopening to allow filing of reaffirmation agreement was denied.** The pro se debtor moved to reopen her case to allow filing of a reaffirmation agreement, and the Court denied the motion, holding that § 524(c)(1) requires that an enforceable reaffirmation agreement be "made" before entry of discharge, and when an agreement is "made" is a question of when the parties had a meeting of the minds. Reopening the case would not allow entry of a reaffirmation agreement that was not made before entry of discharge. *In re Ostrowski*, 635 B.R. 181 (Bankr. M.D. Fla. 2022), Judge McEwen.

**No cause shown to reopen case to allow debtor to file financial management certificate twenty months after closing.** The Chapter 7 case had been closed without discharge due to debtor's failure to file certificate of completion of required financial management course, and the Court applied a four-factor test to determine whether cause for reopening had been shown: "(1) whether there is a reasonable explanation for the failure to comply; (2) whether the request was timely; (3) whether fault lies with counsel; and (4) whether creditors are prejudiced." The opinion cites prior opinions on this issue by this Court and others. Rule 1007(b)(7) requires a showing of cause, and the factors weighed against a finding of cause. *In re Williams*, 636 B.R. 484 (Bankr. E.D. Mich. 2022); *In re Lewis*, 635 B.R. 157 (Bankr. E.D. Mich. 2022); In re Motley, 635 B.R. 150 (Bankr. E.D. Mich. 2022); *In re Brown*, 634 B.R. 748 (Bankr. E.D. Mich. 2022), Judge Tucker.

## Chapter 13 Issues

***Appeals***

**Supreme Court denied certiorari on Second Circuit's interpretation of Rule 3002.1** The Second Circuit Court of Appeals had vacated a bankruptcy court's contempt and sanctions ruling, concluding that, even if PHH Mortgage Corp. improperly disclosed mortgage-related fees, such a violation of Rule 3002.1 could not "form the basis for contempt," in light of *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), because "there is fair ground of doubt" as to whether its conduct was expressly barred. The majority panel went on to hold that Rule 3002.1 does not authorize an award of punitive sanctions. *PHH Mortgage Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2d Cir. 2021), *cert. denied*, 2022 WL 2111447 (June 13, 2022).

***Attorney Fees***

**Chapter 13 debtor's attorney disqualified.** The Chapter 13 debtor's attorney was also a prepetition creditor, holding a potentially large but unliquidated and contingent claim for attorney fees from complex state-court litigation. The attorney waived a fee for the Chapter 13 filing and proposed agreement with the debtor to subordinate the prepetition fee claim to claims of other creditors. Michigan's Rules of Professional Conduct conflict of interest Rule 1.7 required disqualification. Representation of the debtor in the Chapter 13 case may be materially limited by the attorney's own interest, and the debtor needed independent, objective advice and representation. The attorney's conflict of interest could not be waived under Rule 1.7. *In re Baum*, ___ B.R. ____, 2022 WL 1447379 (Bankr. E.D. Mich. May 6, 2022), Judge Tucker.

**No-look fee was not supported by actual and necessary work, with reduced fee allowed.** In an examination of whether the Chapter 13 attorney's actual work justified allowance of $4,350 no-look fee in the district, the Bankruptcy Court evaluated the circumstances in the particular case to determine that a small reduction in the no-look fee was required. The opinion examines no-look fee structures and amounts in several other judicial districts, concluding that a no-look fee cannot automatically be assumed allowable; rather, the facts and circumstances of a case must be considered. The fee in a particular case must be "reasonable and tied to actual and necessary work for the benefit of the estate or the debtor." The opinion reviews authority in the Sixth Circuit on the lodestar method, with a major factor being the rate charged by comparable attorneys in the area. The attorney in this case maintained time records, and the Court found that the case "presented fewer complexities and required less work than many Chapter 13 cases. The evidence did not support an award of the maximum no-look fee." The opinion alerts attorneys that they should "assess each case on its own to determine whether the maximum flat fee of $4,350 or a different fee within that allowed range is appropriate." *In re Spurlock*, ___ B.R. ___, 2022 WL 3041256 (Bankr. S.D. Ohio Aug. 1, 2022), Judge Humphrey. Also, for reduction of debtor's attorney fees, see In re Metts, ___ B.R. ___, 2022 WL 3648420 (Bankr. D. S.C. June 30, 2022), Judge Burris. In *Metts*, the debtor's attorney was inexperienced in bankruptcy, and time spent on tasks were excessive, with inadequate billing records.

**Creditor's motion to disgorge debtor's attorney fees denied.** A judgment creditor moved to require disgorgement of debtor's attorney fees and for sanctions related to the filing of two Chapter 13 cases, but the District Court affirmed denial of that motion, holding that the statutory predicate for disgorgement is § 329(b)'s evaluation of whether the fee exceeded reasonable value

of the legal services. The Bankruptcy Court was familiar with the facts and circumstances underlying the two bankruptcy filings, and that Court had noted that the fee was within the presumptively reasonable fee in the district and that the debtor's attorney had not received full payment for the second case. *In re Lang*, 642 B.R. 76 (M.D. Fla. 2022).

**Chapter 13 debtor's attorney not entitled to retroactive approval of employment.** Although there is no express requirement that a professional's retention be approved prior to rendering services, timely request for approval serves important functions, including evaluation of need for retention, conflicts of interest, control over administrative expenses and transparency. Under Third Circuit authority, retroactive retention requires showing of extraordinary circumstances, and none were shown here when the request was two years after representation began in personal injury action, and the attorney had notice of the client's bankruptcy filing. *In re Young*, ___ B.R. ___, 2022 WL 17730742 (Bankr. W.D. Pa. Nov. 15, 2022), Judge Taddonio.

***Confirmation Issues***

**Interest rate on property taxes after tax sale.** Applying Illinois law on tax sales, the taxpayer may redeem the property by paying the tax-sale purchaser. The plan treated the purchaser as a secured creditor, but the amount of interest on the "sold taxes" was determined under Illinois law at 18%. *In re Drake*, ___ B.R. ___, 2022 WL 548016 (Bankr. N.D. Ill. Feb. 23, 2022).

**Terms of confirmed plan controlled over proof of claim.** Citing authority in the Seventh Circuit, when the confirmed plan provided mortgage arrearage cure amount, creditor with adequate notice of the plan was bound by that provision, which controlled over proof of claim asserting different amount. *In re Mastro-Edelstein*, 645 B.R. 603 (Bankr. N.D. Ill. 2022), Judge Baer.

**Lack of due process notice of plan.** Analyzing prior Eleventh Circuit authority, the Chapter 13 debtor's former divorce attorney did not have adequate due process notice of the plan to provide opportunity to present objections to confirmation. The debtor had not scheduled the attorney and had only sent notice of the filing of the case, and the attorney did not receive the notices required by Rules 2002 and 3015. As a result, the attorney was not bound by terms of the confirmed plan. The Court considered merits of creditor attorney's claim to priority status, finding that the fee owed by the debtor to her former divorce attorney was not a domestic support obligation because it was not in the nature of support. The fee was a contractual obligation that was not entitled to priority status. *In re Collins*, ___ B.R. ___, 2022 WL 17842158 (Bankr. M.D. Ga. Dec. 21, 2022), Judge Laney.

***Completion of Plan***

**Plan determined to be fully performed and debtor's failure to turn over tax refunds forgiven.** In the confirmed plan, the debtor committed to pay 10% to unsecured creditors, to pay mortgage arrearages, and to turn over tax refunds each year during the 36-month plan, but the debtor failed to fully comply with the tax turnover requirement. Nevertheless, the total plan payments were sufficient to pay the mortgage arrearage, allowed attorney fees, and 10% of the only filed unsecured claim (City of Chicago parking tickets), but the trustee moved to dismiss the case for failure to fully comply with the tax turnover provision. The opinion discusses how tax refund expectations may be skewed, including by inaccurate or excessive withholdings and by

the refunds' inclusion of tax credits. The debtor had been providing tax returns to the trustee, disputing that failure to turn over all tax refunds was plan default, and the trustee had not enforced the turnover requirement consistently throughout the plan. Discussing the elements of laches, the Court found fault with both the debtor, debtor's counsel and trustee for the lack of compliance with the tax turnover plan provision, and the Court found that modification of the plan to require the debtor to pay all tax refunds would require the plan to run beyond 60 months because of the debtor's limited income. Under the Court's § 105(a) authority, the debtor's failure to fully perform the tax turnover provision was forgiven and plan payments were complete, *In re Carter*, ___ B. R. ___, 2022 WL 953495 (Bankr. N.D. Ill. Mar. 30, 2022), Judge Barnes.

**Day late and a dollar short.** Chapter 13 plans are limited to five years. Chapter 13 of the bankruptcy code allows qualifying debtors to cover claims through "plans" that pledge future earnings. 11 U.S.C. §§ 1321, 1322(a)-(c). Upon confirmation, the plans bind the debtors and creditors. 11 U.S.C. § 1327. But the code also allows modification of the plan. Through modification, a bankruptcy court can • extend or reduce the time for ... payments (11 U.S.C. § 1329(a)(2)) and• permit the debtor to cure a default on a mortgage payment (*In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994)). But modifications cannot provide for payments more than five years after the deadline for the first payment. 11 U.S.C. § 1329(c). A Chapter 13 bankruptcy case ends in discharge, conversion to Chapter 7, or dismissal. *See* Part 5(B)(1), below. Dismissals and conversions are governed by 11 U.S.C. § 1307; discharges are governed by 11 U.S.C. § 1328. *In re Kinney*, 5 F.4th 1136 (10th Cir. 2021).

***Confirmation***

**Sale plans.** In two cases debtors proposed plans that would sell principal residences during the terms of the plans, and secured creditors objected, resulting in the Court analyzing various issues involved in sale plans. Neither plan indicated current sale prospects, instead proposing future sales during the 60-month plan, with amounts required to cure prepetition arrearages to be paid in full though the future sales. Although the plans provided for secured creditors to retain their liens, the creditors contended that balloon payments did not satisfy § 1325(a)(5)(B) requirements. The Court examined how that section's "equal monthly payments" requirement applied to these prospective sale plans. "If a debtor is providing for payment of a long-term home mortgage loan in a plan, the Code would appear to require a debtor to comply with § 1325(a)(5)(B)(iii) where that plan proposed to maintain monthly contractual payments (or make other periodic payments) and to cure arrearages during the life of the plan." The Court examined the majority and minority interpretations of whether balloon payments are prohibited by § 1325(a)(5)(B)(iii)(I), concluding "that the equal payment provision…is best read to prohibit confirmation of a sale plan, over the objection of a secured creditor holding a mortgage of a principal residence that contemplates periodic payments followed by a lump-sum payment." Section 1322(b)(2)'s anti-modification provision prohibits delay and uncertainty that would result from sale plans that have no definite sale date for the curing of defaults. However, non-consensual sale plans may be confirmable if they provide "for a secured claim to be paid in full through a sale that is in prospect at the time of or at a reasonable time after confirmation, with or without payments prior to the sale, subject to all other confirmation requirements such as feasibility and good faith." Feasibility would include such factors as identification of the sale terms, timeline for sale, marketing efforts, and default remedy, as well as whether the debtor will

be able to make payments contemplated under the plan. *In re Materne*, ___ B.R. ___, 2022 WL 1102452 (Bankr. D. Mass. Apr. 7, 2022), Judge Panos.

**Contempt for violation of confirmed plan.** Finding that TitleMax was in violation of the confirmed plan, which provided for satisfaction of TitleMax's lien and release of the lien upon entry of discharge, TitleMax was in civil contempt for failure to comply with confirmed plan. The lien was ordered satisfied, with the title returned to the debtor and with attorney fees awarded to debtor's counsel. *In re Seaver*, ___ B.R. ___, 2022 WL 2068271 (Bankr. D. S.C. May 13, 2022).

**Inheritance is exempt, is not disposable income, but excess over exemption comes into plan under best interests of creditors test.** The Debtor Wife claimed wildcard exemption in an inheritance, and trustee objected to confirmation contending inheritance was disposable income. The Court concluded that the inheritance was exempt up to the allowable amount. The issue then became whether any portion of the inheritance was disposable income, with the debtors below-median and with disposable income defined in § 1325(b)(2)(A)(i). The opinion discusses the split of judicial view on whether an exempt asset is included as disposable income, with the Fourth and Eleventh Circuits holding that "an exempt asset is not part of the disposable income calculation." This Court concluded that the inheritance was not disposable income "because it is not income or revenue that Debtor Wife will receive 'on a regular basis;'" however, the "value of the inheritance is implicated, if at all, by the 'best interests of creditors' or 'ability to pay' test found in § 1325(a)(4)." To the extent the Debtor received a sum from the inheritance in excess of the amount allowed as exempt under § 522(b)(5), it must be remitted to the trustee for distribution to creditors. *In re McGuire*, 2022 WL _____, Case No. 20-61183-6-DD (Bankr. N.D. N.Y. June 24, 2022), Judge Davis.

**Claimant had sufficient due process notice of case.** Former attorney for debtor in divorce proceedings alleged that his claim for attorney fees was domestic support obligation and that he had not received notice of the plan; however, the attorney received actual notice of the bankruptcy case in time to permit inquiry into what plan provided. The motion to amend judgment confirming plan was denied as improper attempt to revoke confirmation, with revocation requiring adversary proceeding. Attorney failed to establish that he had a domestic support claim against the debtor for fees in the prior divorce. *In re Collins*, 641 B.R. 296 (Bankr. M.D. Ga. 2022), Judge Laney.

***CMI***

**Employer paid benefits included as income.** The chapter 13 trustee objected to debtor's plan because debtor failed to include as income in her CMI calculation employer paid medical, dental and 401(k) benefits. The trustee contended debtor was not paying all disposable income and, indeed, inclusion of those amounts in income could render the debtor above median. Debtor argued that such amounts were not income because debtor never received or controlled the funds and such amounts could not be reached by creditors. The bankruptcy court looked to the definition of "current monthly income," and found no exclusion from income for such employer paid benefits. In addition, current monthly income (section 101(10A)) expressly includes as income amounts paid by "any entity" for "household expenses." Based on controlling law, the Court determined that expenses related to health care were "household expenses" (i.e., expenses

to maintain the home, feed, clothe and protect the family living in the home). Therefore, the employer provided dental and medical benefits were for household expenses and must be included in the calculation CMI. With respect to employer provided 401(k) benefits, however, the Court could not conclude that those contributions were for household expense and therefore did not need to be included in CMI. *In re Clifford*, 2022 WL 16727279 (Bankr. D. Idaho Nov. 4, 2022)

***Curing Defaults***

**After seller had judgment for possession, home not property of estate and default could not be cured.** The debtor had purchased home by installment contract, and seller had obtained prepetition judgment for possession. Noting that "§ 1322 does not fit installment contracts well," there is never a foreclosure upon default and title stays with the seller until full payment of the contract. "For installment contracts, the best analogue to a foreclosure sale is a judgment for possession—and that moment passed for [the debtor] before he filed for bankruptcy, even though he stayed in the house." Although the Bankruptcy Code does not define "foreclosure sale" for purposes of § 1322(c)(1), the Circuit had adopted the gavel rule to decide when property is sold at foreclosure. For an installment sale under Pennsylvania law, default removes the buyer's equitable title when a judgment for possession is entered against the homeowner. The opinion notes that the buyer could have cured default in Chapter 13 if the case had been filed before entry of the judgment for possession. *In re Peralta*, ___ F.4th ___, 2022 WL 4090304 (3d Cir. Sept. 7, 2022).

**Payment of creditors ordered for cause upon case dismissal.** After winning lottery during Chapter 13 case, debtor agreed to payment of creditors' claims and to dismissal of case. Debtor subsequently moved to compel trustee to recover and return funds paid to creditors, but Court found cause under § 349(b) for the distribution to creditors. The trustee made those payments in compliance with the debtor's consent and with the terms of Court's order for payment. *In re Mammay,* 641 B.R. 569 (Bankr. W.D. Pa. 2022), Judge Deller.

**Material default not defined in Code.** The trustee had moved to dismiss the Chapter 13 case for material defaults, and the motion had been granted for debtor's failure to comply with confirmed plan's requirement to provide tax returns to trustee. The debtor's motion for reconsideration was denied, with the Court noting that "material" was not defined in § 1307(c)(6), and nothing in that section required the "default to have a financial impact in order to constitute a 'material default.'" The Court had discretion to determine what constitutes a material default. *In re Lee*, 2022 WL 4085882 (Bankr. E.D. Mich. Sept. 6, 2022), Judge Gretchko.

***Eligibility***

**Debtor ineligible when prior case was dismissed after stay relief order.** The Chapter 13 case was filed within 180 days after the prior case had been voluntarily dismissed following filing of a motion for stay relief and entry of order granting that relief. The Court agreed with those other courts finding § 109(g)(2) to be mandatory when the statute applied, with no requirement of a causal link between the filing of a stay relief motion and subsequent voluntary dismissal of the case. *In re Holloway*, 635 B.R. 149 (Bankr. E.D. Mich. 2022); *In re Baker*, 635 B.R. 147 (Bankr. E.D. Mich. 2022); *In re Boston*, 635 B.R. 483 (Bankr. E.D. Mich. Feb. 112, 2022), Judge Tucker. See also *In re Hill*, ___ B.R. ___, 2022 WL 804068 (Bankr. E.D. Mich. Mar. 9, 2022)

(Incarcerated debtor's spouse took credit counseling for debtor but that was insufficient, and no motion was filed to excuse the debtor from requirement under § 109(h). The debtor was ineligible.).

**Debtor ineligible when debts exceeding debt limit were noncontingent and liquidated.** Examining § 109(e)'s eligibility requirement that debts be noncontingent and liquidated, the money judgments at issue met that requirement, and the debtor's continuing disputes of the judgments did not make them contingent or unliquidated. *In re Ibbott*, _ B.R.___, 2022 WL 697287 (Bankr. D. Maryland Mar. 8, 2022), Judge Chavez-Ruark.

**Ineligibility for Chapter 13 does not prevent voluntary dismissal.** A creditor had asserted that the debtor exceeded the debt limit for Chapter 13 relief, and the debtor sought to dismiss the case under § 1307(b), but the creditor responded that the debtor's ineligibility prevented voluntary dismissal. The Bankruptcy Appellate Panel found no eligibility restriction in the Code on a debtor's right to dismiss. *In re Powell*, 644 B.R. 181 (B.A.P. 9th Cir. 2022).

**Increase in Chapter 13 debt eligibility.** The Bankruptcy Threshold Adjustment and Technical Corrections Act became law with the President's signature on June 21, 2022, immediately increasing the Chapter 13 debt eligibility limit to $2,750,000, and eliminating the distinction between secured and unsecured debt. The Act amends section 109(e) to provide:

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity
> broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title. The Act includes a two-year sunset from the date of enactment, restoring the pre-June 21 version of section 109(e), unless Congress subsequently extended or modified the sunset provision.

**Eligibility based on amount of debt at petition date.** Although the debtors' amount of scheduled debt exceeded the § 109(e) limit, they contended that eligibility should be determined based on the amount of filed proofs of claim less potential disallowance of some claims. The Court disagreed, holding that eligibility is "based on debts as of the petition date not on how many creditors chose to file a claim to participate in distribution." Here, the scheduled noncontingent, liquidated, unsecured debts exceeded the statutory cap of $419,275, and potential disallowance of some claims does not change the amount of debt owed on the petition date. The debtors were ineligible. The opinion notes in footnote 7 enactment of the Bankruptcy Threshold Adjustment and Technical Corrections Act on June 21, but that Act was not in effect when this case was filed, and the Act was not retroactive. *In re Knott*, 2022 WL 2293994 (Bankr. W.D. Va. June 24, 2022), Judge Connelly.

**Filing on behalf of deceased person to delay foreclosure was for improper purpose, with debtor's attorney properly sanctioned.** Two chapter 13 cases were filed for a deceased person at request of that person's daughter/administratrix, with three more cases filed by the daughter pro se, and the Chapter 13 trustee moved to dismiss the cases and for sanctions against the pro se

daughter. The Court then noticed the attorney who filed the first two cases for show cause why he was not subject to sanctions. Affirming the attorney's sanction under Rule 9011, the Sixth Circuit noted that only individuals were eligible for Chapter 13 relief, and a probate estate was not eligible under § 109(e). Under Rule 9011, an objective standard is applied in evaluating whether to sanction, and the bankruptcy court was not required to find that the attorney acted in bad faith; rather, it was appropriate to find that the attorney's conduct in filing Chapter 13 on behalf of a deceased person was unreasonable. The Circuit opinion comments that filing petitions on behalf of the deceased person were for the sole purpose of delaying foreclosure proceedings, which was an "improper purpose." The attorney admitted that he did not conduct a pre-filing reasonable inquiry into whether the deceased person's estate was eligible. The sanctions against the attorney were appropriate under Rule 9011. *In re Bagsby*, 40 F.4th 740 (6th Cir. 2022).

**Filling second case while first case pending violated "single estate rule."** The debtor filed a second Chapter 13 while a case was still pending, and then moved to extend the automatic stay in the second case, but § 362(c)(3) did not apply to terminate stay in second case because the first case had not been dismissed. Generally, filing second case while prior case is still pending violates "single estate rule," because two cases involving same debtor cannot be open simultaneously if they involve same property of estate. Debtor was given notice to show cause why the second case should not be dismissed. *In re Giles*, 641 B.R. 255 (Bankr. S.D. Fla. 2022), Judge Russin.

**Venue incorrect and case dismissed.** Noting that the debtor and her husband had filed thirteen bankruptcy cases in seven districts, the debtor in current case failed to show venue was proper in Connecticut. Because the case was filed in the wrong venue and in bad faith, it was dismissed, and any future cases filed by these parties in this district would be met with show cause why they should not be dismissed with twenty-four month bar. *In re Emiabata*, ___ B.R. ___, 2022 WL 2914361 (Bankr. D. Conn. July 22, 2022), Judge Nevins.

**Son's filing on behalf of incompetent father.** Bankruptcy Rule 1004.1 permits filing by representative, next friend or guardian, provided the debtor is incompetent, and under South Carolina law, mental incompetence is established by evidence of mental impairment that makes the person incapable of managing own affairs. The father was incompetent at time of petition filing so that son was qualified as "next friend' to file on his behalf, and son could be appointed as guardian ad litem for purposes of pursuing the case. *In re Brown*, 645 B.R. 524 (Bankr. D. S.C. 2022), Judge Gasparini.

***Household Size***

**Economic unit approach adopted for measuring household size.** Rejecting "heads on beds" and "income tax dependent" approaches to determination of the debtors' household size, the Court adopted an "economic unit" approach as being most consistent with congressional intent behind BAPCPA's disposable income and means tests. In re Poole, ___ B.R. ___, 2022 WL 5224087 (Bankr. N.D. Tex. Sept. 30, 2022), Judge Larson

***Modification***

**Trustee's failure to enforce tax turnover provision resulted in debtor's plan being deemed complete.** In month 56 of debtor's chapter 13 plan, the chapter 13 trustee filed a motion to

dismiss debtor's case and debtor countered with a motion to modify his plan to deem his plan complete. Debtor was elderly, with a fixed below median income of $18,000, and with a household of five people. Debtor's plan provided that each year during his plan, he would provide the trustee copies of his tax returns and subsequently turnover his tax refund. For a number of years during the plan, debtor failed to provide to the trustee copies of his tax returns or to turnover his tax refund. Some years, the trustee filed motions to dismiss arising from the debtor's failure but always withdrew her motions to dismiss without receiving payment of debtor's tax refund. Then in month 56, the trustee's motion to dismiss alleged a payment default of $15,800 and a total amount due of $40,754 – although by then debtor had paid enough into his plan to pay all plan obligations. The court noted, that were debtor to pay the amounts sought by the trustee in her motion to dismiss, his plan would run an additional 90 months. The court acknowledged the "understandable" confusion when a trustee over an extended period of time neglects to act in accordance with debtor's plan obligations, but recognized that fault lay with debtor and his counsel as well. Recognizing the impossibility of debtor making the payments sought by the trustee and believing that debtor may have been "lulled" into thinking only tax returns were required to be provided to the trustee, the court invoked its power under section 105 (and Rule 60(b)(5)) to forgive the tax turnover provision of the plan and to deem debtor's plan complete. Interestingly, the court noted that dismissal of a case is not mandated just because a plan runs longer than 60 months and that a plan can be modified even after the 60th month – "so long as the court does not extend the plan term itself beyond 60 months." *In re Carter*, 2022 WL 953495 (Bankr. N.D. Ill. Mar. 30,2022)

**Proceeds from sale of business property during term of plan not earnings under 1306(a)(1).** Debtors filed Chapter 13 and confirmed their plan resolving disputes with the Trustee over valuation of husband's 13% interest in an LLC holding a small office building. The parties agreed to value the interest at $15,000, which was reconciled through the plan. Three years into the plan, the other owners of the LLC decided to sell the office building. Husband's 13% interest netted proceeds of approximately $75,000. The Trustee filed a Motion to Modify the Plan demanding debtors turnover the proceeds. The debtors objected and won. Judge Rosania was asked to find the answer in what he called the "apparent contradiction" between Sections 1325(a)(4) and 1306. The Court framed the issue as whether the proceeds from the sale of prepetition property "should be contributed to the chapter 13 plan." Under the "estate termination theory" espoused by other bankruptcy judges in Colorado, he said that "property vested with the debtors upon confirmation was no longer property of the estate." To resolve the contradiction in the statute that the Tenth Circuit recognized in Barrera, Judge Rosania found that "the revesting requirement under 11 U.S.C. § 1327(b) is more specific than the general language of 11 U.S.C. § 1306(a)(1)" and that "the estate termination theory gives meaning to both statutes." Judge Rosania observed that the sale proceeds were generated from the sale of a business entity and were not earnings under Section 1306(a)(2) and ruled in favor of the debtors. However, the more significant finding is he stated that the value of the interest in the LLC "was appropriately disclosed and reconciled in the best interest-of-creditors test" and "revested with the Debtors upon confirmation." Judge Rosania held that the estate termination theory allows the Debtors to retain proceeds from the post-confirmation sale of prepetition property under the facts and circumstances of this case. *In re Klein*, 17-19106 (Bankr. D. Colo. Aug. 23, 2022).

**Maximum plan term returned to five years.** Noting that the portion of § 1329(d) that could permit extension of plans to seven years had sunset, effective March 27, 2022, the maximum term for a plan is now five years; therefore, the debtor's motion to extend the plan to 67 months was denied. *In re Bohinski*, ___ B.R. ___, 2022 WL 1435605 (Bankr. E.D. Mich. Apr. 25, 2022), Judge Tucker.

**Modification to surrender collateral.** The confirmed plan provided treatment of two claims secured by vehicles, and the debtors moved to modify the plan to allow surrender of the collateral. The creditor objected, asserting that modification to surrender collateral was not permitted under § 1329, and the Court reviewed the split of authority on the issue, with no direct authority from the Fifth Circuit. The Court agreed with the majority view that modification may be allowed to surrender collateral if the modification is filed in good faith. Such modification fits within § 1329(a)(3), and the incorporation of §§ 1322 and 1325 into § 1329 supports allowing modification to surrender collateral. The plan modification must be proposed in good faith, which is determined under totality of circumstances. Modification was granted. *In re Jenkins*, ___ B.R. ___, 2022 WL 1196578 (Bankr. E.D. Tex. Apr. 21, 2022), Judge Searcy.

**Plan modification motion was timely when filed before completion of direct payments of ad valorem taxes.** Construing § 1329(a)'s time to file a plan modification, the Court noted the split of authority on whether completion of plan payments was triggered by payments to the trustee or by direct payments, concluding that when the confirmed plan provided for direct payments they were "payments under the plan." Therefore, the debtors' motion to modify the confirmed plan was timely even though filed seven months after payments to the trustee had been completed. The plan provided for direct ad valorem tax payments, which had not been completed. The debtors had entered into a mortgage modification, which could not be considered a de facto plan modification because it did not comply with Code and Rule requirements for plan modification. The plan modification as filed was not confirmable, but opportunity to refile was given. *In re Villarreal*, ___ B.R. ___, 2022 WL 1102223 (Bankr. S.D. Tex. Apr. 12, 2022), Judge Rodriguez.

**Modification of plan untimely under Rule 60(b).** The confirmed plan provided for the State of Wisconsin Department of Children and Families to be treated as priority domestic support creditor under § 507(a)(1)(B). The plan was confirmed in February 2019, but subsequently the Seventh Circuit held in *In re Dennis,* 927 F.3d 1015 (7th Cir. 2019), that excess public-assistance payments were not subject to priority status under § 507(a)(1)(B). As a result of *Dennis*, the potential was for the State's claim to be treated as unsecured non-priority, with reduction in plan term and total payments. The debtors did not seek to modify their plan to take advantage of *Dennis* until December 2020, and the Circuit held that under *Kemp v. United States,* 142 S.Ct. 1856 (2022), Rule 60(b)(1) governs "all kinds of mistakes," legal and factual, or a mixture of them. Rule 60(c) sets a one-year time limit on relief under Rule 60(b)(1). "The Terrells could have sought timely relief [to modify their confirmed plan] under Rule 60(b)(1)—when *Dennis* was decided, that year had more than seven months left to go—but they did not. They took almost two years from the plan's confirmation." Attempted modification was too late under that Rule. *Matter of Terrell*, 39 F.4th 488 (7th Cir. 2022).

**Debtors in plans extended by former § 1329(d) could not modify those plans to maintain extension beyond five years.** Debtors who had extended their plans to 76 and 84 months under

now expired § 1329(d) sought to modify those plans, retaining the extended time periods, but the Court held that § 1329(c) limited the modified plans to five years. The opinion discusses congressional intent, concluding that the Court could not correct any oversight by Congress when § 1329(d) expired. *In re Nelson*, ___ B.R. ___, 2022 WL 6795096 (Bankr. E.D. Wisc. Oct. 11, 2022), Judge Hanan.

***Property of Chapter 13 Estate***

**Debtor retained interest in vehicle subject to title loan under Alabama law.** In a dispute over whether the Chapter 13 debtor and the bankruptcy estate had interests in a vehicle that was subject to pre-bankruptcy title loan, the Court analyzed Alabama common law and UCC, determining that the vehicle was not a pledged good under the State's Pawnshop Act's forfeiture provision and the lender had not obtained absolute title to the vehicle under that Act. The debtor was able to treat TitleMax in a plan as holder of a secured claim. *In re Hambright*, 635 B.R. 614 (Bankr. N.D. Ala. 2022), Judge Henderson. *Compare In re Snyder*, 635 B.R. 901 (Bankr. S.D. Ga. Jan. 13, 2022), Judge Coleman. Under Georgia's pawn law, pawn transactions, including for automobiles, are for 30-day periods, subject to extension for another 30 days, and failure to redeem the pawned property within an extended grace period results in the pawned vehicle not becoming property of the Chapter 13 estate. The unredeemed title pawn contract could not be modified in a plan as a secured claim. The opinion analyzes Eleventh Circuit authority and the effect of § 541(b)(8).

***Reopening Chapter 13 Case***

**Motion to Reopen denied since Chapter 13 could not be modified.** More than one year after chapter 13 plan was complete, debtors sought to reopen their case to disclose a previously undisclosed personal injury cause of action to permit the chapter 13 trustee to administer proceeds for the benefit of creditors. Although the debtors' desire to reopen was commendable, the court denied debtors' motion to reopen because the chapter 13 plan could not be modified after payments under the plan had been completed. The court reasoned that based on *In re Kinney*, 5 F.4th 1136 (10th Cir. 2021), Congress had strictly limited to five years the time for completing payment under a plan. Because debtors' purpose in reopening their case was "futile," (i.e., to modify their plan) the case could not be reopened. The only other purpose for debtors' desire to reopen their case was to disclose the cause of action to avoid the state court defendant's defense of judicial estoppel based on nondisclosure in the bankruptcy case. The Court refused to relieve the debtors of their mistake, neglect or ignorance. *In re Maldonado*, 2022 WL 6233542 (Bankr. D. Utah Oct. 7, 2022)

***Sale of Property***

**Short sale was not sale free and clear of liens.** Interpreting prior judge's order that had authorized the Chapter 13 debtor's sale of real property for less that the total liens on the property, that order had provided for closing upon approval of lienholders. One lienholder agreed to the short sale but the second lienholder did not. The order for sale was not the equivalent of approval of a sale free and clear of liens, and the original motion did not seek approval of a sale under § 363(f). Although the debtors had closed on a sale and the first lienholder was paid what it agreed to accept, the second lien was never released. The District Court affirmed the Bankruptcy Court's determination that the order for short sale of the property was not an order authorizing sale free and clear of all liens, and modifying that order would be impermissible

substantive correction of the order, which was not an order with consent of the second lienholder. *In re Munn*, ___ B.R. ___, 2022 WL 2790714 (N.D. Tex. July 15, 2022). See also *In re Stark*, ___ B.R. ___, 2022 WL 2316176 (E.D. N.Y. June 28, 2022) (Carve-out sales by Chapter 7 trustee, in which property with no equity value is sold under agreement with lienholders to provide bankruptcy estate some value, are disfavored but not necessarily impermissible, but the District Court held that such sales could not be approved without some payment for the debtor's claimed homestead exemption. The value of the property included the debtor's homestead property right; therefore, the carve-out sale with consent of the lienholders was subject to the debtor's claimed homestead.).

***Trustee Fees***

**Trustee does not retain pre-confirmation payments if plan not confirmed.** If a plan is not confirmed, can the standing trustee deduct and keep his fee before returning the rest of the pre-confirmation payments to the debtor or must the trustee instead return the entire amount of pre-confirmation payments to the debtor without deducting his fee? We conclude that, read together, 28 U.S.C. § 586(e)(2) and 11 U.S.C. § 1326(a)(2) unambiguously require the trustee to return the pre-confirmation payments to the debtor without deducting the trustee's fee when a plan is not confirmed. Our conclusion is bolstered by the fact that, in bankruptcies under Chapter 12 and Chapter 11 (Subchapter V), Congress expressly directed a standing trustee to deduct his fee before returning pre-confirmation payments to the debtor when a proposed plan is not confirmed, but Congress did not direct Chapter 13 standing trustees to deduct their fee before returning pre-confirmation payments to the debtor. Having jurisdiction under 28 U.S.C. § 158(d)(1), we, therefore, AFFIRM the district court's decision denying the trustee his fee in this case. *In re Doll*, Case No.: 22-1004, ____ F.5th ____ (January 18, 2023)

**Trustee retains percentage fee paid before dismissal of case.** The District Court was persuaded by the Bankruptcy Appellate Panel's decision *In re Harmon,* 2021 WL 3087744 (B.A.P. 9th Cir. 2021) (which was a 2 to 1 unpublished decision), that 28 U.S.C. § 586(e)(2) controlled whether the Chapter 13 trustee could retain her percentage fee when the case was subsequently voluntarily dismissed. The opinion reviews the split of authority on whether § 1326(a)(2) or § 586(e)(2) controlled. The District Court found § 586(e)(2)'s language to be "plain and unambiguous. Its scheme lays out the details of the percentage fee: it goes to the Trustee for her work as the standing trustee and it comes from the payments made according to the chapter 13 plan. No further qualifiers, limitations, or exceptions appear in the language. Nowhere does § 586(e)(2) direct the Trustee to hold the fee until confirmation or denial of confirmation. It only directs the Trustee to collect the fee—not to hold it and then return it if the plan is not confirmed. Only when you look beyond the statute can you find any ambiguity to read into the statute. But by the plain language of § 586(e)(2), the Trustee keeps the percentage fee upon dismissal of the chapter 13 bankruptcy petition." Moreover, the Court found harmony between § 586(e)(2) and § 1326(a)(2), because the latter statute "differentiates between payments and the percentage fee, and the same subsection also explains that the Trustee may take the fee *before* the payment to creditors. . . .Both statutes lay out the timing for collecting the percentage fee and neither limits it to after confirmation." *McCallister v. Evans*, ___ B.R. ___, 2022 WL 392933 (D. Idaho, Feb. 8, 2022), District Judge Nye.

*Valuation*

**Manufactured home retail value determined under comparable sales.** In disputed valuation of manufactured home, debtor asserted value based on website questionnaire and creditor's expert used depreciated cost, but Court determined that comparable sales appraisal was more appropriate measure of retail value, without including hypothetical cost to move the home. *In re Lay*, 645 B.R. 661 (Bankr. D. Kan. 2022), Judge Somers.

## Claims

**State law did not provide basis for attorney fees to prevailing debtor.** Nevada statute provided for attorney fees to prevailing party when opposing party's claim was without reasonable grounds or was brought to harass prevailing party, but the Bankruptcy Appellate Panel held that the statute could not be used to assess attorney fees to debtor when creditor filed a proof of claim for a time-barred debt. Under *Midland Funding, LLC v.Johnson,* 137 S.Ct. 1407 (2017), the definition of "claim" is a "right to payment" and that is broad enough to include a claim that is unenforceable because of running of the limitations period, which constitutes an affirmative defense that may be asserted by the debtor to the claim. The state claim was not "groundless" for purposes of applying the Nevada fee-shifting statute. *LVNV Funding, LLC v. Andrade-Garcia*, 635 B.R. 509(B.A.P. 9th Cir. 2022).

**Shared responsibility payment under Affordable Care Act is tax entitled to priority.** The Sixth Circuit Bankruptcy Appellate Panel in split decision considered the Affordable Care Act's provision that individuals failing to maintain qualified health insurance or qualifying for exemption from the requirement are subject to a "shared responsibility payment" for those months they lack health insurance coverage. The majority panel held that the liability is subject to priority treatment under § 507(a)(8)(A) in Chapter 13 plans, because the shared responsibility payment is a tax measured by income. The opinion discusses prior Supreme Court authority on the Affordable Care Act and applied the Sixth Circuit's "functional examination" of whether "an exaction is a 'tax' or 'penalty' for purposes of priority, and the majority held that § 507(a)(8)(A) "does not require that the tax be calculated *solely* or *primarily* by measuring income*." In re Juntoff and McPherson*, ___ B.R. ___, 2022 WL 830901 (B.A.P. 6th Cir. Mar. 21, 2022).

**Burdens on objection to claim.** Under § 502(a) a proof of claim is deemed allowed, with the objecting party carrying initial burden of persuasion to overcome the *prima facie* presumptive allowance, and if that is done, the burden shifts back to the claimant to produce evidence to overcome the objection and prove that the claim is allowable. To the extent an objection attacks one aspect for the claim, the claimant is only required to address that aspect. In this case, the objecting debtor failed to specify which subsection of § 502(b) was at issue, and the debtor failed to rebut the *prima facie* allowance of the claim. *In re Speigel*, ___ B.R. ___, 2022 WL 736253 (Bankr. N.D. Ill. Mar. 11, 2022), Judge Barnes.

**Shared responsibility payment under Affordable Care Act is a tax for bankruptcy purposes.** The Third Circuit held that the Affordable Care Act's shared responsibility payment required by those who did not maintain health insurance coverage was a tax and not a penalty for bankruptcy purposes. The payment was a tax on or measured by income, entitled to priority under § 507(a)(8). *In re Szczyporski*, 34 F.4th 179 (3d Cir. 2022).

**Amendment of claim post-confirmation allowed.** Because the Bankruptcy Court provided compelling reasons, the secured vehicle creditor was allowed to amend its proof of claim post-confirmation to add attorney fees. The Chapter 13 was filed shortly after the debtor purchased the vehicle, and the confirmed plan provided for full payment with interest, stating an estimated amount of the claim. Citing *Holstein v. Brill,* 987 F.2d 1268 (7th Cir. 1993), the relation-back principle of Rule 15(c) applies to amended claims. Here, debtor's counsel knew about the creditor's fees prior to confirmation, and the creditor's fees accumulated because of required responses to the debtor's pleadings. *In re Laney*, 46 F.4th ___, 2022 WL 3500194 (7th Cir. Aug. 18, 2022).

**Rule 3002.1 did not apply to bifurcated claim for manufactured home.** The Chapter 13 debtor's plan proposed to bifurcate the claim related to manufactured home, and the creditor's objection was resolved by consent. Subsequent to confirmation, the creditor filed notice of postpetition mortgage fees and expenses, pursuant to Rule 3002.1, and the debtor disputed the amounts. The Court held that the Rule only applied to plans under which "contractual installment payments" are made either by the trustee or debtor, and the bifurcation of the debt into secured and unsecured portions under § 506(a) took the secured portion out of that definition. The confirmed plan provided for the secured amount, with interest and monthly terms, replacing the former contractual installments. Upon plan completion, the creditor could not collect more than the confirmed amount, and compliance with Rule 3002.1 was not required. *In re White*, 641 B.R. 717 (Bankr. S.D. Ga. 2022), Judge Coleman.

**Municipality's claims for water, sewer and other municipal services were not entitled to priority.** Discussing the distinctions between taxes and other fees for municipal services, for purposes of priority treatment under § 507(a)(8)(B), the Court concluded that the City failed to prove that its charges added to the property tax bill for storm water, water and sewer were functionally tax in nature. The City had the burden of proof on priority status. *In re Peete*, ___ B.R. ___, 2022 WL 2387652 (Bankr. E.D. Wisc. June 30, 2022), Judge Hanan.

## Conversion

***Conversion Chapter 7 to 13***

**Debtor's motion to convert to 13 denied.** Affirming the Bankruptcy Court's denial of the debtor's motion to convert from Chapter 7 to 13, the Bankruptcy Appellate Panel reviewed the standard for such conversions, applying *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365 (2007), and concluding that *Law v. Siegel,* 571 U.S. 415 (2014), did not overrule *Marrama.* "The right to convert under § 706(a) is qualified by § 706(d), which requires that a debtor seeking conversion must qualify to be a debtor in the converted case. . . .Put another way, *Marrama*'s holding that the right to convert is not absolute was not premised upon the bankruptcy court's equitable power but on explicit provisions of the Bankruptcy Code. Thus, it does not run afoul of *Law.*" In the current case, the Bankruptcy Court found bad faith in the debtor's attempted conversion, and that finding was not clearly erroneous under the totality of circumstances. Also, the debtor lacked sufficient regular income to fund a Chapter 13 plan. *In re Richards*, ___ B.R. ___, 2022 WL 884593 (B.A.P. 9th Cir. Mar. 24, 2022).

**Chapter 7 trustee's compensation in case converted from 7 to 13.** The debtor objected to the Chapter 7 trustee's application for payment of administrative fees and costs because no

disbursements had been made to creditors before the case was converted to Chapter 13, and the Court noted that this issue has not been consistently resolved by bankruptcy courts. The opinion reviews authority on compensation of the Chapter 7 trustee. In the current case, because the trustee had not recovered assets or made disbursements, compensation under § 326(a) was inapplicable, but the trustee had expended substantial efforts investigating and objecting to the debtor's homestead exemption. These efforts led to the debtor's conversion to 13. The Court considered whether the trustee's requested compensation of $4,000 was available under quantum meruit or other theory, recognizing that equitable powers are constrained and that strict readings of §§ 326(a) and 330 do not provide a remedy. The trustee's substantial work was performed pursuant to § 704 statutory duties. Although sympathetic to trustees' work that leads to debtors' conversion, Congress permitted conversion at any time under § 706(a); therefore, the resulting inability to pay trustees for such work prior to conversion is "not an extraordinary circumstance that would permit this Court to look beyond the commission rates contained in § 326(a)." *In re Mitchell*, ___ B.R. ___, 2022 WL 659509 (Bankr. D. Idaho Mar. 4, 2022), Judge Meier.

***Conversion Chapter 13 to Chapter 7***

**Proceeds from pre-conversion home sale, including appreciated value, belongs to debtors.** Concluding that section 348(f)(1)(A) provided that proceeds of the post-confirmation and pre-conversion sale by Chapter 13 debtors of their home belonged not to the estate but to the debtors, the Tenth Circuit affirmed its Bankruptcy Appellate Panel. The opinion acknowledges that there is a split of judicial authority, but the Circuit found the statutory language to be plain. The case had been converted to Chapter 7 after the Chapter 13 debtors had sold their home, which had increased in value after the 13 filing. The Chapter 7 trustee sought turnover of the appreciated equity above the previously allowed homestead exemption. Property had revested in the debtors at confirmation, and the Circuit held that section 348(f)(1)(A) provided that, absent bad faith, "after conversion, the Chapter 7 estate generally consists of the same interests in property that would have been included in the estate had the debtor originally filed under Chapter 7, so long as the debtor has possession or control of those interests at conversion." The Circuit concluded that section 541(a) recognizes that legal and equitable interests are legally distinct from proceeds from those interests, "Based on the plain language of § 348(f)(1)(A), the sale proceeds—a property interest distinct from the physical house from which they were derived—do not enter the converted Chapter 7 estate." As a result of the post-confirmation sale, the house was not in possession of or under control of the debtors at conversion, and the proceeds of that sale did not exist at the time of filing the Chapter 13. The vesting effect of confirmation supported the Court's conclusion, with the trustee's turnover request ignoring the effect of revestment. The opinion noted in footnote that the Court was not deciding who would get appreciated value when the home was still owned by the debtors at the time of conversion to Chapter 7. *In re Barrera*, 22 F.4th 1217 (10th Cir. 2022).

**Cause for reconversion to Chapter 7.** After the case was filed as Chapter 7, the debtor converted to 13, but the U.S. Trustee moved to reconvert to 7. Under the nonexclusive factors of § 1307(c) and *In re Leavitt,* 171 F.3d 1219 (9th Cir. 1999), bad faith can be ground for cause to dismiss or convert. Bad faith was found in omission or misrepresentation in schedules and statement of financial affairs, and on balance conversion back to Chapter 7 was in the best interest of creditors and the bankruptcy estate. *In re Ezell*, 2022 WL 2134539 (Bankr. D. Ore. June 14, 2022), Judge Hercher.

***Harris* prevents payment of debtors' Chapter 13 attorney's fees after conversion to 7.** The Chapter 13 plan had not been confirmed prior to the debtors' conversion to Chapter 7, and the attorneys representing the debtors in both phases of the case sought payment of Chapter 13 fees from funds held by the trustee at the time of conversion. The Court held that *Harris v. Viegelahn,* 575 U.S. 510 (2015), was controlling in its application of § 348(f). Absent a bad-faith conversion, the funds held by the Chapter 13 trustee do not become part of the Chapter 7 estate and must be returned to the debtors. The fact that the debtors' attorneys were seeking payment from the funds did not distinguish *Harris,* which had rejected an argument that § 1326(a)(2) authorized the Chapter 13 trustee to make payments after conversion. The Court held that *Harris* applied to every converted case, requiring trustees to return postpetition funds to the debtors without making administrative expense disbursements to Chapter 13 attorneys. *In re Montilla*, ___ B.R. ___, 2022 WL 12165276 (Bankr. N.D. Ill. October 12, 2022), Judge Hunt.

## Discharge

**Collateral estoppel not applied to state court judgment for § 523(a)(2).** When a state court judgment was based on breach of contract, there had been no finding of debtor's intent to deceive, and such intent is required for purposes of § 523(a)(2). Therefore, the judgment was not entitled to preclusive effect, and the creditor filed to show that the judgment was nondischargeable. *In re Piazza*, ___ B.R. ___, 2022 WL 16726739 (Bankr. M.D. Pa. Nov. 4, 2022), Judge Van Eck. *Compare In re Sangha*, 644 B.R. 843 (Bankr. C.D. Cal. 2022), Judge Houle. Collateral estoppel applied to state court's finding of the malicious element of § 523(a)(6), but the willfulness element remained for trial in the bankruptcy court.

**Section 523(a)(5) and arbitration of property interests for unmarried parties.** Parties who had previously been married, divorced, lived together without remarrying and subsequently separated disputed their property interests, including one parties' retirement savings. Their dispute was submitted to binding arbitration, with the arbitrator awarding to the woman half of the increased value in the man's retirement account during their cohabitation. There was an appeal in state court that the man lost, and he then filed Chapter 13, with the Bankruptcy Court finding the arbitration had awarded the woman an interest in property that could not be discharged, but the District Court reversed. The Seventh Circuit upheld the District Court, noting that because the parties were not married, the woman "could not secure relief through the familiar channels of divorce law;" she had sued in state court instead on "equitable theories of express or implied contract, unjust enrichment, and *quantum meruit*." The dispute in the bankruptcy was found to be "whether the arbitrator had awarded Anne a money judgment or an interest in property." The Circuit opinion found that "the better reading of the arbitration award is that it awarded Anne a money judgment, not a property interest." The opinion also noted that the arbitrator's award stated that the judgment would not be dischargeable in bankruptcy, but the arbitrator had no authority to determine that conclusively. The Circuit opinion observed that the closest exception to discharge would be § 523(a)(5), but it was not applicable because the parties had stipulated that this was not a domestic support obligation, "for good reason; as a non-spouse Anne does not meet the statutory requirements" under § 101(14A)'s definition of domestic support obligation for purposes of § 523(a)(5). Because this was a Chapter 13 case, § 523(a)(15) was not discussed in the Circuit's opinion. *In re Harshaw,* 26 F.4th 768 (7th Cir. 2022).

**Lump sum alimony and debts incurred in connection with divorce were nondischargeable under §§ 523(a)(5) or (a)(15).** Unpaid balance of agreed lump sum alimony was domestic support obligation under § 523(a)(5), and employee severance owed to former spouse by debtor's business was incurred in course of divorce and therefore covered by § 523(a)(15). Although the debtor's business was the primary obligor for the severance, the debtor agreed that he was responsible for the debt if the business failed to pay. The former spouse's employment was terminated due to the divorce and the debtor's personal liability arose directly from the divorce. Section 523(a)(15) also covered obligations to pay the former spouse's cell phone charges and health insurance premiums. *In re Burkhalter*, 635 B.R. 284 (Bankr. N.D. Miss. 2022), Judge Woodard. See also *In re Kalsi*, ___ B.R. ___, 2022 WL 620033 (Bankr. S.D. N.Y. Mar. 3, 2022) (In Chapter 7 case, domestic support obligations were nondischargeable to extent not paid as priority for estate distributions, and state-court equitable distribution awards were excepted from discharge under § 523(a)(15) but they were not priority claims.).

**Marriage-related debts under §§ 523(a)(2), (4), (6), (5) and (15).** In an analysis of whether some debts to the former spouse were nondischargeable on the basis of fraud, defalcation, larceny or willful and malicious injury, after five-day trial, the Court did not find evidence to support those complaints, but some of the obligations were domestic support in nature, nondischargeable under § 523(a)(5), and others were debts incurred in the course of divorce, making them nondischargeable under § 523(a)(15) in the Chapter 7 case. In re Michelena, ___ B.R. ___, 2022 WL 1815205 (Bankr. S.D. Tex. June 2, 2022), J. Rodriguez.

**Arbitration award confirmed by state-court judgment was for willful and malicious injury.** Arbitration award for tortious interference with prospective economic advantage was confirmed by state court, and under Illinois law such an award required a showing of intentional and unjustifiable interference, satisfying § 523(a)(6). The state court shall clarify the amount of its judgment applied to the tortious interference claim. *In re Ferro*, ___ B.R. ___, 2022 WL 1008280 (Bankr. N.D. Ill. Apr. 4, 2022), Judge Cassling. See also *In re Sage*, ___ B.R. ___, 2022 WL 2155936 (Bankr. E.D. Pa. June 15, 2022), Judge Mayer. (Failure to restrain dangerous dog was wrongful act substantially certain to cause injury, with state court criminal judgment nondischargeable under § 523(a)(6). Judgment was not covered under § 523(a)(7) because payable to individual and not to governmental unit, and debt was for actual pecuniary loss.).

**Cost of attorney disciplinary proceeding was penalty under § 523(a)(7).** Cost of the attorney debtor's pre-bankruptcy disciplinary proceedings, under the Wisconsin Supreme Court's cost order, was a "penalty" within the scope of § 523(a)(7), rather than "compensation for actual pecuniary loss." The costs were excepted from discharge. Attorney discipline "uniquely requires 'a finding of misconduct,'" and the cost order falls within the type that *Kelly v. Robinson,* 479 U.S. 36 (1986), identified as "punitive rather than compensatory." *Osicka v. Office of Lawyer Regulation*, 25 F.4th 501 (7th Cir. 2022).

**Attorney's debt owed to client and to State Bar's Client Security Fund was dischargeable under § 523(a)(7).** On direct appeal, the Ninth Circuit held that a disbarred attorney's obligation to pay clients either directly or to the California Bar's Client Security Fund was not excepted from discharge under § 523(a)(7). That section requires the debt be for a fine, penalty or forfeiture; be payable to and for the benefit of a governmental unit; and not constitute

compensation for actual pecuniary costs, and the Client Security Fund's purpose was to mitigate pecuniary loss by clients of dishonest attorneys, giving the Fund "hallmarks of a secondary, public insurance program overseen by an administrative agency." Once the Fund has made payment to a client victim, the attorney's obligation is to reimburse the Fund. The opinion notes that the disciplinary costs were excepted from discharge under § 523(a)(7), citing *In re Findley,* 593 F.3d 1048 (9th Cir. 2010). *Kansas v. State Bar of California*, 42 F.4th 1123 (9th Cir. 2022).

**Partial student loan discharge.** Applying the *Brunner* standard, as adopted in the Tenth Circuit, there is authority to grant partial discharge of student loan debt to the extent the portion being discharged imposed undue hardship. This Chapter 7 debtor satisfied the three prongs of *Brunner* for the total debt exceeding $225,000, with the nondischargeable amount apportioned among three loans, and the nondischargeable amount will not bear interest. *In re Loyle*, ___ B.R. ___, 2022 WL 567724 (Bankr. D. Kan. Feb 24, 2022), Judge Herren.

**Postpetition consolidated student loan was not subject to discharge.** After filing Chapter 7 and eight years after receiving discharge, the debtor moved to reopen and seek discharge of student loan for undue hardship. However, the debtor had entered into a new consolidation loan after filing the Chapter 7 case, which loan had extended new funds and paid off prior loans in full. The consolidated postpetition loan was not subject to discharge, citing *Hiatt v. Indiana State Student Assistance Comm'n,* 36 F.3d 21 (7th Cir. 1994). *In re Tolbert*, 2022 WL 2125970 (Bankr. N.D. Ill. June 13, 2022), Judge Hunt.

**Student loan discharge under totality of circumstances test.** Applying Eighth Circuit's totality of circumstances test, the Chapter 7 debtor established that payment of a student loan she co-signed for her mother's college education would be an undue hardship, warranting discharge. In re Haugen, 645 B.R. 635 (Bankr. D. N.D. 2022), Judge Hastings.

**Income and potential increase in earning prevented student loan discharge.** Affirming, the Bankruptcy Appellate Panel found no error in the Bankruptcy Court's determination that the pro se Chapter 7 debtor's current income level and potential for increased income did not demonstrate undue hardship. Also, the debtor's eligibility to participate in income-based repayment program weighed against determination of undue hardship. *In re Parvizi*, 641 B.R. 729 (B.A.P. 1st Cir. 2022).

**Temporary restraining order against further collection of discharged student loan debts.** In a sequel to the Second Circuit's decision in *Homaidan v. Sallie Mae, Inc.,* 3 F.4th 595 (2d Cir. 2021), that private loans did not fall within § 523(a)(8)(A)(ii)'s exception from discharge, because those loans were not "an obligation to repay funds as an educational benefit," the former Chapter 7 debtor sought injunctive relief on behalf of a class of debtors who had received discharge but were subject to continuing collection of private loans like those addressed in the Second Circuit decision. In an extensive discussion, the Bankruptcy Court concluded that it had jurisdiction and authority to issue injunctive relief on behalf of a nationwide putative class. The opinion discusses the views on whether a Bankruptcy Court may enforce the § 524(a) discharge injunction for debtors in other judicial districts, concluding that it may do so. Navient was enjoined from taking any collection action on "Tuition Answer Loans held by the Plaintiffs and the Putative Class Members…that exceed the cost of attendance as defined by Internal Revenue

Code § 221(d), and that have an outstanding balance subject to collection." *In re Homaidan*, 640 B.R. 810 (Bankr. E.D. N.Y. 2022), Judge Strong.

**Discharge of personal liability subjected mortgage servicer to potential discharge injunction violation but *Taggart* standard at play.** On summary judgment motions, the Court found that the Chapter 7 debtor's personal liability on mortgage had been discharged and that the mortgage servicer's violation of the injunction would be measured under the *Taggart* standard. In this case, the mortgage statements sent to the debtor post-discharge did not contain disclaimer language or acknowledgment of the discharge, and those statements had a coercive effect that would violate the injunction. However, other notices did not violate the injunction, and there was insufficient evidence that the servicer knew about the debtor's discharge. Without such evidence, the Court "cannot determine whether it was objectively reasonable for [the servicer] to send the mortgage statements in a form that violated the discharge injunction." *In re Lett*, 635 B.R. 713 (Bankr. N.D. Ga. 2022), Judge Ellis-Monro.

**Late-filed tax return was honest and reasonable attempt under § 523(a)(1)(B).** Under the circumstances, the debtors' late-filed federal income tax return satisfied the four-prong test of *Smith v. United States,* 828 F.3d 1094 (9th Cir. 2016): the return "(1) purports to be a return, (2) is executed under penalty of perjury, (3) contains sufficient data to calculate the tax and (4) is an honest and reasonable attempt to satisfy the law." The return provided accurate information, reducing the debtors' assessed tax obligation, with tax obligations discharged in the Chapter 13 case after plan completion. *In re Golden*, ___ B.R. ___, 2022 WL 1272570 (Bankr. E.D. Cal. Apr. 27, 2022), Judge Sargis.

**1040 forms filed years after due were not "returns" under applicable nonbankruptcy law.** The Chapter 13 debtor had filed 1040 forms for two tax years but long after they were due under the IRS Code, and the First Circuit held that those late-filed forms were not "returns" that would satisfy nonbankruptcy law, under either the BAPCPA definition of "returns" or under the *Beard* test. *In re Kriss*, 53 F.4th 726 (1st Cir. 2022).

**Debtor's failure to keep and preserve records justified denial of discharge under § 727(a)(3).** Reviewing the requirements under § 727(a)(3), the debtor failed to keep and preserve adequate records, and that failure was not justified under the circumstances. The debtor had extensive business experience with rental properties, but failed to maintain records of rental income and expenses. *In re Shove*, 638 B.R. 1 (B.A.P. 1st Cir. 2022).

**Material omission from schedules was not knowingly done with fraudulent intent.** Although Chapter 7 debtor admitted inadvertent omission of snowmobile and livestock from schedules and omission was "material," debtor did not act "knowingly" or with fraudulent intent. Creditor failed to establish required § 727(a)(4)(A) elements. *In re Heinle*, ___ B.R. ___, 2022 WL 16841384 (Bankr. D. Mont. Nov. 9, 2022), Judge Hursh.

**Denial of discharge under § 727(a)(5).** The debtor had been a career banker with significant financial experience but failed to explain loss of assets. Under the burden-shifting approach to § 727(a)(5), the United States Trustee identified assets that the debtor owned at one time, with burden shifting to debtor to satisfactorily explain loss of those assets. The Sixth Circuit found no

error in the bankruptcy court looking back at transactions five years prior to the bankruptcy filing, with § 727(a)(5) containing no specific look-back period. I*n re McDonald*, 29 F.4th 817 (6th Cir. 2022).

**Deceased debtor's discharge.** The probate estate of deceased Chapter 13 debtor moved to waive requirement of financial management course and to grant discharge. The debtor's daughter and probate representative completed final plan payments. Rule 1016 provides for continued administration of the case after a death, and the only administrative task remaining was completion of the financial management course. Waiving that course requirement would not adversely impact creditors, with the confirmed plan providing for 100% of allowed unsecured claims and full payment of secured claims. The debtor's death constituted disability under § 109(h)(4), with financial management course waived and debtor entitled to discharge. *In re Ibarra*, ___ B.R. ____, 2022 WL 1787637 (Bankr. W.D. Tex. June 1, 2022), Judge Parker.

## Discharge Injunction

**Violation of discharge injunction leads to attorney fees for appeal.** The Bankruptcy Court has authority to award attorney fees to the debtor for appellate work related to the contempt order for violation of the discharge injunction. The contempt sanction against the mortgage servicer was for attempting to collect the discharged debt, and the servicer appealed to the District Court. The Bankruptcy Court had denied the debtor's attorney's fees for the appellate work, but the Second Circuit concluded that the authority to impose contempt sanctions "includes the authority to award damages and attorneys' fees. This authority carries with it the ability to award appellate attorneys' fees." *In re Bi Battista*, 33 F.4th 698 (2d Cir. 2022).

**Discharge injunction violation and class certification.** Following the Second Circuit's decision that enforcement of the discharge injunction was not subject to arbitration, *Anderson v. Credit One Bank, N.A.,* 884 F.3d 382 (2d Cir. 2018), *cert. denied,* 139 S.Ct. 144 (2018), discovery and litigation continued in the Bankruptcy Court. Finding "repeated, lengthy, and willful discovery failure, including its submission of false affidavits and repeated misrepresentations to the Court," the Bankruptcy Court granted sanctions under Rule 7037. The Court also granted in part the plaintiff's motion for class certification by certifying an opt-out class of individuals for whom the defendant did not correctly report discharged debt as discharged rather than charged off. *Anderson v. Credit One Bank, N.A*., 2022 WL 1926608 (Bankr. S.D. N.Y. June 3, 2021), Judge Drain.

**"Special circumstances" under § 523(d).** The District Court reversed award of $30,000 attorney fees to the Chapter 7 debtor, finding that "special circumstances" existed for purposes of § 523(d)'s attorney fee provision. The court noted that "special circumstances" is not a defined term. "Section 523(d)'s goal of curbing abusive practices by institutional creditors would not be furthered by requiring" law firm creditor to pay substantial fees. Moreover, the adversary proceeding was not confined to § 523(a)(2), also alleging § 523(a)(6) grounds for exception from discharge. *Aboud and Aboud PC v. Cary*, ___ F.Supp.3d ___, 2022 WL 17261415 (D. Ariz. Nov. 29, 2022).

## Dismissal

**Dismissal under § 707(b)(3).** In a case converted from Chapter 11 to 7, involving high income individuals, the Court found cause under totality of circumstances to dismiss the case on creditor's motion for abuse under § 707(b)(3). In looking at the debtors' expenses for purposes of § 707(b)(2), there were two approaches—"snapshot" and forward-looking, with the Court following snapshot approach and not finding presumption of abuse for that Code section. However, under § 707(b)(3)'s totality of circumstances analysis, the Court found "failure to comport their lifestyle to their financial situation, their suspicious house purchase while considering bankruptcy, and their lack of consideration for creditors" justified dismissal for abuse. *In re Lee*, ___ B.R. ___, 2022 WL 1499522 (Bankr. M.D. Ga. May 11, 2022), Judge Laney.

## Exemptions & Property of the Estate

**Debtor denied homestead exemption in dissolution of domestic partnership.** Debtor and non-debtor domestic partner had separated and entered into a settlement agreement which included that debtor would receive a payout of her equity interest based on a hypothetical sale. While debtor did not occupy the residence, she nevertheless claimed a homestead exemption in her bankruptcy case and testified that she would return to the residence if the non-debtor partner were not there because she feared continuing emotional abuse and physical intimidation. Although typically a debtor must occupy a residence to claim a homestead exemption, California law permits an exemption if the separated or former spouse continues to possess or control the residence. The statute, however, applies only to married individuals, not domestic partners. Debtor could nevertheless claim the homestead if she exhibited an intent to return to the homestead after an absence. Notwithstanding debtor's testimony that she would return to the homestead, the objective facts – the agreement to be paid her equity, email exchanges between the parties, change of her address on her driver's license, change of her address on her voter registration, and forfeiting keys – evidenced that debtor did not intend to return to the homestead. Reluctantly, under difficult facts, the Court denied the homestead exemption. The concurring opinion notes that the homestead exemption should be retained if a debtor "merely sojourns in another location until it is safe for body, mind and spirit to return to the homestead." *In re McKee*, 2022 WL 17091179 (BAP 9th Cir. Nov. 18, 2022)

**Roth IRAs are excluded from estate under federal law.** The Chapter 7 debtor claimed exemption in IRA and 401(k) accounts and asserted that the IRAs were excluded from the bankruptcy estate under section 541(c)(2), with the issue on appeal whether Roth IRAs were excluded. The Eleventh Circuit held that Roth IRAs met requirements for exclusion under federal law, because they qualified as beneficial interest in a trust and had restriction on transfer that was enforceable under applicable Georgia law. There was no reason why Roth IRAs should be treated differently from traditional IRAs in the context of exclusion from the bankruptcy estate. *In re Hoffman*, 22 F.4th 1341 (11th Cir. 2022).

**State-law public assistance exemptions include earned income tax credit and child tax credit.** In unpublished decision, the Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's conclusion that Washington's "public assistance" exemption included federal earned income tax credits and additional child tax credits. The opinion refers to similar statutes in other states that have been construed broadly to include such credits as exempt, and the

Washington Supreme Court had held that exemptions were to be liberally construed. *In re Moreno*, 2021 WL 6140115 (B.A.P. 9th Cir. Dec. 23, 2021).

**Trustee did not establish equitable estoppel to prevent debtor's amendment of schedules and exemption.** Finding that the Chapter 7 trustee was aware of the debtor's ownership interest in property and the debtor's position that the property was held in resulting trust for the debtor's nephew, the trustee did not establish required elements of equitable estoppel that would prevent the debtor from amending schedules and wild card exemption. "Equitable estoppel is not a substitute for bad faith," and *Law v. Siegel* prevents denial of exemptions or amended exemptions on grounds of bad faith. *In re Rizal Juco Guevarra*, ___ B.R. ___, 2022 WL 884595 (B.A.P. 9th Cir. Mar. 25, 2022).

**Burdens of proof on homestead exemption under state law.** In Chapter 7 case in which debtor claimed state-law homestead exemption that was subject to increase due to non-filing spouse's disability, the parties disagreed on the burden of proof when the trustee objected to the increased homestead. The opinion reviews *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15 (2000), which looked to state law for the burden related to an objection to claim. The *Raleigh* Court stated that Congress could preempt state law in the Bankruptcy Code, but the burden related to exemption objections is found in Rule 4003(c), and this opinion discusses the authority, including *In re Tallerico,* 532 B.R. 774 (Bankr. E.D. Cal. 2015), on whether the Rule is invalid when a debtor claims exemptions under state law assigning the burden. For reasons discussed in the opinion, this Court "concludes that Fed. R. Bankr. P. Rule 4003(c) remains valid," with the burden placed on the objecting trustee. The Court upheld the increased homestead, based on the spouse's disability. *In re Hammond*, ___ B.R. ___, 2022 WL 796249 (Bankr. C.D. Cal. Mar. 16, 2022). Judge Houle.

**No homestead in property owned by LLC and exemption in SEP lost by prohibited transactions.** The Chapter 7 debtor was not entitled to Ohio homestead exemption in property owned by LLC, and the debtor's SEP IRA lost its tax-exempt status as a result of transactions prohibited by the Internal Revenue Code. Ohio Code's "good-faith savings provision does not affect the exemptibility of the SEP IRA." *In re Villavicencio*, 635 B.R. 486 (Bankr. S.D. Ohio 2022), Judge Hoffman.

**Tenancy by entirety survivorship interest subject to levy under state law.** Examining New Jersey law on tenancy by entirety, each party's individual interest in right of survivorship is subject to levy. As a result, the debtor's claim of exemption under § 522(b)(3)(B) failed. The opinion discusses other opinions on the issues. In re Weiss, ___ B.R. ___, 2022 WL 789445 (Bankr. D. N.J. Mar. 15, 2022), Judge Meisel.

**Debtors judicially and equitably estopped to amend exemptions.** Nine years after Chapter 7 debtors received discharge, following California Court of Appeal decision holding that only the Chapter 7 trustee had standing to prosecute action against the mortgage lender, the Chapter 7 case was reopened, and trustee moved to approve compromise and sale of the home. The debtors then moved to amend exemption, and the Court recognized that Rule 1009(a) allowed amendment after case was reopened, but under California law equitable estoppel could be basis for objection to the amended exemption claim, citing *In re Guevarra*, 638 B.R. 120 (B.A.P. 9th

Cir. 2022), for five elements of equitable estoppel. The Court sustained the trustee's objection to amended exemption based on equitable and judicial estoppel. *In re Stoller*, ___ B.R. ___, 2022 WL 1567253 (Bankr. C.D. Cal. May 18, 2022), Judge Tighe.

**Abandonment not required for undisclosed real property.** The Chapter 13 case had been closed almost twenty years, and the debtor had not scheduled real property (an empty parcel adjacent to a residence that was disclosed), in which she held an interest with her sister. The sister was now deceased, and the former debtor moved to reopen the case and for abandonment so that title could be cleared on the property. The Court could not assume inconsequential value for the unscheduled real property nor was there a basis to order abandonment under § 554(b). The possible resolutions included allowing the current Chapter 13 trustee to administer the asset or the debtor converting to Chapter 7 and allowing that trustee to administer the asset. *In re Dinio*, ___ B.R. ___, 2022 WL 1549404 (Bankr. W.D. N.Y. May 4, 2022), Judge Bucki.

**Increase in equity of residence was property of estate upon conversion from 13 to 7.** The debtors' home increased in value during the Chapter 13 case, $200,000, and the Court concluded that upon conversion to Chapter 7, the equity increase above the claimed homestead was property of the Chapter 7 estate. Affirming, the Court construed § 348(f)(1)(A), holding that the residence was property of the estate upon Chapter 13 filing, and the increased equity was "proceeds, product, offspring, or profits" under § 541(a)(6). The increased equity in the prepetition asset was not a separate, after-acquired property interest, under the holding of *Wilson v. Rigby,* 909 F.3d 306 (9th Cir. 2018). *In re Castleman*, 2022 WL 2392058 (W.D. Wash. July 1, 2022), appeal filed to 9th Cir. Aug. 2, 2022.

**Trustee's futile attempt to reach retirement funds covered by § 541(c)(2).** The Chapter 7 debtor had significant retirement funds in 401(a) and 401(k) accounts, and the trustee's adversary proceeding argued that the funds were not excluded from the bankruptcy estate under § 541(c)(2) or were not exempt under § 522. The Court discussed the controlling authority on exclusion of retirement funds, holding that it did not need to reach the exemption issues because the funds were excluded from the bankruptcy estate under § 541(c)(2). Citing *Law v. Siegel,* the Court observed that any changes in § 541(c)(2) must be made by Congress, not by the Courts. *In re Gilbert*, ___ B.R. ___, 2022 WL 3637569 (Bankr. D. N.J. Aug. 23, 2022), Judge Ferguson.

**Proceeds from prepetition sale of residence did not qualify for § 522(d)(1) exemption.** The debtor claimed homestead exemption under § 522(d)(1) in proceeds from the prepetition sale of her residence, but those proceeds did not satisfy the statute's residence-use requirement. Affirming, the attempted exemption runs afoul of *Law v. Siegel,* and Congress had provided through § 522(d)(5) an exemption in any property to the extent the debtor did not use the exemption provided in § 522(d)(1). *In re Richards*, ___ B.R. ___, 2022 WL 3654827 (B.A.P. 6th Cir. Aug. 25, 2022).

**100% of Fair Market Value Exemption.** The Ninth Circuit Bankruptcy Appellate Panel held that the debtors' claim of homestead exemption, 100% of FMV [fair market value], in the Chapter 11 phase of the case became incontestable after the case was converted to Chapter 7, because there had been no timely objection to the exemption claim. Applying the holding of *Taylor v. Freeland & Krontz,* 503 U.S. 638 (1992), an exemption becomes allowed in the

absence of timely objection, and under *Schwab v. Reilly,* 560 U.S. 770 (2010), an exemption claim of 100% of FMV puts parties in interest on notice that the debtor is claiming full value of the property as exempt, even if the resulting exemption exceeds a statutory limit. Here, the debtors claimed Washington homestead, under § 522(d)(1), which at the time was limited to $45,950, but the claim to 100% FMV was a claim to the entire market value of the home. The snapshot rule did not prevent the exemption from reaching the appreciated value of the home, because there had been no objections to the claim. The Panel notes that it did not condone the conduct of the debtors or their attorneys, observing that improperly claiming exemptions risks sanctions or other appropriate penalties. *In re Masingale*, 644 B.R. 530 (B.A.P. 9th Cir. 2022).

**Under snapshot rule, debtors not entitled to homestead exemption increased by post-filing amendment.** Under Colorado law, Chapter 7 debtors' homestead exemption as limited to amount in effect when petition filed, and the Legislature did not expressly or impliedly intend to make an increase in homestead retroactive. The statutory exemption had been increased from $75,000 to $250,000 a week after the Chapter 7 filing, but debtors were limited to the exemption amount in effect when they filed. *In re Gomez*, ___ B.R. ___, 2022 WL 17097228 (Bankr. D. Colo. Nov. 17, 2022), Judge McNamara.

**Section 522(p) applied to homestead claimed under opt-out state law.** Affirming, the District Court held that § 522(p) applied to state exemptions when the state had opted out of the federal exemptions, and the debtor had acquired the homestead from an LLC a day before filing Chapter 7. The homestead was capped at $170,350. *Kane v. Zions Bancorporation, N.A.*, ___ F.Supp.3d ___, 2022 WL 4591787 (N.D. Cal. Sept. 29, 2022).

**Investment property did not qualify for Florida homestead exemption.** The Chapter 7 trustee objected to debtors' claim of homestead exemption in realty that served as investment property, and the Court determined that the property did not meet requisite subjective and objective tests for homestead and that debtors were residing in other long-term Florida homestead property on date of Chapter 7 filing. The opinion reviews the appropriate factors under Florida law. *In re Coats*, 643 B.R. 634 (Bankr. M.D. Fla. 2022), Judge Brown.

**Debtor did not have ownership in property at petition filing for purposes of homestead exemption.** The Chapter 7 debtor did not claim homestead exemption when she filed, but soon thereafter her mother passed away, leaving will that bequeathed property to debtor and a brother equally, but at commencement of case debtor did not have a fee ownership interest in property to claim as homestead under applicable Idaho law. *In re Zent*, ___ B.R. ___, 2022 WL 17085003 (Bankr. D. Idaho Nov. 18, 2022), Judge Meier.

**Joint tenancy property.** Under Illinois law and agreeing with the Tenth Circuit's *In re Chernushin,* 911 F.3d 1265 (10th Cir. 2018), when a joint tenant dies after one tenant files bankruptcy, the joint tenancy operates as it would in the absence of bankruptcy—the surviving joint tenant becomes sole owner of the property with the deceased debtor's interest no longer property of the bankruptcy estate. "The rationale behind this rule is that the trustee cannot assert greater rights than the debtor." The opinion cites other courts considering the same issue, concluding that the right of survivorship operates as it would absent bankruptcy. The Chapter 7

trustee had no right to sell the deceased debtor's interest in the joint tenancy property. *In re Nakhshin*, 644 B.R. 402 (Bankr. N.D. Ill. 2022), Judge Thorne.

**Jurisdiction**

**Under "narrow" interpretation of "personal injury tort," bankruptcy court could hear claims for defamation and intentional infliction of emotional distress.** Tort claims were filed by pro se plaintiff, who was Chapter 7 debtor's estranged spouse. State-law actions were removed to Bankruptcy Court and issue was whether that Court could hear the litigation or whether District Court should withdraw reference. Bankruptcy Court entered recommendation adopting the "narrow" interpretation of a personal injury tort for purposes of 28 U.S.C. § 157(b)(5). Under that view such a tort "requires a trauma or bodily injury or psychiatric impairment beyond mere shame or humiliation." Under this interpretation, the plaintiff's claims of defamation and intentional infliction of emotional distress were not personal injury torts, and the bankruptcy court could litigate those claims, with the Court recommending against withdrawal of the reference. *In re Byrnes*, ___ B.R. ___, 2022 WL 816378 (Bankr. D. N.M. Mar. 11, 2022), Judge Thuma.

**Timeliness**

**Failure to file final fee application before bar date results in disgorgement of fees.** In Chapter 11 case, Court entered orders with typical procedures requiring counsel to file periodic interim fee applications to receive 75% of fees each month, as well as a final fee application. Ten months into the case, special counsel was employed with court approval. The retention order included provisions requiring court approval for payment of fees. Special counsel filed an interim fee application which was approved. Debtor filed a chapter 11 plan which provided that all professionals file a final fee application not more than 60 days after the effective date of the plan. Special counsel failed to file a final fee application by the bar date. Four months later, the debtor filed a motion for special counsel to disgorge fees it had already been paid. Special counsel objected and filed their final fee application, seeking a total of $150,000, along with a motion to allow the late filed application, claiming they had not received the plan documents with the administrative deadlines. Bankruptcy Judge Michael E. Romero denied the motion to allow late filed application on summary judgement and ordered the special counsel to disgorge fees paid monthly by the debtor. Special counsel appealed, arguing that denial of receipt of notice raised a disputed issue of fact that precluded summary judgment. Judge Babcock explained the "mailbox rule" which provides that a properly addressed piece of mail is presumed to have been delivered. Rebutting the presumption required more than simple denial of receipt, it required objective evidence. Babcock found that the presumption had been activated and there was not sufficient rebuttal evidence provided. Judge Babcock considered whether special counsel had a basis to assert excusable neglect and found that special counsel had received all the other firms' final fee application and still failed to file one. As such, there was insufficient grounds to assert excusable neglect. The bankruptcy court was affirmed, holding that absent a final fee application, there were no fees to award, and therefore, disgorgement was appropriate. *McLeod Brock PLLC v. Cohen (In re Richard D. Van Lunen Charitable Trust)*, 21-1727 (D. Colo. April 18, 2022).

**Lawyer's ineptitude at PACER is not bases to grant extension of time.** In what can only be described as a "comedy of errors" the 10th Circuit rules that a lawyer's ineptitude in navigating

PACER was not a sufficient basis to provide relief for a late filed complaint. The lawyer in question represented a creditor with a $240,000 judgment against a chapter 7 debtor. The lawyer scheduled the debtor's deposition to take place on the last day to object to dischargeability. The deposition concluded at 3:00 pm, a full nine hours before the midnight deadline to file the complaint. The attorney didn't log into PACER until 11:40 pm, to file his second ever complaint. Having difficulty navigating the system, the complaint was not filed until 12:16 am. The attorney alleged that PACER was malfunctioning and that the clerk's office was "inaccessible" which provided him with more time to file his motion for extension under Rule 9006(a)(3). Judge R. Kimball Mosier held a hearing at which witnesses from the clerk's office testified that PACER was functioning properly. Judge Mosier denied the late filed motion to extend the time to file the complaint and dismissed the complaint, based on the requirements of Rules 4004(b) and 4007(c). The 10th Circuit upheld the decision, stating that while relief can be afforded for defective technology, it cannot be given for untutored lawyers attempting to manipulate baffling technology. The Court found that the problems with filing the complaint were caused by the attorney's errors rather than any defect in the court's ECF system. *State Bank of Southern Utah v. Beal (In re Beal)*, No. 21-4124 (10th Cir. December 14, 2022).

# Faculty

**Stephen E. Berken** is a partner with Berken Cloyes, PC in Denver, where he focuses his practice on consumer bankruptcy law, debt workouts, asset protection and mechanic's lien and trust fund statutes. He handles cases involving chapters 7 and 13, the defense and prosecution of bankruptcy adversary matters, and state court litigation involving the Colorado Mechanic's Lien statute. Mr. Berken has lectured for various professional groups, and is a frequent guest on KHOW AM radio. For nearly 30 years, he has lectured at many CLE seminars, including those sponsored by ABI and the Colorado Continuing Legal Education. Mr. Berken is a Board Certified in Consumer Bankruptcy Law by the American Board of Certification, and he has written several articles regarding representing consumer debtors in chapter 7 and 13 cases. He has prosecuted hundreds of motions, adversary cases and appeals. Mr. Berken is the Colorado state chair for the National Association of Consumer Bankruptcy Attorneys. He also is the founding member of the Colorado Consumer Bankruptcy Association and the founder of the Colorado Debtors' Counsel Listserv, an Internet-based source of information for debtors' counsel in the state of Colorado. The listserv is provided as a free service to counsel of the Debtors' Bar. Mr. Berken is a group leader in NACBA's Advocacy Committee, a post that will allow him inside access this next year to the legislature in Washington D.C., as he continues to fight for consumer bankruptcy legislation. He was named Bankruptcy Attorney of the Year by *5280 Magazine* for 2014, 2015, 2016, 2017 and 2018, and was named in *Super Lawyers* from 2020-21. Mr. Berken is admitted to practice before the Colorado Supreme Court, the U.S. District Court for the District of Colorado, the U.S. Court of Appeals for the Tenth Circuit and the U.S. Supreme Court. He received his B.A. *cum laude* in political science from the University of California in 1981 and his J.D. from the University of California, Hastings College of the Law in 1984.

**Lon A. Jenkins** is the Standing Chapter 13 Trustee for the District of Utah in Salt Lake City, appointed in September 2015. He has practiced bankruptcy law for nearly 40 years. Following law school, Mr. Jenkins was an associate with LeBoeuf, Lamb, Greene & MacRae in the firm's Salt Lake City office. While there, he worked with and was mentored by former U.S. Bankruptcy Judge Ralph R. Mabey; in 1993, he became a partner in the firm. During his time at LeBoeuf, Lamb, Mr. Jenkins specialized primarily in chapter 11 bankruptcy reorganizations, representing a wide range of debtors, creditors, creditors' committees, trustees and indenture trustees. Upon departing LeBoeuf Lamb after 23 years in 2006, he continued his bankruptcy practice with the Salt Lake City law firm of Ray, Quinney & Nebeker from 2006-08. While there, he was appointed by the U.S. District Court for the District of Utah as receiver in two federal Ponzi scheme cases to recover and administer assets for the benefit of defrauded investors. Subsequently, Mr. Jenkins was a shareholder at Jones Waldo from 2008-13 and Of Counsel with Minneapolis-based Dorsey & Whitney from 2013-15). Mr. Jenkins has been a frequent speaker and educational program panelist, both nationally and locally, on a variety of bankruptcy-related topics. He also is engaged in community and civic organizations in the Salt Lake City area, participating on various nonprofit boards and committees. Presently, Mr. Jenkins serves as vice president of the Executive Board of the National Association of Chapter 13 Trustees and become president-elect in July 2023. He received his B.A. from St. Olaf College in Northfield, Minn., in 1976 and his J.D. from the University of Utah College of Lawin 1983, where he served as a member of the *Utah Law Review*.

**Tara G. Salinas** is the founder and managing attorney of Salinas Law Group LLC in Denver, and her practice focuses on consumer chapter 7 and 13 bankruptcy and litigation, as well as student loan law. She founded her law firm in 2003 and has handled hundreds of personal and business bankruptcy cases since then. In 2018, Ms. Salinas expanded the practice to include litigation and settlement of private student loans, as well as providing assistance to distressed federal student loan borrowers. She is a frequent speaker at local, regional, national and international bankruptcy programs, including being a speaker at the ABI's Rocky Mountain Conference in 2022, 2020, 2015, 2014, 2012 and 2009 and a contributor to the Central and Eastern European Law Institute's program on International Models of Insolvency in 2020, 2018 and 2017. Active in her local bankruptcy bar, Ms. Salinas has been a member of two judicial selection committees recommending bankruptcy judicial candidates to the district court. She also has served on the Colorado Bankruptcy Local Rules Standing Committee since 2010 and sponsors and manages the Debtors' Counsel Listserv for Colorado consumer debtor lawyers. Ms. Salinas received her B.A. in history from Colorado State University and her J.D. from the University of Colorado School of Law.